

EMPLOYEE'S LIFE OUTSIDE THE WORKPLACE: ETHICAL CHALLENGES OF PRIVACY

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ABSTRACT

In this article, we examine the justification of the policies imposed by companies in order to regulate employees' behavior outside work. In the first section, we argue that legitimacy of such policies can be analyzed in terms of a conflict of rights. In the second section, we identify some general factors that are relevant for deciding which right takes priority in such conflicts. We apply the general discussion in the second section to two corporate policies.

KEYWORDS: *privacy, corporate policies, employees' free-speech rights.*

JEL CLASSIFICATION: *M12*

1. INTRODUCTION

Employers control much of employees' workplace life; they are justified in doing this since, through employment contract, employees are paid for performing their job tasks. However, rules and policies imposed on employees often expand upon employees' personal life. In this article we will focus on these conditions, which influence employee's life outside the working hours. The main purpose of this article is to examine whether such policies are justified. We will not try to give a final answer, but rather to raise the issue and to create a general analysis framework. In the first part, we will discuss how the problem has to be approached. In the second part, we will examine the general factors that can be relevant for the ethical assessment of such policies. In the third part, we will apply the second part analysis to two types of policies.

2. A POSITION BETWEEN TWO EXTREMES: CONFLICT OF RIGHTS

At the beginning of the last century, Henry Ford hired more than 100 investigators in order to spy his employees in their own houses. He considered that a disorderly life, drinking problems or excessive gambling impact upon workers' performance. In order to increase workers' productivity, he imposed strict policies on these habits. Ford's belief that there is a strong relation between personal life and their workplace performance had many positive consequences. In order for workers to be more efficient, Ford took care that his employees and their families to have good health and education. However, involvement of Ford Motors in employees' personal life exceeded the objective of workplace efficiency and expanded upon some life choices that do not have any impact on job performance. For instance, Ford gave his wage of 5 dollars per day only to workers who do not commit adultery and didn't take in boarders (Kenyon, 2004, 122). Such conditions impose standards of morality and infringe employees' privacy.

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Now, a century after Ford imposed these policies, such practices are not common anymore. Nevertheless, even in present days, employers establish certain restrictions that influence employees' off-the-job life. Some employees were fired because they marry with employees working for competing companies; many companies impose rules banning love affairs between colleagues or just between bosses and subordinates. Another category of restrictions affect employees' lifestyles. Banning visible tattoos and prohibiting smoking outside the workplace are included in this category. Finally, a third category of restrictions affect employees' free speech. Employees are banned from expressing their opinions when they harm company's image, by criticizing it or by expressing offensive views.

Such practices generate two extreme reactions. Some people consider that these policies are morally unacceptable because influence employees' personal life. Other people accept all such corporate practices since companies have the right to impose to enforce any conditions that consider necessary for protecting their business interests. We will further develop and reject some arguments for these two extreme views.

The first extreme approach to our problem is based on a strict separation between life at the workplace and life outside the workplace. While companies have the full right to impose workplace rules for employees, these rules should not affect their private lives.¹ Employees have the right to privacy, which bans any corporate policy affecting their personal lives. However, this argument is not sufficient. First, it is not that easy to draw the distinction between employee's personal life and his/her life at work. All, or most, conditions enforced by employers influence employee's job performance and, so, are related with life at work. For instance, banning workplace romances has an undisputable relevance for job life, even if it also infringes upon personal life. Secondly, although employees have the right to have a personal life free of any interference from employers, companies have a competing right to protect its business interest. In virtue of this right, banning some habits of employees that harm the company becomes acceptable. In conclusion, we cannot reject all conditions that affect employees' personal lives.

The second extreme view, defended from a free-market perspective, states that company's owners can impose whatever conditions they would like. The right to property and the fact that they risk their own money gives them the full right to manage their companies and to impose rules. Employers should be free to fire their employees at any time, as employees are free to leave their job wherever they want. Employees that are not willing to agree some corporate policies can find another job. The core of this view is "employment-at-will" common law doctrine, according to which, in the absence of any special regulation or contractual clause, the employee can be dismissed at any moment and the employer does not have the obligation to justify in any way its decision.² This legal doctrine, which governs the employment contract in United States, is implicitly interpreted in an ethical sense, as stating that dismissal of employees is morally acceptable in all situations, regardless of its reason. Next, we will try to reject the view presented in this paragraph.

We will start with a brief critical observation, which we will not develop. In this argument and generally, the free-market supporters pass from the idea that employees consent to the policies and rules imposed by their employers (since otherwise they would find another job) to the fact that these policies are ethically acceptable. This transition is debatable (West, 1985). For instance, an employer who harasses a woman employee does not do a morally acceptable thing, even if she consents, because she is afraid that he would not find another job.

Secondly, the ethical interpretation of employment-at-will doctrine is not adequate. It might be true that "employment-at-will" is adequate as a legal rule, and that companies should not be legally punished for discharging their employees. However, this does not mean that some reasons for firing employees cannot be unethical. In order to show that the employment-at-will doctrine cannot be seen as an ethical approach, we can examine its standard formulations. In the nineteenth century, a Tennessee court states that employers "may dismiss their employees at will for good cause, for no cause, or even for cause morally wrong without thereby being guilty of legal wrong" (Shaw, 2014,

279). As it may be noticed, the court draws the distinction between the legal perspective, which is the point of the doctrine, and the ethical perspective. How could someone argue that it is ethically permissible to fire employers for a "morally wrong" reason? Such a position would be contradictory. Therefore, employment-at-will can be justified as a legal doctrine, but not as an ethical standard.

Thirdly, the free-market view presented above states that the companies that impose some conditions or discharge their employees, for any reason, do not deny their rights, because employers have the absolute right to impose any condition. Let's take a radical example: a company which completely prohibits employees from publicly expressing their political opinions. Some people may argue that this is a violation of free speech. However, according to the free-market approach, the problem should not be approached in terms of rights. Companies that ban public political speech do not violate any rights, but legitimately impose some rules for their employees. Implicitly, the free-market supporters state that the right to free speech cannot be asserted against employers, but only against governments. Space does not allow me to focus thoroughly on this point. Briefly said, we consider that free-market supporters treat completely different two potential situations that are similar enough: governments and, respectively, companies that would ban public speech. There are good grounds for treating similarly the two situations (Campbell, 2002, 3)

In conclusion of this section, none of the two extreme positions discussed above are correct. In some cases, but not in all, imposing certain types of rules and conditions that affect employees' life outside the workplace is acceptable. Employees have rights that can be asserted against companies and violating them is morally unacceptable. Most policies that influence employee's life outside the work should be modeled in terms of a conflict of rights. Companies have the right to impose rules in order to protect their business interests and employees have their right to live their lives and to make their life decisions without employer's interference. However, none of these rights is absolute, but can be limited in some situations by other rights. When two rights collide, many details of the case are relevant in order to establish which of them takes priority. This is the problem that we will discuss in the next section.

2. EMPLOYEE'S LIFE OUTSIDE THE WORKPLACE: HOW TO STRIKE THE BALANCE BETWEEN COMPETING RIGHTS

In the second part, we will briefly analyze some factors that are relevant for establishing whether employer's policies affecting employer's life outside the workplace are permissible or not. The first relevant factor is whether company's policy really protects some business interests. Most of Ford's policies enumerated at the beginning of the paper were not designed to protect business interests, but rather to impose a certain lifestyle, which is considered morally valuable by company's leaders. Such policies are unacceptable; company's rules should not morally regulate the lives of their employees, even if the supported values were actually desirable. It's not always easy to draw the line between policies that seek to impose values and policies that protect a business interest. Does banning of long hair for men protect a genuine business interest or not? Company's leaders can argue that male employees that wear long hair harm company's image, but probably this would expand excessively the concept of business interest.

Secondly, it is relevant whether the business interests that are protected by such policies are legitimate. For instance, company's interest to keep confidential information away from competing companies is legitimate. For this reason, dismissing a top-level manager for marrying with a top-level manager of a competing manager can be considered legitimate, since, in some circumstances, this is the only way to protect some business secrets. On the contrary, the attempt of a company to keep away from public a piece of information regarding a harmful product is not legitimate. For this reason, disciplining or dismissing an employee for sharing such a piece of information is not justified.

The third relevant factor is the size of the harm that is avoided by imposing some restrictions. For instance, some companies prohibit all romances between colleagues, not only between bosses and subordinates. But is the risk of accepting such romances that high for the company? Managers argue that the two colleagues involved in a relationship will tend to be distracted and to spend much time not working. Their coworkers will also tend to focus on gossiping rather than work, which will result in further productivity losses (Boyd, 2010, 327). Couple fights and dissolved workplace relationships can lead to further problems. Anyway, there is no indisputable evidence showing that workplace romances have significant harmful effects on work environment. Some studies show that employees involved in a workplace romances work better in order to create a good impression to their bosses, tend to be more motivated and more involved in their work (Pierce, 1998, 1715-1716). Therefore, the effect of workplace romances between colleagues is rather mixed, not entirely negative. On the contrary, the relationships between bosses and subordinates bring more harmful effects for work environment: preferential treatment from the supervisor, resentment from the other employees resulted from this treatment, whether real or perceived (Boyd, 2010, 327).

Another relevant element is whether companies can avoid potential harmful effects otherwise than completely prohibiting the respective off the job conduct. Let's take the example of the "non-smoker policy", imposed by some companies, by which smoking is not allowed for employees, even outside the workplace. Defenders of this policy argue that the cigarette breaks that smokers take lead to significant productivity losses. Furthermore, in the context of US health system, where most health insurances are provided by employers, smokers incur higher health costs for the company. As a result, some studies show that, in the United States, smoking employees cost employers around 6.000 dollars yearly (Berman et al, 2014). However, instead of rejecting smoking employees, employers can charge smokers more for health insurance and can regulate more carefully employees' breaks.³ These actions are also ethically desirable, since applying them will ensure an equal treatment for smokers and non-smokers.

The fourth relevant factor is the social and individual importance of the right or interest that is claimed by individual against the company. When company's rights are balanced against employees' rights, one of the most important to take into account is the nature of employee's right that is involved. Employers that prohibit workplace romances restrict employees' free choice of a life partner. The free choice of a life partner is an important dimension of human being. Without affirming that such prohibitions are, or should be, illegal, prohibiting romances is something more important than prohibiting piercings. For this reason, companies should have recourse to such policies only in exceptional situations.

3. A BRIEF EXAMINATION OF TWO POLICIES: PROHIBITING VISIBLE TATTOOS AND BANNING PUBLIC CRITICISM OF EMPLOYER

In the third part of the paper we will briefly analyze two types of policies involving employees' conduct outside the workplace: banning tattoos and banning public criticism of employer. Some companies include in their dress codes specific prohibitions of visible tattoos. Are these provisions ethically acceptable? As generally known, for a long period of time, tattoos were strongly associated with outcasts, gang members and criminals. This is the reason why managers are afraid that employees who wear visible tattoos would harm company's image. The first remark is that a complete ban on tattoos will be unacceptable, since only visible tattoos can influence clients' image on company. Secondly, for the same reason, the prohibition is not justified for people that do not work with clients. Thirdly, if tattoos are placed on a body part that is not necessarily visible, for instance on the arm, it's certainly enough to require employees not to make their tattoos visible.

Even with these specifications, we can ask whether banning visible tattoos. At present, tattoos are much more common than they used to be, within large categories of people, and lose most of its original significance. Now, people are generally aware that most people wearing tattoos are not

criminals or gang members. For this reason, we think that wearing tattoos does not significantly harm company's image and it should not be prohibited. Nevertheless, offensive tattoos (sexist, racist etc) harm not only company's image, but also the work environment and so they are legitimately banned.

During the last years, many employees were fired or disciplined for publicly criticizing their employer. Such cases are a very actual issue of ethical debate in the employer-employee relationship. Some people argue that these corporate practices are unacceptable because they violate employees' right to free speech. On the other hand, some argue that companies have the right to protect their reputation and that employees have the obligation to be loyal to their companies. As argued in the first section, the situation can be modeled as a conflict of rights: employees' right to free speech and company owners' right to manage their property and to protect company's reputation (Campbell, 2002, 20-21). In order to decide which of them takes priority, costs for the company and benefits for the public should be weighed.

The size of benefits depends upon the importance of the information that is shared to public. From this point of view, three cases may be distinguished. The first one is when the employee discloses a piece of information that is new and relevant for people, the public criticism is justified.⁴ In other real-life cases, the employee does not share any new or important information, but rather expresses his or her personal critical opinion on something that is generally known. Even in such cases, if the criticism is justified, the free expression of employee's opinions might be important and public benefits of sharing the information can be significant. Finally, employees can share a message that is not really relevant to the public, and in such cases benefits are not great.

When assessing the costs of public criticism for the company, some relevant elements are how widely shared the message was, its continuous or rather accidental character. Another relevant factor is whether the target of the criticism is something important in company's activity (for instance, a best-selling product). Another important element is employee's position. The criticism of a high-rank employee is more damaging to the company. It's worth mentioning that, even if it is agreed that the employee should be disciplined for his or her criticism, the sanction should be proportional to the magnitude of the harm and firing him or her is only a last resort solution. The elements listed here are also relevant for establishing a fair disciplinary measure.

4. CONCLUSION

In this article, we analyze the policies and rules imposed by companies that influence employee's life outside the workplace. We showed that, in many cases, the legitimacy of such policies can be analyzed in terms of a conflict of rights and we identified some relevant factors for establishing which right takes priority. Finally, we examined two particular policies from this point of view. Other policies can be analyzed in the same way. However, even a complete identification of the relevant factors cannot give a final answer regarding the justification of all policies imposed by companies. There is no algorithm for solving all ethical problems.

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¹ The right to privacy, defined famously by Judge Cooley, in a case brought before the court, as "the right to be let alone" (Warren and Brandeis, 1890, 195), is involved in all policies by which companies ban a type of off-the-job behavior. However, other more important employees' rights can be also involved: right to free speech, freedom of conscience, etc.

² See, for instance, (Epstein, 1984).

³ There are cases when actions that have to be taken by companies in order to avoid losses are not legal; for this reason, the way how legal regulations are designed can be relevant for this argument.

⁴ In such cases, the employee can be also legally protected against employer's retaliation.