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When Can You Fire for Off-Duty Conduct?

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“One time they brought me a lot of stuff about his personal life, and I told them I didn’t give a damn about that. That wasn’t my business. It was while he was at work that was my business.” (President Harry S Truman commenting on FBI Director J. Edgar Hoover)[1]

The consequences of private indiscretions on the lives of Senator Gary Hart, television evangelists Jim and Tammy Bakker, and other prominent people make President Truman’s words appear outmoded. Although public figures run the greatest risk of career setbacks arising from their off-stage conduct, people in most occupations may jeopardize their job security if their off-duty activity impairs their acceptability at work or tarnishes their organization’s image.

At the heart of debates on drug testing, unorthodox life-styles, and criminal misconduct lies the more subtle issue of how a person’s private life affects job performance and the employer’s reputation. A still more subtle issue is the degree of privacy an employee can legitimately claim.

How can managers and supervisors balance the employee's job and privacy rights against the interests of the organization, its customers, and its employees? Often there are no clear-cut guidelines that can help determine the course of the action.

Take note of these contrasting cases. A federal court upheld the dismissal of an Omaha Girls Club employee, who was pregnant though single, on the ground that she was a "negative role model" for the girls.[2] But an arbitrator reinstated an unmarried mother of two whom Allied Supermarkets had fired after the birth of her second child because her presence in the Allied store that employed her might cause parents to forbid their teenage daughters to work there. The arbitrator could find no evidence that she was a bad influence on female employees—and added that her presence might serve to underscore the dangers in an illicit sexual relationship![3]

Even when the situation seems clear-cut to the accusatory employer, an arbitrator or a court may side with the offending worker. For instance:

- An asphalt refining company near Birmingham, Alabama discharged an employee for selling a small amount of marijuana to a friend from high school days who was working as an undercover agent. An arbitrator reinstated the worker on the ground that the publicity surrounding his arrest and three-year suspended sentence did not unreasonably harm the company's reputation or product, nor did it render him incapable of performing his duties.[4]

- Gould, Inc. fired a Minnesota man who harassed his former supervisor by dumping a load of dirt in his driveway, putting his house on the market with a real estate agent, and summoning paramedics to his home with a false report that the supervisor was having a heart attack. Gould claimed that these antics caused the supervisor's work to deteriorate. Seven months later an arbitrator reinstated the worker, concluding that the evidence of cause and effect was insufficient. Furthermore, the arbitrator said, the prankster had been drinking at the time he committed the offenses,

and his 20-year-old work history at Gould was unblemished except for one minor incident.[5]

- Potomac Electric Power Company sacked a credit collector for making obscene telephone calls, while off duty, to the teenage daughter of a customer of the utility. The collector had met her during a business call at the customer's home. An arbitrator reinstated him (though without back pay). Influencing the arbitrator's decision were the lack of a company policy on off-duty conduct, a certain amount of confusion regarding the caller's identity, and the offender's satisfactory work record over more than two decades.[6]

On the other hand, when the employer can establish a logical, if not obvious, connection between the on-duty behavior and the offender's job, it can often safely punish the person and make the punishment stick. For example:

- The Hilton Hawaiian Village on Waikiki Beach fired a bellhop after he pleaded guilty to selling a stolen handgun to an undercover agent. In sustaining the Hilton, the arbitrator, noting that the employee had been given access to guests' rooms with a master key, ruled that he had irreparably damaged the trust that the hotel had placed in him. The hotel had a legitimate concern, the arbitrator wrote, over exposure to liability through property damage or injury to guests.[7]

- A liquor store clerk fatally injured a 71-year-old woman when she intervened in a dispute between the man and his wife on a downtown Pittsburgh street, whereupon the store discharged him. Convicted of manslaughter, the man argued that he should be allowed to continue in his job through a prison work-release program. The arbitrator disagreed on the ground that the store's customers would be reluctant to enter the premises if the perpetrator of such a violent deed were working there.[8]

- The Elyria, Ohio Board of Education dismissed a high school counselor after her conviction on a misdemeanor for permitting her husband to use their house for drug trafficking. The arbitrator said the board's action was reasonable because the counselor's conduct related directly to her work of advising students and parents on drug abuse.[9]

Obviously, the outcome in such cases depends a lot on the circumstances and the nature of the business. That is certainly true when an employee's behavior affects job performance and the favorable public image that the organization enjoys. There is also the troublesome and delicate issue of the employee's right to privacy.

Link to the Job

Two truck drivers employed by a retail grocery chain went on a drinking spree during a layover and assaulted two other drivers for the same outfit. Their intoxication, coupled with the injuries they inflicted on the other pair, disrupted the company's delivery schedule. This, according to the arbitrator, was adequate grounds for discharge.[10]

Here the connection between the off-duty behavior and performance on the job is obvious. But look at a case where the employer had to interpret the states of mind of its clients and weigh the potential effect on its workplace. A woman was involved in a shooting incident during an argument at a friend's home. She was fired from her job in the laundry at the Maimonides Institute, a New York City institution for emotionally disturbed young people, because her presence at work made the residents apprehensive. The arbitrator upheld the institute's action.[11]

The clear link was absent, in the arbitrator's view, when the Weyerhaeuser Company let go a raw materials inspector after he admitted smoking marijuana and taking amphetamines while off duty. Because Weyerhaeuser had not demonstrated that his work would be impaired, the arbitrator reinstated him.[12] Arbitrators have

rendered similar decisions in drug-related cases involving a telephone equipment installer, a sand company laborer, and a power company serviceman.[13]

Sometimes a solution is available that preserves the worker in a breadwinning capacity but protects the employer. Parke-Davis dismissed an employee who had pleaded guilty in both state and federal courts to obtaining $500,000 under false pretenses. The drug manufacturer justified itself by claiming that the worker posed an unacceptable risk of a drug security breach, since in his job he had access to controlled substances and kept records, and his continued employment would jeopardize the renewal of Parke-Davis's federal registration. The arbitrator ordered the company to retain the employee but put him in the first available nonsensitive job—unless the Drug Enforcement Administration intervened. (The company didn't help its case by waiting more than four months before taking action against the offender.)[14]

As we have seen in the cases described here, the employee's work record often weighs heavily with arbitrators. In drug-related cases, the employer can take the initiative by offering the offender the choice of being fired or entering a rehabilitation program.

The Company's Image

An employer naturally has a vital interest in protecting its good name, but companies have had trouble sustaining discharges by claiming damage to reputation. Parke-Davis maintained that the "notorious and embarrassing media coverage" of its employee's case hurt its "very visible and highly competitive" business which depended on the trust of the public and the government agencies that regulate drug manufacturing. The arbitrator did not accept that claim as proven.

Egregious behavior itself is not usually enough to demonstrate damage to reputation. Armco Steel fired a worker in a fabricating plant after he pled guilty to taking indecent liberties with a nine-year-old girl. Citing the worker's good 16-year work record, his eight-

month confinement in a state mental hospital following the incident, and the fact that his factory job involved no contact with the public, the arbitrator conditionally reinstated him.[15]

But a similar case had a different result in the context of an offender's highly visible position in a business where image counts a lot. Northwest Airlines dismissed a flight attendant after he had admitted photographing an 18-year-old man in the nude during off-duty hours. He had just recently returned to duty after a suspension for similar behavior. The arbitrator upheld the carrier on the basis that the incident might expose it to damage because "some people may be given pause" about traveling on an airline that is "under the control of persons who are so inept at managing their own affairs."[16]

To employers fearful of harm to their public esteem, an incident involving two errant Internal Revenue Service agents may give pause. The IRS suspended for one day two male agents who, on leaving a Columbus, Ohio bar one evening after drinking several beers, "mooned" a group of women in a parking garage. The arbitrator noted that the act was "sophomoric and foolish" and fell "substantially short of earning them a merit badge." But in revoking the suspension, the arbitrator determined that an employer must have "a sensible expectation concerning the conduct of employees on their own time" and may not "exaggerate unduly what the public may think of incidents having no bearing on their job."[17]

Still undecided is the case of the Kentucky bank that discharged a man who did volunteer work for an organization promoting homosexual rights. The group got support from the Episcopalian church. The bank asserted he was undermining public confidence in it. The man sued the bank, claiming religious discrimination. He lost in a lower court and lost in a federal appeals court, which said it wasn't a case of religious discrimination. The judges remanded the suit to the lower court for further consideration.[18]

As a rule, the potential for embarrassment that justifies disciplinary action hinges on the prominence of the employees involved, the ethical or moral element in the organization's mission, and the efficiency of the communication network involving the organization's clientele. The Gary Hart and PTL scandals contained all these elements. On a smaller scale, the previously mentioned case of the Elyria high school counselor also contained these elements.

Right to Privacy

Employees who are disciplined for moonlighting, extramarital affairs, or other off-the-job activities that employers frown on may raise the privacy issue as a defense. Their constitutional guarantees of privacy and freedom of association, they may argue, make their outside behavior of no concern to the employer as long as they are available to work as scheduled and perform satisfactorily.

The famous case of Virginia Rulon-Miller illustrates this principle. She was an IBM sales manager who was demoted for dating a sales executive of a competitor, QYX Corporation. The demotion was based on written company policy governing conflicts of interest. She quit and sued IBM for invasion of privacy and, in effect, wrongful discharge from her position. A California jury awarded her $300,000 in damages.[19] Similarly, a federal district court upheld the right of a factory inspector employed by Avco to voice his outrage over the company's labor relations policies in a letter that a Connecticut newspaper published.[20]

When constitutional rights are in question, an arbitrator or court will contravene them only in extreme situations where there is a threat of danger or violence. One of these was the case of a Baltimore bus operator who, it developed, was also the acting grand dragon of the Maryland chapter of the Ku Klux Klan. His dual capacity became news, whereupon his fellow bus operators threatened a wildcat strike, and the possibility of a public boycott of the whole bus network arose.

The Baltimore Transit Company discharged the grand dragon on the grounds that there was a clear and immediate danger of violence. An arbitrator sided with the company.[21]

When the privacy matter turns on activities directly relating to a person's job rather than on constitutional guarantees, the picture becomes less murky. Here it's usually a matter of conflict of interest. A disc jockey lost his job at a New York City radio station after doing work for a competing station.[22] A Detroit police officer who moonlighted as a polygraph examiner in non-criminal matters like employment testing was ordered to stop this work after he administered polygraphs on his off-duty time to criminal suspects.[23]

An arbitrator reinstated a cable splicer for Continental Telephone Company of Virginia, however, who had been discharged for selling and installing telephones during days off. The arbitrator ruled that the worker had not violated any company rules, had confined his moonlighting to off-duty hours, and had installed equipment only outside Continental's franchised area.[24]

Naturally, employees on medical leave have their privacy restricted to an extent. If they are caught working at another job, doing strenuous work at home, or participating in potentially injurious sports, they may be fired—and arbitrators have upheld such discharges.[25]

A bank vice president who was unwilling to have his privacy rights tested has concealed his moonlighting. On weekends he works as a professional wrestler, and many of his matches are televised. To avoid discovery and possible dismissal by the bank for unbecoming conduct, he wears a hood while wrestling.

What Policies Are Necessary?

Clearly the proper posture for the organization to take about off-duty behavior is not always obvious. But in anticipation of the necessity of making a decision about an employee, it's advisable to have policies in place and in mind. Here are suggestions:

- Establish written and specific prohibitions against off-duty conduct that management regards as unacceptable, like automatic discharge for a guilty plea or conviction in a felony case.

- Formulate procedures for employees charged with crimes and awaiting trial. An employer is not obligated to retain a worker who faces a long period of incarceration before trial, but an employee released on bail may want to return to work. If the nature of the offense makes it inadvisable to let the person return to work, the company may opt for suspension and take final disciplinary action on resolution of the case. As a gesture of good faith, the company may offer to reimburse the employee for lost income if he or she wins acquittal or the case is dropped.

- Stipulate how the organization will deal with the person who, having received a suspended sentence, is then available for work. (Sometimes, of course, the suspended sentence is contingent on the offender's having a full-time job.) Naturally, the employer will consider such factors as the employee's trustworthiness, propensity for violence or drug abuse, and the possible reaction of customers and coworkers.

- Anticipate the possibility that an employee who is guilty of a crime may "beat the system." There is precedent for disciplinary action against employees who avoid criminal conviction, in the face of overwhelming evidence of guilt, because of legal technicalities. One arbitrator wrote, "It matters not that rigorous protection in the criminal law saved the individual from criminal penalties because such fact does not constitute a bar to the employer's right to protect itself or its other employees."[26] Unless the employer has agreed to base its action on the outcome of a criminal proceeding, this kind of double jeopardy is legally permissible.

It goes without saying that if the decision is to reinstate the worker, the employer must take into account possible reaction from coworkers and customers. The employer has a duty to set the record straight on exaggerated or distorted stories about the employee's conduct—while protecting sensitive information surrounding the case. On the other hand, the organization also has a duty to fellow workers not to suppress pertinent facts.

Often it's difficult for a manager to make a decision about off-duty behavior that has moral or political overtones. An otherwise prudent executive who has no tolerance for extramarital affairs, homosexuality, unorthodox lifestyles, or radical political or social beliefs may overreact by suspending or discharging an employee when there is no connection with the job.

But caution is necessary in such cases because of the principles of a person's right to privacy and freedom of association. In this as well as other aspects of off-duty behavior, the words of Thomas J. Watson, Jr., onetime head of IBM, are pertinent. The California appeals court in the aforementioned Rulon-Miller case cited this memo from Watson, sent "to all IBM managers":

"The line that separates an individual's on-the-job business life from his other life as a private citizen is at times well-defined and at other times indistinct. But the line does exist, and you and I, as managers in IBM, must be able to recognize that line.

"I have seen instances where managers took disciplinary measures against employees for actions or conduct that are not rightfully the company's concern. These managers usually justified their decisions by citing their personal code of ethics and morals or by quoting some fragment of company policy that seemed to support their position. Both arguments proved unjust on close examination. What we need, in every case, is balanced judgment which weighs the needs of the business and the rights of the individual...

“We have concern with an employee’s off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal...

“Action should be taken only when a legitimate interest of the company is injured or jeopardized. Furthermore, the damage must be clear beyond reasonable doubt and not based on hasty decisions about what one person might think is good for the company.

“IBM’s first basic belief is respect for the individual, and the essence of this belief is a strict regard for his right to personal privacy. This idea should never be compromised easily.”

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