

# HIDING FROM THE BOSS ONLINE: THE ANTI-EMPLOYER BLOGGER'S LEGAL QUEST FOR ANONYMITY<sup>1</sup>

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## *Abstract*

*Anti-employer bloggers often use the anonymity of a blog to disclose information about employers or engage in discourse that the employer may perceive as adverse. Employers are increasingly willing to use the power of the courts against such anonymous bloggers. This situation has created a tension between anonymous speech rights and an employer's right to defend its legitimate business interests against disparagement, defamation. Since traditional anonymous speech principles have proven inadequate at resolving this tension, this article proposes new legal theories designed to ameliorate the problem.*

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1. Background material in this article is condensed from Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery for a Blogger's Identity Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 0002 (2006), available at <http://www.law.duke.edu/journals/dltr/articles/2006dltr0002.html>.

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## I. INTRODUCTION

“The Internet has proved to be the greatest advancement in our ability to disseminate news and information since the invention of the printing press by Gutenberg in 1450.”<sup>2</sup>

The rise of Internet bloggers has created a powerful information tool on the Internet. Anti-employer blogs are among that group and bloggers often use anonymity to disclose information about employers or engage in anti-employer blogging. Employers are increasingly willing to use the power of the courts against such bloggers to pursue defamation and breach of loyalty claims. Indeed, several cases have recently arisen where the courts have compelled Internet Service Providers (“ISPs”) to disclose the identity of anti-employer bloggers. This situation creates a tension between the employer’s right to defend legitimate business interests against disparagement, defamation and employee disloyalty, and the employee’s speech rights. Long-standing principles of speech anonymity preservation are proving inadequate to the task of shielding anti-employer bloggers from disclosure. Consequently, the use of new legal theories to preserve anonymity in the face of employer lawsuits seeking identity disclosure must be developed.

## II. THE RISE OF THE POWERFUL ANTI-EMPLOYER BLOG

A “Blog,” or “web log,” as originally named, is an Internet page that serves as a publicly accessible personal journal for an individual. Blogs emerged during the inception of the Internet, when skilled computer programmers created websites that would automatically update and provide hyperlinks to related web pages of interest.<sup>3</sup> Blogs assist readers in quickly finding information and 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, Jorn Barger realized the significance of the growing popularity and usefulness of these web pages and

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2. John Conyers, *Bloggers Have Rights Too*, CNET NEWS.COM (2005), [http://news.com.com/Bloggers+have+rights+too+/2010-1034\\_3-5632544.html](http://news.com.com/Bloggers+have+rights+too+/2010-1034_3-5632544.html).

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

described them as “weblogs,”<sup>4</sup> which was later shortened to the term “Blog.”<sup>5</sup>

In 1999, Brigitte Eaton compiled a list of every blog she knew about and created Eatonweb Portal.<sup>6</sup> Eaton created a criterion for blogs that stipulated that the site had to consist of dated entries.<sup>7</sup> Her criteria led to the now widely accepted definition of a blog: a web site that contains an online personal journal with reflections, comments, and hyperlinks provided by the author.<sup>8</sup>

Although it experienced a slow start, blogging quickly took flight in the mid-1990s with the introduction of automated publishing systems, such as Typepad.com, Wordpress.org and Blogger.com.<sup>9</sup> Such systems allowed the average Internet user to establish a personal online diary that contained no restrictions to publishing, content or potential readers online. However, one of the most attractive features of a blog to a blogger is the ability to post information while maintaining a hidden anonymity.

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

Today, blogs have arisen to cover virtually every area of human interest.<sup>12</sup> There are personal blogs, news blogs, campaign blogs, tech blogs, sports blogs, employment law blogs, photo blogs, military blogs, and the list goes on. Indeed, the importance and power of blogs should not be underestimated. For example, in their role as the “new

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4. Weblog resources FAQ, <http://www.robotwisdom.com/weblogs/> (Jorn Barger personal blog explaining web log terms).

5. See Steven Levy, *Will the Blogs Kill Old Media?*, NEWSWEEK, May 20, 2002, at 52.

6. Eatonweb Portal now consists of a listing of over 30,000 blog sites. Eatonweb Portal, <http://portal.eatonweb.com/> (last visited July 27, 2005).

7. See Duncan Riley, *A Short History of Blogging*, BLOG HERALD, Mar. 6, 2006, <http://www.blogherald.com/2005/03/06/a-short-history-of-blogging/>; John Foley, *Are You Blogging Yet?*, INFORMATIONWEEK, July 2, 2002, <http://www.informationweek.com/shared/printableArticle.jhtml?articleID=6502713>.

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

9. *Id.* at 105.

10. Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, WALL ST. J. ONLINE, May 26, 2005, <http://online.wsj.com/article/SB111685593903640572.html>.

11. Knowledge@Wharton, *Blogs Everyone? Weblogs are Here to Stay, but Where are They Headed?*, <http://knowledge.wharton.upenn.edu/index.cfm?fa=printArticle&ID=1172> (last modified Apr. 6, 2005) [hereinafter *Blogs, Everyone?*].

12. See Gutman, *supra* note 3, at 145.

journalism” the information that blogs provide often eclipses the role of traditional media.<sup>13</sup> Dan Hunter, Wharton legal studies professor, put the matter in perspective when he wrote of blogs: “This is not a fad. It’s the rise of amateur content, which is replacing the centralized, controlled content done by professionals.”<sup>14</sup>

Without question, blogs have become a powerful non-traditional force in the world of journalism. This is illustrated by the example of the CBS News story concerning President George W. Bush’s National Guard service.<sup>15</sup> In September 2004, CBS television aired a report on its “60 Minutes Wednesday” which purported to show that President Bush evaded the draft and later used influence to join the Texas Air National Guard and white wash his military record.<sup>16</sup> The story was based upon documents allegedly written by Lt. Col. Jerry Killian, deceased, a former commander in the National Guard.<sup>17</sup> Within days of the story, bloggers such as PowerlineBlog.com, Ratherbiased.com and WizBangBlog.com immediately began questioning the authenticity of the story and the veracity of the documents relied upon to publish it.<sup>18</sup> In fact, bloggers searched the Internet for experts on 1970s typewriters; the kind that would have been available to Killian, and within a short time had firmly established that the Killian documents were forgeries.<sup>19</sup> The power of these blog reports compelled CBS News to conduct its own investigation and make public its conclusion the Bush National Guard story was based upon forgeries from an anonymous source.<sup>20</sup> The CBS News case led some observers of the Internet to conclude that the blog would replace mainstream media journalism. Although that conclusion may be premature, it is clear the CBS News case revealed just how powerful blogs and blogging have become as a source of information. This

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13. *Blogs, Everyone?*, *supra* note 11.

14. *Id.*

15. Nye, *supra* note 8, at 103.

16. CBS News, *CBS Ousts 4 for Bush Guard Story*, Jan. 10, 2005, <http://www.cbsnews.com/stories/2005/01/10/national/main665727.shtml>.

17. *Id.*

18. Dave Eberhart, *How the Blogs Torpedoed Dan Rather*, NEWSMAX.COM, Jan. 31, 2005, <http://www.newsmax.com/archives/articles/2005/1/28/172943.shtml>. See also Randy Hall, *Chronology of Rather’s ‘60 Minutes’ Controversy*, CYBERCAST NEWS SERVICE, Nov. 23, 2004, <http://www.cnsnews.com/ViewNation.asp?Page=Nation\archive\200411\NAT20041123e.html>.

19. *Id.*

20. Howard Kurtz, *Rather Admits ‘Mistake in Judgment,’* WASH. POST, Sept. 21, 2004, at A01.

power has important legal implications for the business world, which now faces Internet criticism from anti-employer blogs.

While the majority of blogs are politically oriented,<sup>21</sup> an increasing number of blogs are dedicated to complaints about work and the boss. For instance, blogs and message boards at sites such as FuckedCompany.com<sup>22</sup> and Disgruntled.com are dedicated to expressions of employee frustration about work and their employer.<sup>23</sup> For example, FuckedCompany.com, which receives approximately 124, 000 visits per week, actively encourages company insiders to give out confidential information about their employers.<sup>24</sup>

These anti-employer blog sites, sometimes referred to as “gripe sites,” pose a huge potential risk for employers, large and small, which seek to protect important business relationships and goodwill.<sup>25</sup> In fact, some cases have shown that anti-employer comments posted on message boards and on blogs have done serious damage to employer stock values.<sup>26</sup> In response to the increasing 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>27</sup> to search Internet blogs,

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21. *Blogs, Everyone?*, *supra* note 11.

22. <http://www.fuckedcompany.com> (last visited July 27, 2005).

23. Orit Goldring & Antonia L. Hamblin, *Think Before You Click: Online Anonymity Does Not Make Defamation Legal*, 20 HOFSTRA LAB. & EMP. L.J. 383, 388-89 (2003).

24. This phenomenon of encouraging employees to be disloyal to the employer was recognized by the chairman of the board of General Motors as early as 1971, when he stated: “Some of the 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.” INDIVIDUAL RIGHTS IN THE CORPORATION 93 (Alan Westin & Stephen Salisbury eds., 1980).

25. Julia King, *Bitch Sites and What To Do About Them*, COMPUTERWORLD, Feb. 28, 2000, at 53.

26. 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 posting on a message board claimed that company executives were covering up a multimillion-dollar embezzlement, exaggerating economic forecasts, and putting the company up for sale. Laura DiBiase, *Are Your Clients Smear-savvy?*, 18-9 AM. BANKR. INST. J. 22, 22 (1999). PhyCor is another company that experienced severe damage to its stocks, dropping from a high in 1996 of \$41.75 to \$1.09 in 1999, due to anonymous postings on a message board. 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). Many of these messages came from posters claiming to be current or former PhyCor physicians. *Id.*

27. eWatch is an online company that allows businesses to track print and online media for what is being said about that business, its competitors, and the industry. This enables businesses to immediately assess the damage it may receive from the above media. eWatch, <http://ewatch.prnewswire.com/rs/login.jsp>.

message boards and chat rooms in an attempt to root out anti-employment postings.<sup>28</sup> Employers rely on these “electronic news clippings” to learn of damage done to the employer through blog entries by suspected disgruntled employees who use the anonymity the Internet offers.

### III. AN EMPLOYEE’S DUTY OF LOYALTY

As agents of employers,<sup>29</sup> employees owe a duty of loyalty to employers under the traditional rules of agency.<sup>30</sup> Without question, the duty of loyalty is high, and an employee is obligated to refrain from acting in a manner that would adversely impact an employer’s interest.<sup>31</sup> Under the Restatement (Second) of Agency, the duty of loyalty is broad and includes the duty of obedience, confidentiality, in addition to loyalty.<sup>32</sup> The Restatement specifies the numerous circumstances under which revealing confidentiality will breach this duty.<sup>33</sup>

While most courts agree that the duty of loyalty is related to the degree of responsibility with which the employee has been entrusted,<sup>34</sup> some courts have concluded that the duty applies to all

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

29. BALLENTINE’S LEGAL DICTIONARY AND THESAURUS 211 (1st ed. 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 J. 321, 321 (1999).

30. RESTATEMENT (SECOND) OF AGENCY § 387 (1958). Along with the duty of loyalty, employers can reasonably expect nondisclosure and non-competition from their employees. See Gutman, *supra* note 3, 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).

31. 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).

32. RESTATEMENT (SECOND) OF AGENCY § 387 cmt. a, illus. 1-2 (1958).

33. *Id.*

34. See United Teachers Associates Ins. Co. v. Mackeen & Bailey, Inc., 99 F.3d 645, 651 (5th Cir. 1996); White v. Ransmeir & Spellman, 950 F. Supp. 39, 43 (D.N.H. 1996).

employees, regardless of their respective status.<sup>35</sup> However, reason would favor a conclusion that an employee that is given a significant responsibility, such as access to confidential information or trade secrets, would be under a greater standard of care than would an employee who had no such entrustment.<sup>36</sup> Regardless of the fact that employees may owe varying levels of loyalty to an employer based upon job status,<sup>37</sup> the one thing that is certain is that all employer-employee relationships contain a duty on the part of the employee to be worthy of trust, confidence and loyalty.<sup>38</sup>

This duty of loyalty requires an employee to refrain from a wide variety of conduct.<sup>39</sup> Generally, cases that involve a breach of the duty of loyalty by an employee consist of employee engaging in competition with an employer,<sup>40</sup> or disclosing trade secrets,<sup>41</sup> or other confidential information,<sup>42</sup> however, a breach of the duty of loyalty is not limited to these few circumstances and may arise whenever the employee has “unclean hands.”<sup>43</sup> As a result, the breach of the duty of loyalty could include “[h]armful speech, insubordination, neglect,

35. See *Regal-Beloit Corp. v. Drecoll*, 955 F. Supp. 849, 858 (N.D. Ill. 1996); *Vigoro Indus., Inc. v. Cleveland Chem. Co. of Ark.*, 866 F. Supp. 1150, 1164 (E.D. Ark. 1994).

36. Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 B.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, 206-07 (1999).

37. See *Flood v. State of Ala. Dept. of Indus. Relations*, 948 F. Supp. 1535, 1544 (1996).

38. RESTATEMENT (SECOND) OF AGENCY §§ 387-396 (1958) (including, but not limited to, nondisclosure and noncompetition).

39. This duty of loyalty has been found to “attach[] once performance commences [by the employee] and continues until it is terminated.” See *Condon Auto Sales & 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).

40. 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).

41. 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).

42. 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.

43. 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 (1st ed. 1994). See also *Howard W. Brill, The Maxims of Equity*, 1993 ARK. L. NOTES 29, 34 (1993) (maintaining the maxim of “he who comes into equity must come with clean hands.”).

disparagement, disruption of employer-employee relations, . . . dishonor to the business name, product, reputation or operation” or nondisclosure of important information to the employer.<sup>44</sup> Moreover, the prevailing rule states that an employee breaches the duty of loyalty by simply criticizing the employer’s products or services.<sup>45</sup>

However, not all negative comments by an employee about an employer will be a breach of the duty of loyalty. For example, 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>46</sup> In addition, legislatures have recognized that public policy concerns protect certain kinds of employee criticism and disclosures.<sup>47</sup> Despite the allowance of some negative comment by employees, the recent case of *Marsh v. Delta Air Lines, Inc.* demonstrates how strong the employer’s position in breach of the

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44. See Weigand, *supra* note 36, at 20.

45. Cynthia L. Estlund, *What do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 989 (1992).

46. RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1958).

47. Specifically, these include whistleblower protection statutes. 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 n.8 (1992) (statements made in connection with a legitimate labor dispute). 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, . . .” 29 U.S.C. § 157 (2000). 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 Union No. 1229*, 346 U.S. 464, 471 (1953), held that employer-critical handbills distributed by disgruntled employees “deliberately undertook to alienate their employer’s customers by impugning the technical quality of his product” and was not protected activity under the Act. A Strategic Lawsuit Against Public Participation (“SLAPP” suit) 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 2006). Also, there are exceptions to the at-will employment doctrine available in most states. 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 3, at 156-57.



duty of loyalty claims is against a disgruntled employee who publishes negative comments about the employer.<sup>48</sup> In *Marsh*, a twenty-six year veteran of Delta Air Lines was working as a baggage handler when he wrote a letter to the editor, criticizing Delta.<sup>49</sup> The letter was eventually published in the *Denver Post*, and upon knowledge of its publication, Delta fired Marsh, determining his actions constituted “conduct unbecoming a Delta employee.”<sup>50</sup> Marsh filed a wrongful discharge claim, but the trial court rejected his claim, granting summary judgment in favor of Delta.<sup>51</sup> The court reasoned Marsh’s critical letter “breached the bona fide occupational requirements of an implied duty of loyalty” and concluded that Marsh was not an employee who was trying to expose public safety concerns, but rather a “disgruntled worker venting his frustrations to his employer whom he felt betrayed him and his coworkers.”<sup>52</sup>

An employee who posts entries on an Internet blog that criticizes his employer’s products, services or operation methods may have breached the duty of loyalty. When the identity of a disloyal

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48. *Marsh v. Delta Air Lines, Inc.*, 952 F. Supp. 1458 (D. Col. 1997).

49. The letter 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 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.

*Id.* at 1460-61.

50. *Id.* at 1461.

51. *Id.* at 1463.

52. *Id.*

employee blogger is known, a firm is likely to terminate the employee. Such was the case in the following examples.

While going to work at Microsoft's print shop, Michael Hanscom noticed a shipment of Apple computers being delivered to a Microsoft loading dock.<sup>53</sup> Hanscom found the situation humorous due to the reputed animosity between Apple and Bill Gates.<sup>54</sup> He took a picture of the arriving Macs and added it to his daily personal blog.<sup>55</sup> Microsoft discovered the blog photographs, determined their postings violated Hanscom's duty of loyalty under the nondisclosure principle, and expeditiously terminated Hanscom.<sup>56</sup>

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."<sup>57</sup> 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.<sup>59</sup>

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.<sup>60</sup> When his employer discovered the critical blog, Brown was terminated.<sup>61</sup>

The foregoing shows that anti-employer blogging can lead to employees being terminated. In *Marsh*, and other cases cited above,

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53. Jon Bonné, *Blogger dismissed from Microsoft*, MSNBC, Oct. 30, 2003, <http://www.msnbc.com/id/3341689/>.

54. *Id.*

55. *Id.*

56. *Id.*

57. Ensign: Jeremy Wright's Blog, Jan. 6, 2005, <http://www.ensight.org/archives/2005/01/06/the-whole-story-or-as-much-as-i-know-anyways/>.

58. *Id.*

59. Kate Lorenz, *Avoid Getting Fired for Blogging*, CNN.COM, Apr. 6, 2005, <http://www.cnn.com/2005/US/Careers/04/05/blogging/index.html>.

60. Jason Koulouras, *Employee Fired by Starbucks Over Blog*, BLOGCRITICS MAG., Sept. 4, 2004, <http://blogcritics.org/archives/2004/09/04/141004.php>.

61. *Id.*

the employer knew the identity of the offending employee blogger. However, a more common situation occurs when the anti-employer blogger hides behind a curtain of Internet anonymity to make disloyal anti-employer comments or disclosures. The problem of anonymity for the employer seeking to reveal who is posting negative comments about the firm is profound because anonymous speech is constitutionally protected.

#### IV. ANONYMOUS BLOG ENTRIES ARE PROTECTED SPEECH

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 traditional of American political thinkers who published their works anonymously.<sup>63</sup>

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, which prohibited the distribution of anonymous campaign literature, violated an individual’s free speech rights to distribute anonymous pamphlets opposing a school tax levy.<sup>65</sup> The Court found, in sum, that regarding issues of public concern, anonymous speech is protected under the First Amendment.<sup>66</sup> 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>67</sup>

Several years later, in 1997, the Supreme Court applied the principle of constitutionally protected anonymous speech to Internet postings in the case of *Reno v. American Civil Liberties Union*.<sup>68</sup>

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62. U.S. CONST. amend. I.

63. James Madison, Alexander Hamilton and John Jay authored the Federalist Papers under the name “Publius.” Jennifer B. Wieland, *Note: Death of Publius: Toward a World Without Anonymous Speech*, 17 J.L. & POL. 589, 592 (2001).

64. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

65. *Id.* at 336.

66. *Id.* at 357.

67. *Id.* See also *Talley v. California*, 362 U.S. 60 (1960) (addressing anonymous pamphlets seeking boycotts of allegedly racially discriminatory businesses).

68. *Reno v. ACLU*, 521 U.S. 844 (1997).

There, the Court was asked to review the constitutionality of Communications Decency Act provisions that sought to protect minors from harmful material on the Internet.<sup>69</sup> In that landmark decision defining free speech rights on the Internet, the Court reiterated that the Internet provides for virtually unlimited capacity for communication of all kinds.<sup>70</sup> 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>71</sup>

The Court, harkening back to its decision in *McIntyre*, ultimately concluded that “the vast democratic forums of the Internet” would be stifled if users were unable to preserve their anonymity online.<sup>72</sup> This reasoning aligned with what the Court stated earlier in *McIntyre*, 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>73</sup>

Notwithstanding the strong fundamental speech protections embodied in the Constitution, employers are increasingly and successfully filing suits seeking to obtain, through subpoenas from the anonymous defendant’s ISP, the blogger’s identity.<sup>74</sup> The following section provides some examples.

## V. BLOGGER IDENTITY DISCLOSURE CASES

It has been traditionally held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns.<sup>75</sup> Under the Federal Rules of Civil Procedure a subpoena

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69. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 133-35 (1996).

70. *Reno*, 521 U.S. at 850.

71. *Id.* at 870.

72. *Id.* at 868.

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

74. *Id.*

75. 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.

will be quashed if it “requires disclosure of privileged or other protected matter and no exception or waiver applies. . . .”<sup>76</sup>

Recently, courts have had to address motions to quash subpoenas seeking to identify anonymous Internet blogger identity information from ISPs. Some courts have required disclosure, while others have not. The law continues to be in flux on the standards to employ when anti-employer identity is requested by motion for subpoena in a lawsuit as the following cases show.

*A. Suits Based Upon a Claim of Defamation Which Sought to Subpoena the Identity of an Anti-Employer Blogger.*

One type of suit involving bloggers in which motions to quash are frequently filed are suits based on a claim of defamation. *In re Subpoena Duces Tecum to America Online, Inc.*<sup>77</sup> and *Dendrite International, Inc. v. John Doe*<sup>78</sup> illustrate the approaches that courts can take in these cases.

1. *In re Subpoena Duces Tecum to America Online, Inc.*<sup>79</sup>

In 2000, by way of *In re Subpoena Duces Tecum to America Online, Inc.*, 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 Internet.<sup>80</sup> There, five John Does were sued in state court for allegedly posting defamatory statements about a company known as APTC in an AOL Internet chat room.<sup>81</sup> Accordingly, APTC sought to discover the identity of the persons posting the negative comments.<sup>82</sup> On behalf of itself and the John Does, AOL refused to divulge client information and filed a motion to quash.<sup>83</sup> The Circuit

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NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958). Thirty years latter, 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. *NLRB v. Midland Daily News*, 151 F.3d 472, 475 (6th Cir. 1998).

76. FED. R. CIV. P. 45(c)(3)(A)(iii).

77. *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Jan. 31, 2000).

78. *Dendrite Int'l, Inc. v. John Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001).

79. *In re Subpoena Duces Tecum to America Online, Inc.*, No. 40570, 2000 WL 1210372 (Va. Cir. Jan. 31, 2000).

80. *Id.* at \*6.

81. *Id.* at \*1.

82. *Id.*

83. *Id.*

Court of Appeal found that authorizing a subpoena in such a case would have an oppressive effect upon AOL, but believed that the question remained as to whether the subpoena was reasonable in light of all surrounding circumstances.<sup>84</sup> The court indicated that the question:

must be governed by a determination of whether the issuance of the *subpoena duces tecum* and the potential loss of 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>85</sup>

Consistent with its contentions, 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>86</sup> The court considered the AOL test too cumbersome and proclaimed this rule:

when a subpoena is challenged . . . , a court should only order . . . [an] Internet service provider 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>87</sup>

Under its new test, the court denied AOL's motion to quash, concluded that all three prongs had been satisfied by APTC and ordered the identity of the John Does released.<sup>88</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]

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84. *Id.* at \*5

85. *Id.*

86. *Id.* at \*7.

87. *Id.* at \*8.

88. *Id.*

the limited intrusion on the First Amendment rights of any innocent subscribers” whose identity must be revealed.<sup>89</sup>

2. *Dendrite International, Inc. v. John Doe*<sup>90</sup>

One year after *In re Subpoena Duces Tecum to America Online, Inc.*, a New Jersey state court faced a similar problem in the case of *Dendrite International, Inc. v. John Doe*, and developed the “Dendrite Test.”<sup>91</sup> In that case, a John Doe No. 3, under the pseudonym, “xxplrr,” published comments on a Yahoo! message board questioning Dendrite’s revenue accounting practices, marketing strategies and its value to investors.<sup>92</sup> Dendrite filed suit, alleging defamation and sought to discover the identity of “xxplrr.”<sup>93</sup> In determining if the discovery request should be granted, the court adopted the following test:

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.<sup>94</sup>
2. The plaintiff must identify and submit the exact statements made by each anonymous poster that the plaintiff claims constitutes actionable speech.<sup>95</sup>
3. The plaintiff has to produce sufficient proof in support of each element of its cause of action on a prima facie basis.<sup>96</sup>

If all these elements are satisfied, 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>97</sup> Anonymous or disguised speech is allowed so long as its rendering is not a violation of the law.<sup>98</sup>

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89. *Id.*

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

91. *Id.* at 760. The author has coined the term “Dendrite Test”.

92. *Id.* at 763.

93. *Id.*

94. *Id.* at 760.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 767.

Applying this analysis, the court granted John Doe No.3's motion to quash, reasoning that Dendrite had failed to show the posting resulted in any harm to the firm.<sup>99</sup> Indeed, in the days subsequent to the postings Dendrite actually enjoyed an upsurge in stock value, thus the court found it impossible to create a nexus between the posting and any harm.<sup>100</sup>

*B. Suits Based Upon a Claim of the Breach of the Employee's Duty of Loyalty Which Sought Anti-Employer Blogger Identity.*

Establishing a prima facie case for blogger defamation or disparagement is straightforward and simple because the employer merely has to show that the complained of statements were false. However, to make a case in a breach of the duty of loyalty case is much more difficult because one of the elements an employer must establish is that the critical blogger statements were made by an employee. Thus, if it cannot be shown that the blogger is actually an employee, then the employer will simply be unable to establish a prima facie case under a duty of loyalty claim. There are two recent developments that have carved out exceptions to this rule.

1. *Immunomedics, Inc. v. Doe*<sup>101</sup>

In July 2001, in the case of *Immunomedics, Inc. v. Doe*, an anonymous Internet poster sought to quash a subpoena seeking her identity be revealed by Yahoo!, her service provider.<sup>102</sup> The plaintiff, Immunomedics, which required all of its employees to sign a confidentiality agreement, discovered that an anonymous Internet poster was revealing confidential information about the company that could have only come from an informed employee.<sup>103</sup> Specifically, the Internet messages reported the company was out of stock for products in Europe and was planning to fire its European manager.<sup>104</sup> The information was true, however the anonymous poster, if an employee, breached the confidentiality agreement.<sup>105</sup> The court applied the Dendrite factors and struck a balance in favor of

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99. *Id.* at 772.

100. *Id.*

101. *Immunomedics, Inc. v. Doe*, 775 A.2d 773 (N.J. Super. Ct. App. Div. 2001).

102. *Id.* at 774.

103. *Id.* at 777.

104. *Id.* at 774.

105. *Id.* at 775.



disclosure, finding Immunomedics had sufficiently shown the poster was an employee who had executed a confidentiality agreement and the context of the posted messages revealed a breach of that agreement.<sup>106</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 simply avoid punishment through invocation of the First Amendment.<sup>107</sup>

## 2. *Raytheon Co. v. John Does 1-21*<sup>108</sup>

In *Raytheon Co. v. John Does 1-21*, Raytheon alleged breach of contract and disclosure of proprietary information by company employees after reading messages posted on a Yahoo! message board.<sup>109</sup> After filing suit, Raytheon successfully subpoenaed Yahoo! for the identities of the suspected employee posters.<sup>110</sup> 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>111</sup> This case has been criticized as an abuse of the discovery process in lawsuits because Raytheon failed to show that any of the John Does were actual employees of the company.<sup>112</sup> As *Immunomedics* and *Raytheon* show, an employer may successfully subpoena the identity of suspected anti-employer bloggers.

In another work, the author has argued that a reformation of the process of blogger identity discovery in the context of an employer lawsuit based upon a breach of the duty of loyalty is necessary.<sup>113</sup> Indeed, judicial officers should, before ordering ISPs to release any names of bloggers, review *in camera* a request for employee blogger identity so as to ensure the anonymous blogger is indeed an employee of the requesting enterprise. However, until any change is made, courts will continue to order ISP providers to reveal blogger identities

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106. *Id.* at 777.

107. *Id.* at 777-78.

108. *Raytheon Co. v. John Does 1-21*, No. 99-816 (Mass. Super. Ct. Feb. 1, 1999), available at <http://www.netlitigation.com/netlitigation/cases/raytheon.html>.

109. *Id.*

110. See *Raytheon Drops Suit Over Internet Chat*, ASSOCIATED PRESS, May 22, 1999, <http://www.nytimes.com/library/tech/99/05/biztech/articles/22raytheon.html>.

111. *Id.*

112. David L. Sobel, *The Process That "John Doe" is Due: Addressing the Legal Challenge to Internet Anonymity*, 5 VA. J.L. & TECH. 3, ¶ 15 (2000), <http://www.vjolt.net/vol5/symposium/v5i1a3-Sobel.html>.

113. Lee, *supra* note 1.

when the court is satisfied the employer has made a prima facie tort showing.

In light of the current aggressive posture of employers seeking to discover blogger identity, bloggers who wish to remain anonymous will no longer be able to remain hidden simply by relying on traditional protections. Rather, bloggers must formulate new specific legal theories to support continued anonymity. While not exhaustive, the author suggests the following theories may be asserted by the anonymous blogger as a defense against identity disclosure.

#### VI. SUGGESTED LEGAL THEORIES AN ANTI-EMPLOYER BLOGGER MAY USE TO PRESERVE ANONYMITY IN THE FACE OF AN EMPLOYER SUBPOENA TO AN ISP SEEKING BLOGGER IDENTITY

Not all negative comments about an employer by an anti-employer employee blogger will constitute defamation or breach of the duty of loyalty. Nevertheless, employers are increasingly aggressive in seeking the identity of employees who anonymously blog negatively about employers through subpoena to ISPs.<sup>114</sup> If a blogger can successfully establish that blogs entries are protected speech by statute or otherwise, then he may successfully remain anonymous or pseudo-anonymous.<sup>115</sup>

Specifically, if a blogger can show his blogging comes under the protections of a journalist source shield law, a whistle blower protection statute, or a union activity statute then he may be able to establish that a plaintiff employer has no legal interest in discovering a blogger's identity. Additionally, if the blogger can show an employer's actions are designed to quell public participation in a legitimate community interest then anti S.L.A.P.P.<sup>116</sup> protections may be available.<sup>117</sup>

##### *A. Bloggers as Journalists*

If an anti-employer blogger can successfully argue that revealing his or her identity would be the same as revealing a confidential

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114. In most instances, an employer may not file a lawsuit against the ISP for defamation or disparagement because of federal protections codified in the Communications Decency Act of 1996. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, § 502 (1996).

115. For ease in writing no distinction has been made between the ISP and the blogger.

116. S.L.A.P.P. is an acronym for "Strategic Lawsuits Against Public Participation." *See* <http://www.nolo.com/definition.cfm/term/1264241E-6BCC-41DE-88FB065B11543680>.

117. *Id.*

journalistic “source,” the blogger may be able to invoke identity protection under journalist “shield laws.”<sup>118</sup> Predating the formation of the United States, journalist source protection was originally envisioned to cover newspapers.<sup>119</sup> The first state shield law was enacted in Maryland in 1896 and barred reporters from being subpoenaed to reveal confidential sources.<sup>120</sup> Over time, many states adopted shield laws and expanded coverage to include radio and television journalists.<sup>121</sup> Currently, thirty-one states and the District of Columbia have shield laws, each with varying definitions of what constitutes a journalist.<sup>122</sup> Some states only protect journalists who work at old-school media establishments while others, such as North Carolina, include protections for a reporter who disseminates information “via any news medium.”<sup>123</sup> Michigan’s law goes even further and defines a journalist as “[a] reporter or other person who is involved in the gathering or preparation of news for broadcast or publication . . . .”<sup>124</sup>

The question of whether as blogger is a “journalist” and hence protected by shield law has most recently been addressed in *O’Grady v. Superior Court* in California.<sup>125</sup> There, Apple Computer subpoenaed email records from three sites, which published confidential product information, in an effort to discover who, presumably employees, leaked proprietary information.<sup>126</sup> The bloggers moved for a protective order and argued that they were

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118. Over a third of the states have enacted so called Shield Laws designed to protect reporters from judicial contempt findings for not revealing confidential sources. See Ken Sobel, *The Newsmen’s Qualified Privilege: An Analytical Approach*, 16 CAL. W.L. REV. 331, 368 n.284 (1980). California, for example, by statute and by constitutional amendment, provides that “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper . . . shall not [“cannot” in California Evidence Code] be adjudged in contempt . . . for refusing to disclose the source of any information procured while connected or employed for publication in a newspaper . . . or for refusing to disclosure any unpublished information. . . .” CAL. CONST. art. I, § 2 (b); CAL. EVID. CODE § 1070. At least two jurisdictions have recognized a reporter’s confidential source privilege at common law without resort to constitutional provisions. See *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *Senear v. Daily Journal-American*, 641 P.2d 1180 (Wash. 1982).

119. Mark Thompson, *States’ Shield Laws Might Not Cover Online Journalists*, USC ANNENBERG ONLINE JOURNALISM REV., June 16, 2004, <http://www.ojr.org/ojr/law/1086825172.php>.

120. *Id.*

121. *See id.*

122. *Id.* See also D.C. CODE ANN. § 16-4701 (LexisNexis 2001).

123. N.C. GEN. STAT. § 8-53.11 (2006).

124. MICH. COMP. LAWS ANN. §§ 767.5a, 767A.6 (West 2006).

125. *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).

126. *Id.* at 76.

journalists and therefore, protected by California's journalist shield law.<sup>127</sup> The Superior Court, without reaching the question of whether the bloggers were journalists, found that the information published constituted trade secrets and was therefore stolen property.<sup>128</sup> The court declined the defendant blogger's request for a protective order shielding their anonymity.<sup>129</sup>

The defendant bloggers sought appellate relief and the case headed to the California Court of Appeal, Sixth Appellate District.<sup>130</sup> There, Apple argued the bloggers were not "legitimate" journalists and, therefore, unworthy of shield law protection.<sup>131</sup> The Court of Appeal disagreed and wrote:

We decline the implicit invitation to embroil ourselves in questions of what constitutes "legitimate journalis[m]." The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.<sup>132</sup>

The 2006 *O'Grady* decision recognizes that bloggers are journalists. This conclusion is in keeping with some of the best thinking on the matter. For example, in response to July 2006 Senate proceedings on the question of whether a federal shield law should apply to bloggers, New York Times columnist and wordsmith icon William Safire responded to Senator John Cornyn by saying, "I don't think journalism should profess to be a profession. I think the lonely pamphleteer has the same rights as The New York Times."<sup>133</sup>

Applying the journalist source protection principles of shield laws to the anonymous blogger leads to the following conclusion: as the newspaper is to the print journalist, so the anonymous blog site is

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127. *Id.* at 81.

128. *Id.* at 76-77.

129. *See id.* at 82.

130. *Id.* at 72.

131. *Id.* at 96.

132. *Id.* at 97 (emphasis in original).

133. Kimberly Wilmot Voss, *Will Lawmakers Raise Shields to Protect Bloggers?*, USC ANNENBERG ONLINE JOURNALISM REV., Oct. 13, 2005, <http://www.ojr.org/ojr/stories/051013voss/>.

to the blogger. Further, as the print journalist is to the “source”, so the blogger is to the “source.” Notwithstanding that the source and the blogger may be one in the same, the doctrine of the shield law will protect the blogger’s anonymity. That is, when writing as a journalist, the blogger holds a privilege of source confidentiality. Likewise, in this author’s view, the blogger holds a privilege of personal anonymity. This conclusion is consistent with the long-standing Constitutional protections afforded the anonymous and pseudo-anonymous political pamphleteer.

### *B. Bloggers as Whistleblowers*

Legislatures have recognized that public policy concerns protect certain kinds of employee criticism and disclosures. Specifically, these include whistleblower protection statutes. The federal government, and most states, have recognized that the public has an interest in protecting employees who refuse to condone illegal or fraudulent activity by an employer. Statutes have been enacted which protect such employees from termination or other retaliatory action when they disclose evidence of employer wrongdoing.<sup>134</sup>

For example, California’s whistleblower protection statute provides that an employer may not retaliate against an employee who discloses information about the employer’s business to a government or law enforcement agency when the employee believes a violation of law has occurred.<sup>135</sup> Interestingly, California’s whistleblower protection scheme also includes a strong indication by the California Legislature that, where possible, the identity of the employee whistleblower be preserved. This is evidenced by the provision of California’s Labor Code that provides that the Attorney General is required to maintain a whistleblower hotline to receive calls from persons who have information about employer misconduct.<sup>136</sup> That

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134. See, e.g., ARIZ. REV. STAT. ANN. § 38-532 (2006) (prohibiting retaliation against state employees for disclosure of information that is of public concern); COLO. REV. STAT. § 24-50.5 (2005) (encouraging state employees to disclose information on state agencies not acting in public interest; prohibiting retaliation for those disclosures; providing mechanism to file complaints alleging retaliation; providing for civil actions); DEL. CODE ANN. tit. 29, § 5115 (1997) (protecting employees who report violations or suspected violations of law; providing right of civil action for injunctive relief and/or actual damages). See generally STEPHEN M. KOHN & MICHAEL D. KOHN, THE LABOR LAWYER’S GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF EMPLOYEE WHISTLEBLOWERS 39-59 (Quorum Books 1989) (discussing development of state protections for private sector whistleblowers; providing state-by-state breakdown of public policy exception to common law termination-at-will doctrine).

135. CAL. LAB. CODE § 1102.5(b) (2006).

136. CAL. LAB. CODE § 1002.7(a).

statute further requires that the Attorney General “hold in confidence . . . the identity of the caller disclosing the information . . . .”<sup>137</sup> It is evident that California’s legislature desires to keep a whistleblower’s identity from the employer to shield the employee from potential employer retaliation. Accordingly, the same principle of identity protection would apply in the blogger whistleblower context and an employer should be prevented from ascertaining the identity of an employee blogger suspected of “spilling the beans.”<sup>138</sup>

Moreover, the Restatement (Second) of Agency 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>139</sup> It follows then, that if whistleblower statutes are designed to protect persons who reveal corporate and government malfeasance, that goal may not be accomplished if the whistle blower’s identity must always be revealed. Therefore, one of the protections that may be extended to the blogger whistleblower is the preservation of anonymity status through application of whistleblower statutes.

### *C. Bloggers as Public Interest Advocates*

The anti-employer blogger may also be able to remain anonymous if he can successfully portray the employers’ efforts to discover identity as an attempt to intimidate the blogging employee into backing down from legitimate public participation against corporative initiatives which may have negative impact on the environment or other public concerns. He can do this by invoking protection under state “anti-SLAPP suit” legislation.

“SLAPP” suits are lawsuits brought by firms against a public interest organization in an attempt to scare that group into dropping protests against a corporate initiative. SLAPP suits “typically involve the environment – for example, local residents who are petitioning to change zoning laws to prevent a real estate development might be sued in a SLAPP suit for interference with the developer’s business interests.”<sup>140</sup> Many states have “anti-SLAPP suit” statutes that protect

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137. CAL. LAB. CODE, §1102.8(c).

138. The catch in this argument is that most state and federal whistleblowing statutes provide that the whistleblower report must be made to a state agency. *See* Sarbanes-Oxley Act of 2002 § 806(a) (codified at 18 U.S.C. § 1514A (2006)); Occupational Safety and Health Act of 1970 § 11(c) (codified at 29 U.S.C. § 660 (2000)).

139. RESTATEMENT (SECOND) AGENCY § 395 cmt. f (1958).

140. *See* Nolo,

citizens' rights to free speech and to petition the government.<sup>141</sup> For example, California enacted such a statute in 1992 for the purpose of providing an efficient procedural mechanism to obtain an early and inexpensive dismissal of non-meritorious claims "arising from any act" of the defendant "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ."<sup>142</sup> If lawsuits seeking the identity of anti-employer blog entries can be successfully characterized as designed to harass or scare a public interest group from participating in protests against the firm, then the same rationale that prevents such actions could be used to prevent the disclosure of a public advocate anti-employer blogger's identity.

#### *D. Bloggers as Union Activists*

Blogger statements made in connection with a legitimate labor dispute may shield an anti-employer blogger from liability and likewise identity disclosure. Section 7 of the National Labor Relations Act ("NLRA") provides that employee may "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>143</sup> Much of the activities engaged by labor unions or labor organizers could be seen as "disloyal" conduct towards the employer. The NLRA is designed to shield employees for terminations based upon legitimate labor rights endeavors.<sup>144</sup> Case law has established that electronic mail communications come within the protections of the NLRA's concerted activities protections.<sup>145</sup>

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<http://www.nolo.com/definition.cfm/term/1264241E-6BCC-41DE-88FB065B11543680>.

141. California's has such a statute. *See, e.g.,* CAL. CIV. PROC. CODE §425.16(b)(1) (2006). To achieve this objective, the Legislature authorized the filing by a defendant of a special motion to strike those claims within 60 days after service of the complaint. *Equilon Enterprises, Inc. v. Consumer Cause, Inc.* 124 Cal. Rptr. 2d 507, 689 (Cal. 2002). The trial court's determination of each step is subject to de novo review on appeal.

142. CAL. CIV. PROC. CODE § 425.16 (b)(1) and (f). An anti-SLAPP motion "requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds [that] such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." *Equilon Enterprises*, 124 Cal. Rptr. 2d at 518.

143. 29 U.S.C. § 157 (2000).

144. Employees must be careful not to overstep the bounds of section 7, as the United States Supreme Court in *NLRB v. Local Union No. 1229* held that employer critical handbills distributed by disgruntled employees "deliberately undertook to alienate [the] employer's customers by impugning the technical quality of its product" was not protected activity under the Act. *NLRB v. Local Union No. 1229*, 346 U.S. 464, 471 (1953).

145. *Timekeeping Sys. Inc.*, 3223 N.L.R.B. 244 (1997).

Therefore, if anonymous blogger entries are an engagement in legitimate concerted activities related to collective bargaining or mutual aid of other workers, he may be able to invoke the protections of the NLRA, at section 7, to preserve anonymity. Important support for that claim may come from other employees' knowledge of the blog as a source of union concern, frequent posts about wages, and the terms of employment and availability of input from blog visitors.

The preceding legal theories may or may not be successful, but are offered as a starting point in the discussion of what legal theories bloggers may employ in the quest to preserve anonymity.

## VII. CONCLUSION

The power of the Internet to instantaneously disseminate information worldwide is unparalleled in the history of the world. The role of the blogger in that power is central. The task for employers seeking to control and limit anti-firm anonymous bloggers is staggering. While employers may seek the identities of anti-employer bloggers who defame the employer, disparage the employer's products, reveal trade secrets, or otherwise breach the duty of loyalty, an anonymous anti-employer blogger may be able to remain anonymous through the creative application of existing statutes designed to protect employees from employer abuses.