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Lifestyle Discrimination: Should Employers Discipline Employees For Violating Policies That Regulate Off-Duty Conduct?

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Carolynn is an associate general counsel at a global manufacturing firm where she has worked for six years. She is considered a sharp litigator and has been involved in numerous high stakes lawsuits on behalf of her company. She has acquired the nickname "barracuda" for eating witnesses alive on cross-examination. Carolynn has also gained the reputation amongst the other attorneys at the firm of being able to hold her liquor. Recently, after winning an important case, Carolynn and a few friends went to a downtown sports bar to celebrate after work. She consumed four glasses of wine in the space of three hours. The following morning, Carolynn reported to work early with the faint smell of alcohol on her breath. She was unaware that, on that morning, her firm decided to conduct a random, unannounced drug and alcohol test for all employees in the legal and safety compliance departments. Firm policy allows unannounced testing because

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the firm has been cited by OSHA for the relatively high number of drug-related accidents occurring in the plant. The firm also has a written policy that states "anyone who tests positive for unlawful drugs or alcohol use is subject to immediate dismissal." Carolynn tested positive for alcohol. What should the firm do regarding Carolynn's discipline?

Steven has worked for a bank for fifteen years. He is a computer analyst who has consistently received outstanding performance evaluations. On Thursday nights, Steven performs at a popular club under the stage name "Stephanie," where he wears women's clothes, heavy make-up, and synthetic breasts. The Sunday edition of the local newspaper ran a "lifestyle article" in its Metro Section on the club where Steven performs, including a smiling picture of Steven dressed in drag. Several customers of the bank recognized Steven from the newspaper photo and complained to the bank's customer service department that they would rather bank somewhere else if people like Steven are allowed to handle their money. What should the bank do regarding Stephanie, I mean Steven?

Michael, a divorcee for four years, is a senior manager in his company's human resources department. While attending a conference a year ago, he met and fell in love with a HR manager who works for a competing company. Michael is involved in the recruitment and selection process of high potential employees throughout his company, and has knowledge of the techniques used to "recruit" these highly sought after employees. The company has a strict policy against fraternization with competitor company employees where trade secret and conflicts of interest issues may arise. The president of the company has become aware of the relationship, and has come to you seeking whether, and to what degree, Michael should be disciplined. What should you tell him?

Legal Perspective

Most employee-employer relationships are "at-will," meaning that an employer has the right to terminate an employee for any reason, or no reason at all, so long as the reason is not illegal. A growing trend among employers is to monitor the off-duty lifestyle activities of their employees, and to take adverse employment action when the employer deems it appropriate. The reasons most often cited by employers are: the harm an employee's off-duty conduct can cause to the employer's image, reputation and mission; the impact of the off-duty conduct on the employee's job performance, which can lead to increased health care costs for the employer; and the

potential misuse of power, confidential information, and trade secrets when employees become involved with each other inside and outside the company. Many employees hold the belief that what they do off-duty and away from the employer's premises is their own business, and companies that monitor their off-duty conduct are invading their right to privacy.

In response to the perception that employers have too much power over what employees do off-duty, nearly half the state legislatures have enacted statutes that protect employees from adverse employment actions for off-duty legal conduct. Most of these statutes prohibit conduct involving off-duty, off premises drinking and smoking, or what is commonly called the "legal use of consumable products." However, a number of statutes also exist that protect employees for other "legal recreational activities" that employees engage in while off-duty. Regardless of whether your state legislature or local municipality has enacted these types of regulations, employers should have written policies or employment contracts in place that specify the type of off-duty conduct employees can be disciplined for. Why? Because even though employers can discipline employees for off-duty conduct, which can result in terminating the employee, it is not always advisable to do so. Each situation should be decided on its own merits. Employees may argue that the employer's reason for discipline or termination is simply a pretext for unlawful discrimination. Additionally, taking a hard line on off-duty conduct could create negative publicity for the employer or instill low morale among employees.

Employers should consider various factors before disciplining or discharging an employee for off-duty conduct. The primary consideration should always be what impact the off-duty conduct has on the legitimate business interests of the employer. For example, in the hypothetical situation involving Carolynn's drinking after work, many courts have ruled that where an employer is attempting to regulate off-duty conduct that does not affect the employee's job performance, "the employer is required to make it known to each and every employee the conduct that will result in discharge." Here, Carolynn should have been aware of her employer's strict policy regarding drug and alcohol use. Additionally, she undoubtedly knew that she could be dismissed if she tested positive for alcohol, because the policy clearly stated so. Thus, whether Carolynn was under the influence of alcohol, which arguably could have affected her job performance when she arrived at work, is not the relevant issue in this case.

Another important factor which should be considered is the

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impact the employee's off-duty conduct will have on the employer's image, reputation or mission. In the second hypothetical involving Steven, the "performance artist," although he is considered an outstanding employee, his off-duty activities may unfortunately harm the employer's image. The company will have to balance the direct negative effect of losing customers with Steven's off-duty freedom of self-expression. How the employer assesses this situation will not only affect the bank's customers, but also the bank's employees who may feel Steven was treated unfairly if his employment is terminated for his off-duty activities.

The most controversial policies an employer may impose are in the area that often deals with rules that prohibit dating or fraternization among co-workers and employees of competing companies. In the third hypothetical, Michael is in a relationship with an employee who works for a competing company. Michael also has knowledge of certain techniques used by his company to "attract" high potential recruits. Michael's employer will have to factor whether his off-duty conduct is objectionable, and thus requiring some type of discipline, because his relationship could expose the company to the misuse of confidential information, trade secrets, or create a conflict of interest for the employer at a later date.

Often, these rules are difficult to enforce. However, an employer can design policies that prohibit supervisor/subordinate relationships, certain interactions with competitors, and situations that present conflict of interests. As a California court once stated, "[A]n employer has the right to expect the undivided loyalty of its employees," and that that right is compromised "when an employee's outside activities give rise to a possibility of personal influence." *Stokes v. Dole Nut*, 41 Cal. App. 4th 285, 48 Cal. Rptr. 2d 673 (3rd Dist. 1995).

In conclusion, each situation involving off-duty conduct should be viewed on a case-by-case basis. Employers must promulgate clear and specific policies concerning off-duty conduct and the disciplinary procedures that will be followed if an employee is found to be in violation of a policy. These policies and procedures should be defined in the employee handbook, employment contract, or in the case of union workers, in the collective bargaining agreement. Above all else, employers are advised to handle off-duty conduct problems only when it can be shown that the off-duty conduct has had a direct negative impact on the employer's business interests.