J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 6(4) 271-288, 1997-98

PRIVACY AND THE EMPLOYEE'S PRIVATE/WORK LIFE: WHERE TO DRAW THE LINE

KURT H. DECKER
Stevens & Lee, Reading, Pennsylvania

ABSTRACT

This article gives an in-depth review of litigation concerning employee privacy concerns, both in and outside of the workplace. The author focuses on how employers attempt to limit employees' privacy expectations outside the workplace. Reviewed are cases involving personal association, lifestyle regulation, loyalty, conflicts of interest, off-duty misconduct, and residency. Statutory protections for employees are also cited.

Employment privacy concerns are not limited to those that arise during hiring and at the workplace. Employer restrictions outside the workplace may affect employee associations, financial arrangements, additional employment opportunities, living arrangements, romantic involvements, etc. [1].

Privacy concerns arise over whether activities outside the workplace are strictly a personal employee matter subject only to violation of a law that should be dealt with by the courts or involve legitimate employer interests. Not conforming with these restrictions may subject the employee to adverse employer action up to and including termination.

The employee's ability to effectively challenge these employer restrictions depends on the type of restriction, whether the employee is union or nonunion, and whether the employee works in the private or public sector. This discussion focuses on how employers attempt to limit employment privacy expectations outside the workplace by reviewing the areas of personal associations, lifestyle regulation, loyalty, conflicts of interest, off-duty misconduct, and residency along with what statutory protections may be available for employees.

doi: 10.2190/YUBP-AEWH-DXCR-GEJR
http://baywood.com

DEFINING EMPLOYMENT PRIVACY

Privacy encompasses a broad spectrum of employment interests. These interests relate to the intrusiveness and fairness of information collection, maintenance, use, and disclosure along with employee lifestyle regulation at and outside the workplace. They arise prior to, during, and after the employment relationship is terminated. They can be summarized into the five main employment privacy themes of: 1) beliefs, 2) information, 3) association, 4) speech, and 5) lifestyle.

GENERAL CRITERIA FOR EVALUATING EMPLOYEE ACTIONS OUTSIDE THE WORKPLACE

The arbitration process has provided a major forum for evaluating employment privacy outside the workplace. Criteria developed by arbitrators in the private and public sectors may provide useful guidance for dealing with these issues.

Arbitration under collective bargaining agreements generally involves a neutral third party's review of an adverse employment action to determine whether just cause supports employee discipline or termination. Beyond the particular grievance decided, arbitration awards do not serve as precedents [2]. However, they are persuasive authority for other arbitrators, the union relationship, and the manner in which many nonunion employers conduct their affairs.

The analytical framework developed by arbitrators evaluates these employer concerns outside the workplace based on:

1. *The effect on employee work performances.* For example, an employee who was dating a married woman was terminated when her husband entered the employer's facilities with a gun and threatened to shoot him [3]. Acting in self-defense, the employee disarmed the husband. The arbitrator reinstated the employee, because the husband was entirely responsible for the incident. No overall employee work performance was affected.
2. *The effect on other employees.* For example, no justification existed in terminating an off-duty airline employee who "streaked" at an airport [4]. This behavior did not cause employee morale problems. However, when off-duty misconduct indicated a propensity for violence that would make fellow employees fearful, termination was appropriate [5].
3. *The effect on the employer's operational efficiency.* This usually involves altercations between employees and supervisors. Disciplinary action is warranted when off-duty conduct is job-related [6].
4. *The direct employer injury.* This may subject the employees to discipline when they enter a competitor's employment or when they establish a competing business [7].
5. *The indirect employer injury.* For example, a utility company employee was terminated for an embezzlement conviction that arose out of a part-time job [8].

The employer was concerned about its public image because its employees regularly entered customers' homes. Even though the employee did not have access to customers' homes, this did not eliminate the adverse impact because the public was not aware of that.

PERSONAL ASSOCIATIONS

Freedom of association is generally guaranteed by the United States Constitution's First Amendment [9]. This often requires concealing one's associations to avoid harm; i.e., preventing information disclosure regarding a particular association [10]. It includes the right to engage in advocacy of political, social, and governmental beliefs.

BASIC ASSOCIATIONS

Freedom of association's constitutional protections are not limited to views that are popular or noncontroversial [9]. They protect associations advocating unpopular, controversial, dissident, or unorthodox views [11]. Association is not confined to political ideals, but extends to asserting mutual economic, legal, and social interests [12]. Among the associations protected are political affiliations [13], labor unions [14], and social clubs [15].

Constitutionally protected association rights are recognized for public employees [16]. A public employee's rights were abridged when forced, through a polygraph examination, to disclose information regarding personal sexual matters [17]. Constitutional privacy rights outweighed other interests when a married part-time policeman was terminated because he was flirting with a married woman [18]. However, the privacy right of two police officers was not infringed by city regulations that prohibited off-duty employees from cohabitation outside of marriage [19].

These constitutional interests may or may not be given protection when private sector employees are involved. As fundamental interests, they may be protected within at-will employment's public policy exception [2]. Through this, freedom of association interests outside the workplace may be extended to benefit private employees.

Employee personal association protection is also provided by federal and state fair employment practice (FEP) statutes. Under the federal Civil Rights Act of 1964 (Title VII) [21], a violation occurs when individuals are denied an employment opportunity because: 1) their name is associated with a national origin group; 2) they have membership in, or association with, a national origin group; 3) they have membership in, or association with, an organization identified with, or seeking to promote the interests of, national origin groups; or 4) they attend or participate in schools, churches, temples, or mosques generally used by persons of a national origin group [22].

A white person's termination because of association with blacks is illegal race discrimination [23]. The court held this in a case in which an employer did not hire a white applicant because the applicant's sister associated with a black male by whom she had biracial children. White persons are protected from job discrimination motivated by the sale of their homes to blacks [24].

BANKRUPTCY/DEBTORS

Private and public sector employers are prohibited by the federal Bankruptcy Code from discriminating in employment against individuals because they have been associated with or are a bankrupt or debtor in bankruptcy [25]. An employer may not terminate an employee "solely" because an employee files a bankruptcy petition. A police department rule terminating police officers for filing bankruptcy petitions was unconstitutional [26]. Likewise, terminating firefighters for declaring bankruptcy hampered firefighters from obtaining a new opportunity in life [27]. The code does not permit termination or short-term suspensions of debtors because of ordered wage deductions [28]. Remedies for violations include back pay [27] and reinstatement [29]. Additional protection for debtors may exist under collective bargaining agreements [30].

UNIONS

Adverse actions against employees because of membership in or activities on behalf of unions violates the National Labor Relations Act (NLRA) [31] and state labor relations statutes [32]. The employer must have knowledge of the union activity [33] along with a discriminatory motive or unlawful intent for a violation to occur [34].

Absent antiunion motivation, an employer may terminate an employee for a good reason, a bad reason, or no reason at all without violating the NLRA [35]. The employer will prevail if the termination would have occurred even in the absence of union activities [36]. Outside of disciplinary actions, forced resignations and layoffs may also give rise to claims that an employer acted because of the employee's union activity.

Refraining from union association can be protected under federal and state fair employment practice (FEP) statutes. Under the federal Civil Rights Acts of 1964's (Title VII's) [21] religious discrimination guidelines [37], employers must accommodate an employee whose religious beliefs prohibit compliance with a collective bargaining agreement requiring joining the union or paying union dues. The employee must be excused from the membership requirement and be permitted to pay a sum equivalent to the dues to a charitable organization. The NLRA contains similar protections [38]. For example, an employee whose religion allowed the support of unions but whose personal study of the Bible led

her to oppose unions was exempt from paying the union dues required by her employer's union security agreement [39].

For other employees, the union dues requirement can be excused; however, they can be required to pay a fair share for the union's representation and collective bargaining activities [40]. When this happens, the nonunion employees must be provided with a constitutionally adequate procedure that allows them to challenge any fair share fee before an impartial arbitrator [41].

LIFESTYLE REGULATION

Employer lifestyle regulation outside the workplace generally involves living, romantic, and social relationships that center on morality standards. Intrusions may arise prior to [42] and after hiring [43].

When a public employer regulates employee lifestyles outside the workplace, a rational connection must exist between the employee's lifestyle and the employee's job requirements [44]. If the regulation involves a fundamental constitutional right or is within a recognized zone of privacy, a public employer must show more than a *de minimis* interest in restricting the employee's lifestyle outside the workplace. When a property interest in continued employment exists or a liberty interest is affected, the public employee must be accorded certain procedural guarantees.

Cohabitation or sexual activity outside of marriage may at times present legitimate employer concerns. This often depends on the public employment's nature. More deference may be given to the state's interest in preserving the morale and integrity of law enforcement, fire protection, and teaching activities than might be appropriate in other public employment contexts.

A deputy sheriff was lawfully terminated for insubordination and disobedience when he continued to visit the wife of an organized crime leader contrary to a sheriff's order [45]. City regulations prohibiting police officers from engaging in any personal conduct that could result in unfavorable public criticism did not infringe privacy interests when two employees were disciplined for cohabitation [46]. A patrolwoman and a police sergeant were suspended because they dated and spent several nights together. These punishments were imposed even though the department failed to provide any notice that their conduct was prohibited.

Perception of one's sexual preference should also not be permitted to serve as a job disqualification [47]. Fifth Amendment interests may also be violated [48].

Public employee lifestyles have been regulated by requiring disclosure of outside employment earnings [49]. This does not concern intimate economic relationships of husband and wife to preserve privacy. It involves financial affairs of persons who are paid by the public and who occupy public trust.

Private sector employees have also claimed lifestyle intrusions outside the workplace. Romantic relationships at and outside the workplace may cause challenges. Termination for having an affair with a married coworker despite an

explicit employer policy to the contrary did not violate a municipal equal opportunities ordinance [50].

Likewise, an employee who alleged she was demoted, and thus constructively terminated, because she had a personal relationship and cohabited with a terminated manager stated claim under New York labor law statute that prohibits retaliation for employees' lawful off-hours recreational activities [51]. The statute's purpose is to prohibit employers from discriminating against employees whose after-work activities the employer does not like, including social activities (whether or not they involve a romantic element), as long as activities occur outside of work hours and off premises without use of the employer's equipment or property and do not create a material conflict of interest related to the employer's trade secrets, proprietary information, or other business interests).

A "topless stripper" was improperly terminated for engaging in prostitution acts on her own time where her extracurricular activities had not injured the employer's business reputation [52].

A ban against single-parent pregnancies among a girls' club's staffers did not violate the Civil Rights Act of 1964 (Title VII) despite its disproportionate impact on black women [53]. The club acted lawfully when it terminated an unmarried pregnant black employee who could no longer serve as a role model for the club's teenage members. A role-model rule was justified by business necessity and as a bona fide occupational qualification, because role modeling may help prevent teenage pregnancies, which was one of the club's main purposes.

Adverse employer decisions affecting pregnant females may be considered intrusions into the employee's lifestyle by affecting the employee's right to have children. This employee decision may be protected by Fair Employment Practice (FEP) statutes. For example, the timing of an employee's termination was inappropriate where supervisors had made negative remarks regarding an employee's pregnancy and the pregnancy was considered a pretext for the termination [54].

Decisions to obtain or not obtain an abortion may also be considered intrusions into an employee's lifestyle when an employer takes adverse actions on that basis. This employee decision may be protected by federal and state FEP statutes. However, an employer did not terminate an employee because of her abortion where it was clearly shown that a supervisor did not have any motivation to take adverse action based on this and the employer did not learn of the abortion until after the termination decision had been made [55].

Spousal abuse outside the workplace has also affected the right of an employee to retain employment. An employer terminated an at-will employee after discovering she had been a victim of spousal abuse [56]. The termination did not, however, violate public policy favoring a right to privacy, as the employee freely revealed to other employees that she had been raped and severely beaten. The employer did not initiate conversations relating to the spousal abuse, inquire into

personal or private details, question the employee about her marital situation, or seek to intrude on her privacy in a substantial and highly offensive manner.

Failure to obtain an employer's preapproval for statements, views, or articles that appear in publication which identify the employee's relationship with the employer may also cause problems. This is especially applicable where the employer's reputation or business interests will be actually harmed. However, mere speculation regarding harm to the employer may not be sufficient to sustain a termination, especially where it arises under a collective bargaining agreement. For example, an airline improperly terminated a flight attendant whose "bohemian" lifestyle was described in a magazine article that identified him as working for the employer, even though the employee failed to obtain the required prepublication review, approval, and permission [57]. The attendant's artistic endeavors and their promotion through the article did not constitute work detrimental to or in conflict with the employer's interest, and other employees who had violated the employer's prepublication policy had received no discipline or warnings.

Military reserve commitments outside of employment may cause discipline or termination problems. Generally, employees who are members of military reserve units must be permitted reasonable time off by the employer to fulfill their commitments [58]. However, not every military leave must be approved. Leaves may be denied if the employer will have difficulties in operating without the employee, special workload circumstances must be arranged during the requested leave, and additional costs must be incurred by the employer because of the employee's absence [59].

The employee spouse's reputation has also been considered. A nursing home that failed to promote a black nurse's aide to a certified medication technologist's position validly considered her husband's reputation as a drug abuser [60]. The husband's reputation as a drug abuser within the community was firmly established.

Employers at times may have legitimate interests in monitoring employee's home activities. This has been found appropriate during medical leaves [61] and while the employee is on call away from the employer's premises by prohibiting employees from drinking alcoholic beverages [62].

LOYALTY

Just as all employees promise to perform work prudently and skillfully, they also implied promise to serve their employer faithfully and honestly. It is a legally cognizable duty to act in a loyal fashion throughout an employment relationship. The extent of the employer's right to demand loyalty represents a significant privacy concern outside the workplace that affects employee furtherance of economic opportunities. Several circumstances exist under which employer relief is sometimes granted:

1. An employee forms a competing business before resigning from employment [63].
2. An employee quits and, either before or after quitting, solicits customers whom the employee serviced [64].
3. One employer successfully solicits employees of another to leave their present jobs and join a competing enterprise [65].
4. An employee openly boycotts the employer's products [66].
5. An employee does not devote full time to the primary employer's business because the employee is conducting other employment activities while working for the primary employer [67].

CONFLICTS OF INTEREST

This involves employees' duty to avoid or disclose any actual or possible conflict of interest with their employer. Often it is not the conflict itself that results in problems but the failure to disclose or to divest the conflict when warned.

Termination was "reasonable" when an employee failed to disclose a conflict of interest to a university [68]. The employee contracted (for the university) with a firm in which her husband had a substantial financial interest and did not reveal this relationship. It was not unreasonable to conclude that the employee knew her conduct was improper.

A conflict of interest surfaced involving a sportswriter who picked favorites for horseraces [69]. The sportswriter became part owner of a horse. Although the employee refrained from picking favorites when his horse was racing, a conflict of interest was present when horses of the same stable ran in other races.

Conflict of interest may also involve marital and family relationships. Employee termination may occur because a spouse or close family member is also employed. Termination is based on an inherent conflict of interest when family members work closely together. Employers argue that conflicts between family loyalty and employer obligations are increased when this occurs.

Generally, an employer may publish and institute a rule prohibiting married couple, sibling, and close family member employment. Problems arise when the employer has not published a rule and terminates a spouse or gives one the opportunity to resign.

Dating a sales representative from a competing employer was improper when an employer raised a conflict of interest concern [70]. The employer had expressed a policy of not interfering in employees' personal affairs unless it had a detrimental effect on the employees' work performance. This policy ensured employees a privacy right to hold a job even though off-duty conduct might not be approved by the employer. No evidence of an actual conflict of interest was presented. The employee did not have access to sensitive information that could have been used by a competitor.

A former employee, however, could not recover when the employer allegedly terminated him because he was accompanied by a woman who was not his wife, but who was presented as his wife, at a company outing [71]. Though freedom of association is an important social right that ordinarily should not dictate employment decisions, the right to associate with a nonspouse at an employer's outing without fear of termination was not within the public policy exception prohibiting an at-will employee's termination.

State adverse interest acts may also affect the outside employment of public employees. For example, a state adverse interest act did not prohibit employees from engaging in supplemental employment with entities having contracts with the public agency, where no actual adverse interest was shown [72].

OFF-DUTY MISCONDUCT

Noncriminal Misconduct

Certain instances arise where the employer may properly demonstrate concern for employee misconduct outside the workplace. Employers generally maintain that the employee's misconduct outside the workplace has caused an actual business loss or injured the employer's reputation. When an injurious effect on an employer's reputation is alleged, the source and degree of adverse publicity [73], the type of misconduct [74], and the employee's position [73] become important.

When an off-duty employee "streaked" in front of an airport terminal he was terminated for irresponsibility [75]. Termination was improper because this misconduct was not viewed negatively by other employees, fellow employees encouraged it, and there was little reluctance to work with the employee. "Mooning" or "baring of bottoms" while outside the workplace has been found insufficient to support termination [76]. However, violating an employer's requirement to moon or bare bottoms as a workplace requirement at an employer outing may support a wrongful termination action [77].

The termination of an employee who verbally and physically assaulted his supervisor at a restaurant while both were off duty was sustained [78]. The assault was detrimental to the supervisor's ability to handle employees, and the employee's bitterness and hostility toward supervision would carry over into the employment relationship. Discipline has also been considered proper for employees who prevented other persons from aiding a foreman who was being assaulted at a party [79].

Police officers who had a part ownership interest in a video rental store could not be prohibited through departmental regulations from renting or selling sexually explicit videotapes [80]. The distribution of sexually explicit films was protected speech under the First Amendment, and outweighed the city's fear of an erosion of respect for and confidence in the police department.

Similarly, an employee was permitted to maintain an action against her employer where she was told by a supervisor that she would not be terminated for appearing in a *Playboy Magazine* layout [81]. These oral assurances altered her at-will employment status, creating an enforceable oral contract.

An off-duty prison guard away from his job and out of uniform was properly terminated when he made anti-Semitic remarks to a bank teller who declined to cash his check [82]. Misconduct at employer-sponsored athletic events outside the workplace and off the employer's premises may result in disciplinary action [83]. This may occur, for instance, where an employee threatens other employees at an employer-sponsored athletic event.

Criminal Misconduct

When an arrest or conviction has an adverse impact on the employer's business, disciplinary action is generally considered appropriate. The effect and likelihood of negative publicity along with the sensitive nature of certain public sector positions makes it likely that criminal activities outside the workplace of public employees will have an indirect but damaging impact on the employer's business.

A dairy driver-salesman was one of ten people arrested in a raid on a night club and charged with Sunday liquor sale, prostitution, pandering, and conducting obscene exhibitions involving men and women [84]. The employee's suspension was sustained, pending the outcome of the trial, because of possible damage to the employer's image and good will. The driver-salesman's duties necessitated a close personal relationship with customers, and the charges' seriousness increased the employer's potential harm.

When an employee grabbed a shotgun and went into the woods behind his home after a quarrel with his wife, a state trooper ordered the employee to come out [85]. As the employee emerged, the gun discharged, slightly grazing the trooper and resulting in the employee's arrest. The employee was terminated because of the adverse publicity in two local newspapers. The employee was reinstated because the newspaper accounts of the incidence did not reveal the employer's identity and his job did not require him to deal with the public.

A driver employed by a county road commission for ten years was terminated after pleading no contest to a third-degree criminal sexual offense [86]. Although the one-year jail sentence had a work-release provision to enable employment continuation, the driver was terminated for violating the commission's rule against conviction for a penal offense and for indecent or immoral conduct. No direct relationship between the illegal conduct and the driver's job was found. Absent a job relationship, discipline was inappropriate. The employee's good work record and the imposition of a relatively light sentence with work-release privileges outweighed possible problems with fellow employees and the public.

A city corrections officer was interviewed as part of a police investigation into a burglary [87]. The corrections officer signed a statement admitting that on the night of the burglary he had been smoking marijuana with four teenage boys and that he had driven one of the boys to the home of the boy's mother, where the burglary occurred. The Corrections Department terminated the officer for misconduct stemming from his purchase and smoking of marijuana in the company of teenagers and due to his role in the burglary. This behavior of smoking marijuana was sufficient to bring considerable discredit to the employer and warrant termination. Public officers relinquish some of their privacy rights when they accept their positions. Because the employee was an off-duty peace officer, his violation had a greater impact than would the same action by an average citizen.

A city could not base discipline on its belief that a police officer had committed a jealousy-induced assault when a jury had acquitted him of assault and battery charges [88]. An employee whose job was to administer Breathalyzer™ tests was properly suspended for off-duty driving under the influence of alcohol [89]. Terminating an employee following arrest and conviction was permitted for possession of drugs during off-duty hours and away from the employer's premises [90]. Also, termination was permitted when an employee who had criminal charges pending was eventually acquitted, despite the argument that termination violated public policy [91].

Assault by an off-duty police officer on an on-duty police officer, who had placed the off-duty officer under arrest, was just cause for termination, even though the off-duty police officer was acquitted of all criminal charges and was granted unemployment compensation benefits after his termination [92].

RESIDENCY REQUIREMENTS

Residency or distance requirements are frequently imposed by public employers and occasionally by private employers. Generally a person's residence is where s/he resides and where s/he intends to stay; i.e., the domicile or abode. Physical presence for a long period of time is not dispositive of residence [93]. Other factors include: 1) voting place; 2) mailing address; 3) driver's license address; 4) where one keeps clothes; 5) location of property owned; and 6) rental payment.

At issue in residency requirements are employment privacy interests in choosing where one lives, a right to travel, and geographical limits curtailing access to employment opportunities. Regulations generally affect associational privacy interests. Residency requirements may result in the employer compromising applicant quality because of a constricted recruitment base. Constitutional challenges to residency requirements have focused on interference with a fundamental right to travel [94].

Residency requirements necessary to serve legitimate employer interests are valid [95]. Teachers, police, and firefighters are frequently subject to these [96].

USE OF LAWFUL PRODUCTS

Various states have adopted legislation prohibiting an employer from discriminating in the hiring, retention, and termination of employees who use lawful products outside of the workplace (for example, alcohol and tobacco) [97]. Each statute is different. Statutes may deal with only tobacco, with both tobacco and alcohol, or may restrict the employer's right to prohibit any lawful product's use. However, some statutes allow employers the right to differentiate with respect to employee-contributed insurance premiums attributable to tobacco or alcohol use.

CONCLUSIONS

Employers may legitimately regulate certain employee activities outside the workplace. However, the degree of the enforceability of the employer's restrictions depends on whether the employee is union or nonunion and whether the employee works in the private or public sector.

* * *

Kurt H. Decker is a partner with the law firm of Stevens & Lee in Reading, Valley Forge, Allentown, and Harrisburg, Pennsylvania. He serves as an adjunct professor with the School of Law, Widener University, and with the Graduate School of Industrial Relations of Saint Francis College in Loretto, Pennsylvania. Mr. Decker is the author of numerous books and articles on employment law, published by John Wiley & Sons. He is also the author of the *Individual Employment Rights Primer* (1991), published by Baywood Publishing Company, Inc.

ENDNOTES

1. *See* K. Decker, *Employee Privacy Law and Practice*, ch. 8, John Wiley & Sons (1987 and 1996 Supp.); *see also* K. Decker, *Employee Privacy Law and Practice: Forms and Procedures*, John Wiley & Sons (1988); K. Decker, *A Manager's Guide to Employee Privacy: Law, Procedures, and Policies*, John Wiley & Sons (1989); K. Decker, *Privacy in the Workplace*, Labor Relations Press (1994).
2. F. Elkouri & E. Elkouri, *How Arbitration Works* 373 (3d ed. 1973) (some arbitration awards may establish plant-wide or company-wide precedent).
3. National Lock Co., 10 Lab. Arb. (BNA) 15 (1948) (Epstein Arb.).
4. Air Calif., 63 Lab. Arb. (BNA) 350 (1974) (Kaufman, Arb.).
5. Central Packing Company, 24 Lab. Arb. (BNA) 603 (1955) (Granoff, Arb.) (meatpacking employer justified in terminating employee who was convicted for knifing two nonemployees off the employer's premises outside normal working hours).

6. *See, e.g.*, Chicago Hardware Foundry Co., 6 Lab. Arb. (BNA) 58 (1946) (Larkin, Arb.) (subjecting supervisor to off-duty verbal abuse).
7. Dispatch Services, Inc., 67 Lab. Arb. (BNA) 632 (1976) (Matten, Arb.) (soliciting employer's customers).
8. New Haven Gas Co., 43 Lab. Arb. (BNA) 900 (1964) (Stutz. Arb.).
9. U.S. Const., Amend. I.
10. *See Shelton v. Tucker*, 364 U.S. 479 (1960) (individual's right to refuse disclosure to the government of information pertaining to private associational relationship absent a compelling state interest).
11. *See, e.g., Communist Party of Ind. v. Whitcomb*, 414 U.S. 441 (1974) (mere organizational membership without specific advocacy of any illegal conduct is protected by the Constitution).
12. *See, e.g., United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *Griswold v. Connecticut*, 381 U.S. 479 (1965).
13. *See Rutan v. Republican Party*, 497 U.S. 62 (1990) (hiring promotions, transfers, and recalls based on support for political party in power impermissibly infringe on first amendment rights of public employees, unless party affiliation is appropriate requirement for effective performance of position involved). *But see Giglio v. Supreme Court*, 675 F. Supp. 266 (M.D. Pa. 1988) (Pennsylvania supreme court's prohibition against political activities by court-appointed employees was permissible).
14. *Greminger v. Seaborne*, 584 F.2d 275 (8th Cir. 1978).
15. *Moose Lodge v. Iris*, 407 U.S. 163 (1972) (freedom of association includes rights to form exclusive social club).
16. *See, e.g., Shelton v. Tucker*, 364 U.S. 479 (1960) (teachers); *Connick v. Myers*, 461 U.S. 138 (1983) (assistant district attorney).
17. *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) *cert. denied*, 469 U.S. 979 (1984), *later appeal aff'd in part rev'd & remanded in part*, 802 F.2d 1131 (9th Cir. 1986) (Constitution prohibits unregulated, unrestrained employer inquiries into personal sexual matters that have no bearing on job performance; however, when this case's events transpired, court decisions had not delineated this privacy right's parameters with sufficient clarity to regard this right as clearly established and defeat public employer's good faith immunity claim).
18. *Briggs v. North Muskegon Police Dep't*, 563 F. Supp. 585 (W.D. 1983).
19. *Shawgo v. Spradlen*, 464 U.S. 965 (1983).
20. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (public policy claim can be pleaded against private employer under Pennsylvania law for termination interfering with First Amendment political expression rights).
21. 49 U.S.C. §§ 200e-1-2002-17 (1992).
22. 29 C.F.R. § 1606.1 (1996).
23. *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (Title VII).
24. *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975), *on reh.*, 520 F.2d 409 (2d Cir. 1975).
25. 11 U.S.C. § 525 (1992).
26. *Rutledge v. City of Shreveport*, 387 F. Supp. 1277 (D. La. 1975).
27. *Matter of Loftin*, 327 So.2d 543 (La. Ct. App.), *cert. denied*, 331 So.2d 852 (La. 1976).

28. *See* In re Latchaw, 24 Bankr. 457 (N.D. Ohio 1982); *see also Smith v. Pennsylvania Dep't of Transp.*, 66 Bankr. 244 (E.D. Pa. 1986) (transportation authority discriminated against debtor by bringing license revocation proceedings); In Re Hicks, 65 Bankr. 980 (W.D. Ark. 1986) (transfer of bankrupt employee discriminatory).
29. *See Detz v. Hoover*, 539 F. Supp. 532 (E.D. Pa. 1982).
30. *See* American Airlines, Inc., 59 Lab. Arb. (BNA) 947 (1972) (Kotin, Arb.) (employee could not be terminated because of wife's debts).
31. 29 U.S.C. § 158(a) (1) (1992). *See, e.g.*, Ogle Protection Serv., 149 N.L.R.B. 545 (1964), *enforcement granted in part and denied in part*, 375 F.2d 497 (6th Cir. 1967), *cert. denied*, 389 U.S. 843 (1967).
32. *See, e.g.*, Pa. Stat. Ann. tit. 43, §§ 211.1-211.13 (Purdon 1964 & Supp. 1986); *see also Pa. LRB v. Kaufman Dep't Stores*, 345 Pa. 398, 29 A.2d 90 (1943) (employer cannot discriminate for union activity).
33. *Stone & Webster Eng'r Corp. v. NLRB*, 536 F.2d 461 (1st Cir. 1976).
34. *NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016 (4th Cir. 1972).
35. *Clothing Workers v. NLRB*, 564 F.2d 434, 440 (D.C. Cir. 1977).
36. Wright Line, 251 NLRB 1083 (1990), *enforced*, 622 F.2d 899 (1st Cir. 1981) *cert. denied*, 455 U.S. 989 (1982).
37. 29 C.F.R. § 1605.2(d) (2) (1996).
38. 29 U.S.C. § 169 (1992) (provides that persons who hold religious objections to joining or financially supporting a union need not to do so to remain employed, but the collective bargaining agreement may require these employees to contribute a sum equal to dues and initiation fees to a nonreligious charity and to reimburse the union for representation in a grievance arbitration procedure).
39. *Machinists, Lodge 751 v. Boeing Co.*, 833 F.2d 165 (9th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).
40. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).
41. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).
42. *Trumbauer v. Group Health Corp.*, 635 F. Supp. 543 (W.D. Wash. 1986) (probationary employee's claim that employer breached collective bargaining agreement when it terminated him for preemployment sexual relationship with his supervisor).
43. *See Kukla v. Village of Antioch*, 647 F. Supp. 799 (N.D. Ill. 1986) (cohabitating members of police department).
44. *See Hughes v. Lipscher*, 720 F. Supp. 454 (D.N.J. 1989) (ban on marriage between city employees held unconstitutional).
45. *Baron v. Meloni*, 556 F. Supp. 796 (W.D.N.Y. 1983); but *see Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981).
46. *Shawgo v. Spradlen*, 701 F.2d 470 (5th Cir. 1983), *cert. denied*, 464 U.S. 965 (1983) [19].
47. *See Jantz. v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991 (school's refusal to hire teacher perceived as homosexual found to be biased).
48. *See Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (homosexual persons constitute suspect class for purpose of Fifth Amendment's equal protection component). *But see Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (first amendment and equal protection rights of United States Army Reserve sergeant who was avowed

homosexual were not violated by application of regulation making homosexuality, including admitted homosexuality, a nonwaivable disqualification for service regardless of conduct so as to bar reenlistment).

49. *See Cook Cty. Tchrs. U. v. Bd. of Trustees*, 234 Ill. App. 3d 489, 481 N.E.2d 40 (1985); *Illinois State Employees Ass'n v. Wallser*, 57 Ill, 2d 512, 315 N.E.2d 9 (1974) *cert. denied*, 419 U.S. 1058 (1974).
50. *Federated Rural Elec. Ins. Co. v. Kessler*, 131 Wis.2d 189, 388 N.W.2d 553 (1986).
51. *See Pasch v. Katz Media Corp.*, 10 I.E.R. Cas. (BNA) 1574 (S.D.N.Y. 1995); *but see New York v. Wal-Mart Stores*, 207 A.D.2d 150, 621 N.Y.S.2d 158 (1995) ("dating" while married is not within those "recreational activities" regulated by New York statute that protect employee rights).
52. *Conway, Inc. v. Ross*, 627 P.2d 1029 (Alaska 1981); *but see Houston v. Belk Store Services*, 10 I.E.R. Cas. (BNA) 921 (D.S.C. 1995) (employer that asked employee, who had been arrested for prostitution, to resign did not make negligent misrepresentations about employment; employee was never told that conduct occurring away from the workplace would not affect employment status).
53. *Chambers v. Omaha Girls Club*, 824 F.2d 697 (8th Cir.), *reh'g denied en banc*, 840 F.2d 583 (8th Cir. 1988).
54. *See Suarez v. Illinois Valley Community College*, 688 F. Supp. 376 (N.D. Ill. 1989); *see also Cumpiano v. Banco Santander P.R.*, 902 F.2d 148 (1st Cir. 1990) (finding that employer terminated employee because she was pregnant, and not because she violated employer's norms of conduct by committing adultery, was sustainable where she had been engaged in longstanding affair of which employer was aware, she was placed in positions of increased responsibility, she was never charged with nor convicted of adultery, and nothing changed between date of her last promotion and her termination, except that employer became aware of her pregnancy).
55. *Doe v. First National Bank*, 865 F.2d 864 (7th Cir. 1989).
56. *See Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995).
57. *See* Trans World Airlines, 93 Lab. Arb. (BNA) 167 (1989) (Eisler, Arb.).
58. 38 U.S.C. §§ 2020-2026 (1992) (Veterans Reemployment Act).
59. *See Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989) (500 days of leave by employee in less than five years).
60. *Holloway v. Prof. Care Centers*, 42 Fair Empl. Prac. Cases (BNA) 161 (E.D. Mos. 1986).
61. Potash Co. of Am., 85 Lab. Arb. (BNA) 559 (1985) (White, Arb.) (employee performed strenuous tasks at home while on medical leave).
62. *Beck v. Director of Div. of Emp. Sec.*, 396 Mass. 1016, 489 N.E.2d 664 (1986).
63. *See Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 411 P.2d 921, 49 Cal. Rptr. 825 (1966).
64. *See Aetna Building Maintenance Co. v. West*, 39 Cal. 2d 198, 246 P.2d 11 (1952), *superseded by statute as stated in American Paper & Packaging Products, Inc. v. Kirger*, 183 Cal. App.3d 1318, 228 Cal. Rptr. 713 (1986).
65. *See Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D. N.Y. 1971).
66. *See George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992).

67. *See Howard University v. Baten*, 632 A.2d 389 (D.C. 1993) (employee used university office to practice law and refused to terminate law practice after warnings).
68. University of Calif., 78 Lab. Arb. (BNA) 1032 (1982) (Ross, Arb.).
69. New York Post Corp., 62 Lab. Arb. (BNA) 225 (1973) (Friedman, Arb.).
70. *Rulon-Miller v. IBM*, 162 Cal. App.3d 241, 208 Cal. Rptr. 524 (1984).
71. *Staats v. Ohio Nat. Life Ins. Co.*, 620 F. Supp. 118 (W.D. Pa. 1985).
72. *Federation of State Cultural & Educational Professionals v. Department of Education*, 119 Pa. Commw. 63, 546 A.2d 147 (1988) (employees had no role in negotiating, recommending, influencing, or implementing public agency's contracts). *See also Sector Enterprises, Inc., v. DiPalermo*, 779 F. Supp. 236 (N.D.N.Y. 1991) (rejecting first amendment constitutional challenge to New York's statutes and regulations restricting outside employment by state employees; it was found that conflicts are inherent whenever public sector employees engage in ventures outside of employment; two computer analysts prevented from setting up business related to their governmental positions).
73. *See, e.g.*, Fairmont Gen. Hosp., 58 Lab. Arb. (BNA) 1293 (1972) (Dybeck, Arb.).
74. *See, e.g.*, Quaker Oats Co., 15 Lab. Arb. (BNA) 42 (1950) (Abrahams, Arb.).
75. Air. Cal., 63 Lab. Arb. (BNA) 350 (1974) (Kaufman, Arb.).
76. South Central Bell, 80 Lab. Arb. (BNA) 891 (1983) (Nicholas, Jr., Arb.); U.S. Internal Revenue Service, Cincinnati Dist. Office, 77 Lab. Arb. (BNA) 19 (1981) (Edes, Arb.).
77. *Wagonseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985). Regarding "mooning" and public policy it was indicated:

    > We have little expertise in the techniques of mooning. We cannot say as a matter of law, therefore, whether mooning would always violate the statute by revealing the moonee's anus or genitalia. That question could only be determined, we suppose, by an examination of the facts of each case. We deem such an inquiry unseemly and unnecessary in a civil case. Compelled exposure of the bare buttocks, on pain of termination of employment, is a sufficient violation of the policy embodied in the statute [indecent exposure] to support the action, even if it would have been no technical violation of the statute [at n.5].

78. General Tel. Co. of Kentucky, 69 Lab. Arb. (BNA) 351 (1977) (Bowles, Arb.). *See Philadelphia v. Fraternal Order of Police, Lodge No. 5*, 125 Pa. Commw. 625, 558 A.2d 163 (1989) (arbitrator's award affirmed where off-duty police officer was disciplined for altercation with two other police officers and a supervisor).
79. Murray Machinery, Inc., 75 Lab. Arb. (BNA) 284 (1980) (Kerkman, Arb.).
80. *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989).
81. *Hammond v. Heritage Communications, Inc.*, 756 S.W.2d 152 (Ky. Ct. App. 1988).
82. *See Hawkins v. Department of Public Safety*, 325 Md. 621, 602 A.2d 712 (1992).
83. *See* Indianapolis Power & Light Co., 88 Lab. Arb. (BNA) 1109 (1987) (Volz, Arb.) (employee misconduct at employer-sponsored basketball game).
84. Menzie Dairy Co., 45 Lab. Arb. (BNA) 283 (1965) (Mullin, Jr., Arb.).
85. Valley Bell Dairy Co., 71 Lab. Arb. (BNA) 1004 (1978) (Hunter, Jr., Arb.).

86. Gratiot County Rd. Comm'n, Pub. Bargaining Cas. (CCH) ¶ 49,048 (1986) (Roumell, Jr., Arb.).
87. New York State Dep't of Corrections, 86 Lab. Arb. (BNA) 793 (1986).
88. City of Mason, 73 Lab. Arb. (BNA) 464 (1979) (Ellman, Arb.).
89. Polk County, Iowa, 80 Lab. Arb. (BNA) 639 (1983) (Madden, Arb.).
90. *Watts v. Union Pac. R.R.*, 796 F.2d 1240 (10th Cir. 1986) (decision by Public Law Board upheld by court).
91. *Cisco v. United Parcel Serv.*, 328 Pa. Super. 300, 476 A.2d 1340 (1984) (termination not a violation of public policy when employee arrested but not convicted of theft).
92. *Philadelphia Civil Service Commission v. Wojtusik*, 106 Pa. Commw. 214, 525 A.2d 1255 (1987) (assaulting the other police officer who had placed him under arrest constituted conduct unbecoming an officer, providing just cause for termination. It reflects poorly on the police department by affecting its morale and destroying public respect and confidence in its operations).
93. *See, e.g., Mercadente v. City of Patterson*, 111 N.J. Super. 35, 266 A.2d 611 (1970).
94. *See Shapiro v. Thompson*, 394 U.S. 618 (1969) (violation of right to travel when Connecticut, Pennsylvania, and the District of Columbia denied welfare benefits to persons who met all other eligibility requirements, but who had not resided within the jurisdiction for at least one year immediately preceding their application for assistance); *see also Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *United States v. Guest*, 383 U.S. 745 (1966).
95. *See Fritzshall v. Board of Police Comm'rs*, 886 S.W.2d 20 (Mo. Ct. App. 1994) (police officer properly terminated for failing to establish residency within city, even though he spent workday nights at uncle's house in city, registered car there, registered to vote and pay personal property taxes there, and had spouse file for legal separation and child support but with no division of property; officer spent off-duty, weekend, and vacation days with wife and family in their suburban home); *Winkler v. Spinnato*, 72 N.Y.2d 402, 530 N.E.2d 835, 534 N.Y.S.2d 128 (1988) (residency requirement permissible for police, firefighters, and corrections officers); *Koehler v. City of Greensburg*, 164 Pa. Commw. 53, 641 A.2d 1287 (1994) (secretary of Zoning and Planning Department subject to city residency ordinance).
96. *Local 799, Fighters v. Napolitano*, 516 A.2d 1347 (R.I. Sup. 1986); *Booth v. Township of Winslow*, 193 N.J. Super. 637, 475 A.2d 644 (1984).
97. *See, e.g.*, Conn. Stat. Ann. § 31-40a (West Supp. 1985); D.C. Code Ann § 6-913.3 (Supp. 1995); Ill. Ann. Stat. ch. 820, paras. 55/5, 55/10, 55/20 (Smith-Hurd 1993); Ind. Code Ann. §§ 22-5-4-1 to 22-5-4-4 (Burns 1992); Ky. Rev. Stat. Ann. § 344.040 (Michie/Bobb-Merrill 1993); La. Rev. Stat. Ann. § 23:966 (West Supp. 1995); Me. Rev. Stat. Ann. tit. 26, § 597 (West Supp. 1995); Minn. Stat. Ann. § 181.938 (West 1993); Miss. Code Ann. § 71-7-33 (Supp. 1995); Mo. Ann. Stat. § 290.145 (Vernon 1993); Mont. Code Ann. §§ 39-2-213 to 39-2-314 (1993); Nev. Rev. Stat. § 613.333 (1991); N.H. Rev. Stat. Ann. § 275:37-a (Supp. 1995); N.J. Stat. Ann. §§ 34:6B-1 to 34:6B-4 (West Supp. 1995); N.M. Stat. Ann. §§ 50-11-2 to 50-11-6 (Michie 1992); N.C. Gen. Stat. § 95-28-2 (1993); Okla. Stat. Ann. tit. 40,

§§ 501-503 (West Supp. 1995); Or. Rev. Stat. § 659-380 (Supp. 1995); R.I. Gen. Laws § 23-20.7.1-1 (Supp. 1995); S.C. Codified Laws Ann. § 60-4-11 (1993); Va. Code Ann. § 15.1-29.18 (Michie 1989); W. Va. Code § 21-3-19 (Supp. 1995); Wis. Stat. Ann. §§ 111.321, 111.322, 111.35 (West Supp. 1995); Wyo. Stat. § 27-9-105 (1991).

Direct reprint requests to:

Kurt Decker, Esq.
Stevens & Lee
607 Washington Street
Box 679
Reading, PA 19607-0679