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Marvin Hill Jr.
Emily Delacenserie

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Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers—Bosses, Workers, Courts, and Labor Arbitrators

Marvin Hill, Jr.*
Emily Delacenserie**

I. INTRODUCTION

In Greenburgh, New York, Paul Solomon, once a popular sixth-grade teacher, faces possible dismissal for his role in the "Fatal Attraction" case involving the shooting death of his wife, Betty Jeanne Solomon. Mr. Solomon, who was granted immunity from prosecution, admitted in open court to having numerous extramarital affairs, including an affair with a fellow teacher, Carolyn Warmus. She is currently facing a second trial after a hung jury in her first trial for the killing of Mrs. Solomon. Leon Leighton, an 88-year-old lawyer who has lived in the community for 47 years, has sent a letter to 100 citizens asking them to press the school board for Solomon’s dismissal. Leighton is quoted in the New York Times to have said that "what he has done is immoral" and returning Solomon to the classroom would be "an unforgivable outrage to the integrity of our school system and a body blow to our property values." Others have echoed similar concerns with Solomon’s ability to function as a role model for students.

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* Professor of Labor and Industrial Relations, College of Business Administration and Adjunct Professor of Law, College of Law, Northern Illinois University, DeKalb, Illinois. J.D. & Ph.D., University of Iowa. A member of the National Academy of Arbitrators, Hill is actively engaged in arbitration in the public and private sectors. Hill has co-authored (with Anthony V. Sinicropi) three books: Management Rights: A Legal and Arbitral Analysis (BNA, 1986), Remedies in Arbitration (BNA, 1991), and Evidence in Arbitration (BNA, 1987).

** J.D., (candidate) College of Law, Northern Illinois University.

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1. Some Ask if Husband in Love-Triangle Case Is Fit to Teach, N.Y. Times, August 17, 1991, § 1, at 23, Col. 2.

What should the board of education do? Even more interesting, what can the board do in response to the citizens' desiring to terminate the contract of Mr. Solomon? Would it be constitutional for Paul Solomon to be held to a higher standard of behavior than other employees of the district (the janitor, for example)? To what extent can private and public-sector employers regulate or control, under threat of discipline or discharge, an employee's personal off-duty lifestyle? Can management withhold a benefit or promotion because of the employee's unhealthy or bizarre lifestyle? Aside from the educational environment, examples where both private- and public-sector management concerns itself with the employee’s lifestyle, or the results of that lifestyle, are numerous:

In the air, American Airlines, similar to United, Delta, and Continental, promulgated weight standards for flight attendants. American, like most airlines, does not want "fat" flight attendants. Those who do not tip the scales at the right numbers according to height and weight tables are placed on leave. If weight is not made within a designated period, dismissal follows. In Cranston, Rhode Island a hospital attendant is refused employment with her former employer, the State of Rhode Island, because at 315 pounds she is considered fat. Management believes that its workers' compensation costs might rise if it rehired her.

A bus driver, who received extensive publicity for his off-duty activities as Acting Grand Dragon of the Ku Klux Klan, is discharged for his "political" activities. Management rejects outright the employee's constitutional arguments relating to free speech and association.

The Omaha Girls Club dismisses an unmarried staff member because she conceived a child out of wedlock. According to management, her condition made her a negative role model to the children and, thus, unsuitable for continued employment.

Concluding that management had to take steps to help contain medical costs and that "there are certain lifestyle decisions that we are just not going to assure the results of," the Circle K Corporation, the nation's second-
largest convenience store chain, announced that it would terminate the medical coverage of "employees who become sick or injured as a result of AIDS, alcohol, drug abuse or self-inflicted wounds."\(^8\)

The Walt Disney Company, in the midst of hiring some 12,000 employees to maintain and populate its Euro Disneyland theme park in Marne-la-Vallee, 20 miles east of Paris, has spelled out a dress and appearance code that goes beyond height and weight requirements. The rules mandate strict guidelines on the length of men's hair, and prohibit facial hair and the display of tatoos. Women’s hair must be one natural color, and women can use only limited amounts of makeup. Further, the length of women’s fingernails is restricted and false eyelashes and other eye makeup is completely disallowed:

As for jewelry, women can wear only one earring in each ear with the earring’s diameter no more than 2 centimeters. . . . Neither men nor women can wear more than one ring on each hand.

Further, women are required to wear "appropriate undergarments" and only transparent pantyhose, not black or anything with fancy designs.\(^9\)

Although a daily bath is not mentioned in the rules, employees are expected to appear for work "fresh and clean."\(^10\) Similar rules are in force at Disney’s three other theme parks. The French Government has lodged a formal complaint against Disney.\(^11\)

An executive is dismissed because he was accompanied by someone other than his spouse at a convention. The executive argues that nothing less than a public policy is at issue and that management should not be allowed to effect a dismissal simply because his lifestyle is different than that of his superiors.\(^12\)

Other examples include the Turner Broadcasting System, who will not consider an employee for employment if he is a smoker.\(^13\) At U-Haul International, workers who smoke or are underweight or overweight pay for their health insurance.

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8. Id.
10. Id.
11. Id.
A. Focus of Article

Is there a remedy at law for any of these employees, including the Mr. Solomons of the world, if management elects to effect a dismissal because the employee does not fit in the company's procrustan bed? What are the limits of management's power to regulate the individual lifestyles of employees, even when those lifestyles have little or no relation to the job in question? Are the rules different for public-sector employers where constitutional standards are operative? If the employee is covered under a collective bargaining agreement and has access to the grievance-arbitration procedure, what are his chances of a successful challenge in the arbitration forum? When is arbitration an effective remedy? Will an arbitrator, deciding a case in the public sector, accord more deference to management than he would to a private-sector company because of the applicability of the constitution to public employees?

This Article will review case law, both in the private and public sector, dealing with employer attempts to regulate the personal lifestyles of employees. Remedies under common law and federal statutes will be reviewed with a special focus on Title VII of the Civil Rights Act of 1964.

14. After Procrustes, a Greek giant who stretched or shortened his captives to fit one of his iron beds.

15. Lifestyle n. Also life-style, life style. "An internally consistent way of life or style of living that reflects the attitudes and values of an individual or a culture." AMERICAN HERITAGE DICTIONARY 452 (3d ed. 1979).

   "The consistent, integrated way of life of an individual as typified by his manner, attitudes, possessions, etc." WEBSTER'S NEW WORLD DICTIONARY, 398 (2d ed. 1986) (which lists it as two words).

   As used in this Article, "lifestyle" refers to all areas in life where an employee could expect that an employer would not interfere, such as sexual practices and identity, credit and financial references, off-duty drug or alcohol use, and religious practices. Other areas include medical infirmities, grooming and dress requirements, speech, and political and personal associations, all of which can impact or reflect the individual's way of life. In limiting most of the analysis these areas we do not suggest that there are not other facets of lifestyle that may impact an employment decision. We confess to some sins of commission (for example, a one-time drug conviction, sometimes sufficient for dismissal from employment, may not reflect an employee's lifestyle) and omission (we left out the parts that people would skip!). As our editors know, this Article is already longer than promised and limiting a discussion of lifestyle to these areas will not alter our analysis or conclusions.

   Cf. "If they asked, I could write a book." I could write a book from PAL JOEY, music by RICHARD ROGERS, lyrics by LORENZ HART


as amended, and the Federal Rehabilitation Act of 1973.\textsuperscript{17} Constitutional limitations on public employers are discussed in the analysis. Our investigation also includes a review of published and unpublished private and public-sector arbitration decisions in those cases where management's employment decisions are challenged under a just cause standard through the grievance-arbitration procedure.\textsuperscript{18} A synthesis and policy analysis follows with guidelines recommending when employer interference with employee lifestyle is appropriate. Our thesis is that absent a nexus between the employee's off-duty conduct or lifestyle and his on-the-job performance, or a significant showing that the employee's conduct affects the employer's product or reputation, any inquiry or regulation impacting off-duty conduct or lifestyles should be prohibited. Some kind of presumption should operate, both in the judicial and the arbitral forum, in favor of the employee when management effects discipline because of off-duty conduct. While at common law no nexus between the conduct complained of and a private-sector employee's job need be shown, it is difficult to justify affording some protection from arbitrary dismissal to public-sector employees and individuals covered under collective bargaining agreements while in most cases denying any protection to common-law "at-will" employees. Accordingly, a secondary thesis is that the common-law employment-at-will rule ought to be scrapped in favor of a minimal just cause standard when employees are dismissed.

\section*{II. Employers and Workers at Common Law}

During the eighteenth and nineteenth centuries, employers effectively had total discretion in directing all phases of their business without regard to considerations of fairness to employees. Under an 1877 legal principle, the employer-employee relationship was "at will," meaning that employment could be terminated at the will of either party for a good reason,\textsuperscript{19} a bad reason, or

\begin{itemize}
\item \textsuperscript{17} 29 U.S.C. § 794 (1991).
\item \textsuperscript{18} Some challenges to regulations regarding an employee's lifestyle, such as a regulation involving an employee's grooming, weight or his sexual preference, may be cognizable under the Constitution, a federal or state fair employment or rehabilitation statute, and arbitration under a collective bargaining agreement. When expedient, such restrictions are discussed in more than one section. In general, specific restrictions will be addressed in those sections where most of the litigation has occurred or, alternatively, where management's limitations are severely restricted.
\item \textsuperscript{19} The term "good cause" is "largely relative in [its] connotation depending upon the particular circumstances of each case." . . . "Essentially [it] connotes a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." . . . The employer does not have a right to make an arbitrary or unreasonable decision about terminating an employee
\end{itemize}
even for no reason without intervention from the courts.\textsuperscript{20} As a practical matter, however, the at-will principle meant that the terms and conditions of the employment relationship existed solely at the will of the employer because few employees possessed the bargaining power to compel the employer to enter into a true contract of employment for a specific duration or to otherwise treat employees fairly.

Today, with the passage of protective labor legislation, particularly Title VII of the Civil Rights Act and the Rehabilitation Act of 1973, and the presence of unions and collective bargaining with labor arbitration available to most employees covered under a collective bargaining agreement, the at-will doctrine has been significantly modified. This section examines the common law at-will rule and the most significant development in the entire field of labor and employment law in the last decade—the growing willingness of courts to modify the traditional doctrine of employment-at-will when management's action is determined violative of some public policy. Unfortunately for the employee with an unhealthy or unconventional lifestyle, judge-made exceptions do not leave a large window for an employee's job rights.

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when there is an agreement to terminate only for good cause. In deciding whether the employee's termination was for "a fair and honest cause or reason regulated by the good faith of the employer," the trier of fact does scrutinize the employer's business judgment and determines whether the discharge was justified under all the circumstances. If the reasons advanced by the employer for the discharge are trivial, capricious, unrelated to business needs or goals, or pretextual, the finder of fact may properly find that the stated reason for termination was not "a fair and honest cause or reason" regulated by good faith. The employer does not have an unfettered right to exercise discretion in the guise of business judgment.


With respect to declarations by arbitrators, see infra note 469 and accompanying text.

A. Review of the Common Law At-Will Rule Regarding a Private-Sector Employer's Power to Designate the "Right Kind" of Employee Management Desires

Stieber reports that approximately 60 million U.S. employees are subject to the employment-at-will doctrine, and approximately 2 million of them are terminated each year without the right to a hearing before an administrative agency or an arbitrator. Further, about 150,000 of these employees would have been found to have been discharged without just cause and reinstated to their former positions had they been accorded a hearing. St. Antoine argues that the most significant development in the entire labor law field during the past decade is the growing willingness of state courts to modify the traditional employment-at-will rule. Using tort or contract theory, judges have overturned the traditional at-will rule and have placed significant limitations on management's right to dismiss employees at will. Some of the theories applied by the courts are arguably applicable to the employee with an unconventional lifestyle, and for this reason it is instructive to review recent developments in employment at will.

1. Judicial Limitations: A Primer of Exceptions to the At-Will Rule at Common Law

Judicial limitations to the employment at-will rule may generally be categorized into three major divisions: (a) public policy (the most widely applied exception); (b) "whistle-blowing;" and (c) "malice and bad faith" exceptions. While there is admittedly overlap between and within the categories of cases in these divisions, it is useful to examine leading cases within these categories.

a. Public Policy Exceptions

A theory adopted by courts in those states that limit the employment-at-will rule is that employers should not be permitted to discipline or discharge employees for reasons violative of an established "public policy." A rule...
to the contrary would mean that public policy could easily be defeated by the threat of retaliatory conduct on the part of employers. Public policy cases fall into four categories: (1) refusal to violate a criminal statute; (2) exercising a statutory right; (3) complying with a statutory duty; and (4) adhering to professional codes of ethics. The courts, applying a public policy analysis, have accorded little relief to employees terminated because of a particular lifestyle.

(1). Discharge for Refusing to Violate a Criminal Law

The leading case in this category is Petermann v. Teamsters Local 396. In that case, a union business agent was discharged for refusing to commit perjury for his employer (a labor union). In ruling for the employee, the California Court of Appeals stated that "the right to discharge an employee under such a contract may be limited by statute . . . or by considerations of public policy." In another often-cited case, Tameny v. Atlantic Richfield Co., the Supreme Court of California found a cause of action in tort for an employee who was discharged for refusing to participate in an illegal price-

There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters purely personal . . . a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

Id. at 878-79 (citation omitted).

In Lucas v. Brown & Root, 736 F.2d 1202 (8th Cir. 1984), the court of appeals defined public policy this way:

Public policy is usually defined by the political branches of government. Something "against public policy" is something that the Legislature has forbidden. But the Legislature is not the only source of such policy. In common-law jurisdictions the courts too have been sources of law, always subject to legislative correction, and with progressively less freedom as legislation occupies a given field. It is the courts, to give one example, that originated the whole doctrine that certain kinds of businesses—common carriers and innkeepers—must serve the public without discrimination or preference. In this sense, then, courts make law and they have done so for centuries.

Id. at 1205.

25. Id. at 27.
fixing scheme. In so holding, the court declared that "an employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order."27

(2). Discharge for Exercising a Statutory Right

While recognizing that generally "an employee at will may be discharged without cause," in 1973 the Indiana Supreme Court, in Frampton v. Central Ind. Gas Co.,28 carved out an exception to the at-will doctrine for employees discharged for exercising a statutorily conferred right to receive a workman's compensation award. The Indiana court reasoned that it would be against public policy to prohibit a cause of action because the language of the Indiana compensation statute prohibited any "device" to circumvent the employer's liability. The court stated that the statute created a duty in the employer to compensate employees for work-related injuries and a right in the employee to receive such compensation, and in order for the goals of the act to be realized and for public policy to be effectuated, the employee must be able to exercise his right without being subject to management reprisal.29

27. Id. at 1336-37. The public-policy exception was further defined in Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988), where an employee was dismissed after reporting to his employer that his newly-hired supervisor was currently under investigation by the FBI for embezzlement from his supervisor's former employer. The court found that his conduct did not implicate basic public policy because the employee disclosed information only to his employer that did not serve any public interest. Id. at 380. The Foley court also held that there is no remedy in tort for a breach of the implied covenant of good faith and fair dealing in an employment contract.

Id. at 396-96.

See also Kessler v. Equity Management Inc., 572 A.2d 1144 (Md. Ct. App. 1990) (finding cause of action for employee who refused supervisor's orders to enter apartment while tenant was absent to snoop through papers for information that landlord could use to collect past rent); Sargent v. Central Nat'l Bank & Trust, 809 P.2d 1298 (Okla. 1991) (auditor discharged for refusal to destroy audit report that was possible evidence in shareholders' suit against bank stated tort claim for wrongful discharge).


29. Id. at 427. While some states have passed specific legislation prohibiting discharge of employees for filing workmen's compensation claims; see, e.g., Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981), others have not and, accordingly, several courts since the Frampton decision have had to address the issue. See, e.g., Hentzel v. Singer Co., 188 Cal. Rptr. 159, (Cal. Ct. App. 1982); Kelsay v. Motorola,
(3). Discharge for Complying with a Statutory Duty

In the leading case in this area, *Nees v. Hocks*,30 the Supreme Court of Oregon held that an at-will employee may recover in tort for wrongful discharge when complying with statutory jury duty to sit on a jury, reasoning that the legislature and the courts regard the jury system high on the scale of American institutions and citizen obligations.31 It follows that if an employer were permitted with impunity to discharge an employee for fulfilling jury duty obligations, the jury system would be adversely affected.

(4). Discharge for Adhering to Professional Codes of Ethics

In *Pierce v. Ortho Pharmaceutical Corp.*,32 the Supreme Court of New Jersey considered whether a cause of action existed for an at-will physician and research scientist who was dismissed for refusing to continue a project she considered medically unethical (she opposed continued laboratory research, development, and testing of a drug containing saccharin, which Ortho intended to market for the treatment of diarrhea). What is interesting in this case is the court’s focus on the special considerations arising out of the right to fire an at-will employee who is a member of a recognized profession. As stated by the court:

Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers. However, an employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee’s personal morals, as distinguished from the recognized code of ethics of the employee’s profession.33

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30. 536 P.2d 512 (Or. 1975).
31. *Id.* at 516.
32. 417 A.2d 505 (N.J. 1980).
33. *Id.* at 512.
While the court made it clear that a cause of action would lie where the discharge is contrary to a clearly mandated public policy, it cautioned that not all professional codes of ethics express such public policy. Absent legislation, and as indicated by the court, the judiciary must define the cause of action in a case-by-case determination.

b. Whistle-Blower Exception

Related to the public policy exception are disciplinary measures triggered by an employee’s reporting of allegedly unlawful conduct. In some cases the employee may report a supervisor’s conduct to upper management; in other cases the employee may report the company’s activities to a governmental authority. Whistle blower cases are factually similar: (1) the employee objects to work or conduct that the employee believes violates state or federal law; (2) the employee expresses his intention not to perform the requested work or

34. Id. at 512.
35. Id. at 512. Pierce was followed by Warthen v. Toms River Community Memorial Hosp., 488 A.2d 229 (N.J. Super. Ct. App. Div. 1985). In that case a registered nurse employed in a hospital’s kidney dialysis unit was assigned to dialyze a double amputee patient who suffered from a number of maladies. On two occasions she had to cease treatment because the patient suffered cardiac arrest and severe internal hemorrhaging during the dialysis procedure. When she was again scheduled to dialyze this patient, she informed management that "she had moral, medical, and philosophical objections" to performing this procedure because the patient was terminally ill and, according to the nurse, it was causing the patient additional complications. Her request for reassignment was initially granted but, approximately eight months later, she was again assigned to dialyze the patient. Once again she objected to the head nurse who told her that if she continued to refuse to dialyze the patient, she would be dismissed.

On a retrial, the court concluded that the nurses’ code of ethics is a personal moral judgment and does not rise to a public policy. The court reasoned that "identifying the mandate of public policy is a question of law, analogous to interpreting a statute or defining a duty in a negligence case" and that the burden is on the employee "to identify a ‘specific expression’ or ‘a clear mandate’ of public policy which might bar his or her dismissal." Id. at 232-33. The court accordingly held that the considerations cited by the nurse involving her own personal morals did not rise to the level of a public policy mandate.
Id. at 233-35; see also Lampe v. Presbyterian Medical Ctr., 590 P.2d 513 (Colo. Ct. App. 1979), where the court rejected a nurse’s contention that a cause of action should be allowed for a wrongful dismissal for refusing management’s order to reduce the overtime assignments of her staff since she felt that the reduction of overtime would jeopardize the health of the patients. Id. at 514-15. The court pointed out that a statute containing general principles pertaining to the licensing of nurses did not create a cause of action. Id. at 515-16.
engages in "self-help" activity outside the work place to halt the work (often by going to the media); and (3) the employee is dismissed.

The courts have had little trouble in affording a cause of action in tort to an employee who is urged by his or her employer to violate a criminal or civil statute as part of a company pattern or practice. The more difficult situation involves those cases where an employee reports conduct that the employee feels is illegal or, because of professional considerations, unethical.

For example, the Supreme Court of West Virginia, in Harless v. First National Bank in Fairmont, 36 considered whether an employee who was discharged in retaliation for his efforts to require his employer to comply with a state consumer credit and protection statute stated a cause of action in tort. Finding that the legislature intended to establish a policy protecting credit consumers, the court ruled that this "policy should not be frustrated by a holding that an employee of a lending institution covered by the Act who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge." 37

A similar result was reached by the Illinois Supreme Court in Palmateer v. International Harvester Co., 38 where the court found a cause of action in tort for an employee who was discharged for supplying local law enforcement agencies information indicating that a fellow employee might be violating criminal statutes. Reasoning that public policy favors the exposure of crime by citizens possessing knowledge of criminal activity, the court concluded that "[p]ersons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused." 39

With few exceptions, before a court will allow a cause of action for "whistle blowing," the conduct complained of must be clearly illegal. The burden to show illegality is on the employee. A possibility of criminal activity will be insufficient to protect the employee who goes to the authorities. 40

37. Id. at 276.
39. Id. at 880 (citing Joiner v. Benton Community Bank, 411 N.E.2d 229 (Ill. 1980)).
40. A review of the cases in the whistle-blower area indicates that, in finding a cause of action, the courts undertake a balancing of the competing interests at issue. The employer's interest is to be permitted to efficiently operate a business; the employee's interest is security in earning a livelihood. At the same time, the judiciary has recognized that society has an interest in making sure that its civil and criminal statutes are not violated. Accordingly, where the conduct complained of by a whistle blower clearly violates a criminal or civil statute, courts have little difficulty finding a cause of action in tort for a retaliatory discharge. These situations involve conduct that the legislature has clearly seen fit to address. Courts reason that to refuse a cause
c. **Malice and Bad Faith Exception**

The malice and bad faith exception operates in tandem with that of public policy. It is this exception which provides the employee with a disapproved lifestyle with the greatest opportunity for relief.

The predominant case in this area is *Monge v. Beebe Rubber Co.* In that case a married woman was discharged by her foreman because of her refusal to go out on a date with him. The New Hampshire Court held the discharge malicious and unlawful and concluded that a termination by the employer of a contract of employment which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good. In *Lucas Brown & Root, Inc.*, an employee was dismissed when she refused to sleep with her supervisor. Although the time for filing a sexual harassment claim had run out under Title VII, the Eighth Circuit reasoned that the decisions of the Arkansas Supreme Court established the proposition that there are exceptions to the at-will rule that come into play when the bases for the discharge are so extreme and

of action would effectively permit an employer to increase his chances of escaping liability for violating civil or criminal statutes. It is difficult to rationalize any public policy that would be served in the case where an employer is allowed to dismiss an employee for acting as a "private attorney general," at least in those instances where a court determines that the employee's allegations are correct.

A more interesting and difficult problem arises in the case where an employee reasonably, but incorrectly, concludes that his employer's conduct is illegal. Even though the disclosure is motivated by a good faith belief that the conduct was illegal, few courts will allow a cause of action for the so-called "good faith" whistle blower. There should be no difficulty in refusing a cause of action to an employee who, for vexatious reasons, falsely accuses his employer of violating statutes. No policy is served by affording protection in this case; indeed, an employer would likely have a cause of action in tort against such an employee.

It is of note that some states have passed legislation which prohibits employer reprisals or disciplinary action against an employee who reports to a public body an employer's violation or suspected violation of any federal, state, or municipal law or regulation. See, e.g., *Parten v. Consolidated Freightways*, 923 F.2d 580 (8th Cir. 1991) (citing MINN. STAT. ANN. § 181.932(c) (1990) making it illegal for employer to discharge because "(c) the employee refuses to participate in any activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law.").

41. 316 A.2d 549 (N.H. 1974).
42. *Id.* at 550.
43. *Id.* at 551.
44. 736 F.2d 1202 (8th Cir. 1984).
45. *Id.* at 1203.
outrageous as to render the discharge tortious for intentional infliction of emotional distress.⁴⁶ According to the court, "a woman invited to trade herself for a job is in effect being asked to become a prostitute," and "[p]laintiff should not be penalized for refusing to do what the law forbids."⁴⁷ The court, citing the decision in Tameny, declared that "it is an implied term of every employment contract that neither party be required to do what the law forbids," and that if the plaintiff can prove that she was dismissed for refusing to sleep with her foreman, and that her employer was responsible for it, she can recover damages for breach of contract.⁴⁸

Underlying the malice and bad faith exception is the principle that an implied covenant of good faith and fair dealing (often termed an "implied-in-law contract") exists. The principle essentially holds that in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the agreement. In Pugh v. See's Candies, Inc.⁴⁹ a California appellate court found that an employee made out a prima facie case of wrongful termination in violation of an implied promise by the employer that it would not act arbitrarily in dealing with the employee.⁵⁰ The court stated that "[i]n determining whether there exists an implied-in-fact promise for some form of continued employment . . . a variety of factors in addition to the existence of independent consideration" are relevant to such a finding.⁵¹ These include "the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged."⁵² Given Pugh's 32 years of employment, the commendations and promotions he received, the apparent absence of any criticism of his work, the assurances he was given "that if you are loyal to [See's] and do a good job, your future is secure," and the employer's acknowledged policies that administrative personnel would not be terminated except for good cause, the court had little trouble in concluding that there were facts in evidence from which a jury could determine an implied promise of fair dealing with the employee.⁵³

⁴⁶. Id. at 1204-05.
⁴⁷. Id. at 1205.
⁴⁸. Id. at 1205 (citing Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335 (Cal. 1980)).
⁵⁰. Id. at 927.
⁵¹. Id. at 925.
⁵². Id. at 925-26.
⁵³. Id. at 927.
Most courts have adhered to the common law and have not adopted a general requirement of good faith and fair dealing where employment contracts are of indefinite duration. Moreover, even in the select jurisdictions that have ruled that employment contracts are subject to an implied covenant that the parties carry out their obligations in good faith, courts have declined the invitation to transform the requirement of good faith into an implied-in-fact condition that an employee may be discharged only for good cause. Sometimes an employee handbook can modify an at-will relationship, but absent this situation the employee is left with little recourse at common law, especially where the employer issues disclaimers in the employment application or handbook.

2. Judicial Limitations: Lifestyle Cases

A review of court decisions in lifestyle cases reveals that employees have limited opportunity under common law to challenge the restrictions imposed by employers regarding the kind of employee management desires. Indeed, at common law no nexus between the conduct complained of and the employee's job need be shown, although in selected cases courts, substituting their views for those of management, have ruled in favor of employees. Four areas of recurring interest involve (a) association, (b) health, (c) sexual propriety and privacy, and (d) speech.

54. See HEW-LEN v. F.W. Woolworth, 737 F. Supp. 1104 (D. Haw. 1990); Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 453 (Iowa 1989) (noting that "[t]he majority of jurisdictions that have addressed the covenant have unequivocally rejected it [covenant of good faith and fair dealing]."); Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989); Brehany v. Nordstrom Inc., 812 P.2d 49, 55 (Utah 1991) ("The covenant of good faith . . . cannot be construed to change an indefinite term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge.").


56. See, e.g., Vaske v. DuCharme, McMillen & Assoc., 757 F. Supp. 1158 (D. Colo. 1990) (holding that employment manual that contains non-inclusive list of actions that constitute "cause" for which employees may be dismissed may form implied just-cause standard); Shumaker v. Frito-Lay, 6 Indiv. Empl. Rts. Cas. (BNA) 155 (D.C.N.D. 1991); Duldulao v. Saint Mary of Nazareth Hosp. Tr. 505 N.E.2d 314, 318 (Ill. 1987) ("[A]n employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present.").

a. Association

A major consideration in the association area is whether at common law a private-sector employer can dismiss an employee because of his membership in an organization that the company finds distasteful or because of the employee's association with employees of competitors.58 Reflective of the majority view, the Fourth Circuit, in Bellamy v. Mason's Stores, Inc.,59 ruled that a private-sector employee's right of association is not protected and that he may be discharged based on the fact "that he belongs to an obnoxious organization,"60 in this case the Ku Klux Klan. Holding that the complaint states no cause of action under Title VII of the Civil Rights Act61 the court declined to rule on the question whether "religious pomp and ceremony" is enough to make the Klan a religion for purpose of Title VII.62

In Rulon-Miller v. IBM,63 an association case with wide implications (at least in those limited situations where management has issued some declaration regarding the privacy rights of its employees), a California state court sustained a $300,000 ($100,000 compensatory and $200,000 punitive) jury verdict in favor of an employee dismissed for dating a competitor's employee.64 The court found that IBM's declarations that employees have a right to privacy and the right to hold a job even though off-the-job behavior might not be approved by management resulted in a cause of action for wrongful termination and intentional infliction of emotional distress.65 According to the court, the covenant of good faith and fair dealing embraces a number of rights, including the right of an employee to the benefit of rules and regulations adopted for her protection and the requirement that like cases be treated alike.66

How arbitrary can a private-sector employer be in dismissing or failing to hire an employee because of conduct that has no bearing on the job at issue? Does Bellamy, reflecting the majority view in at-will cases, stand for the proposition that management can exclude an individual from employment

58. Other types of associations often of interest to management—the sexual partners of employees—is discussed infra notes 85-87 & 397-419 and accompanying text.
59. 508 F.2d 504 (4th Cir. 1974).
60. Id. at 505.
62. Bellamy, 508 F.2d at 505.
63. 208 Cal. Rptr. 524 (Cal. 1984).
64. Id. at 530.
65. Id. at 529.
66. Id.
because that person is a member of a Green Bay Packer fan club (an understandable decision to those employers in Chicago but arguably disturbing elsewhere)? Absent state action, we see no legal infirmity in dismissing a complaint by an at-will employee that he was terminated or not hired because of his preference in football teams or even for race, as one court has held.67 There may be little or no basis in fact for management’s decision, and it may even be irrational and capricious, but excluding individuals from employment because of their associations or even their race, sex,68 or national origin69 has not been recognized as a public-policy exception to the at-will rule. Unless the dismissal violates a clearly-stated public policy, the employee, unlike his public-sector counterpart, has little recourse to rectify an irrational decision.70 If the employee has any recourse, it is under a specific intent to harm theory,71 or a theory that the information requested or acted upon constitutes an "unreasonable, substantial, or serious interference with [the employee's] privacy."72

67. See Eklof v. Bramalea Ltd., 733 F. Supp 935 (E.D. Pa. 1989) (black employee who failed to pursue administrative remedies under Human Relations Statute precluded from bringing tort action for wrongful discharge; racial-discriminatory discharge does not qualify as exception to common law at-will rule).

Marvin’s (not Emily’s) football example is not as bizarre as one would think. Eddie Sutton, while basketball coach at the University of Kentucky, located in Lexington, directed that Andy Dumstorf, described as a "first-rate" worker in the Kentucky sports information department, be terminated because Dumstorf "made no secret of his love for the Louisville [Cardinals] basketball team," Kentucky’s arch-rival. According to published reports, Sutton commented that "the true Kentucky fans will understand . . . . They’ll probably give me a medal." A Loyalty Test, THE CHICAGO TRIBUNE, Feb. 3, 1986 at 9.


70. There may be a glimmer of hope under the common law, even when there is no statutory expression of public policy. See, e.g., Payne v. Rozendaal, 520 A.2d 586, 588-98 (Vt. 1986), where the court ruled that public policy prevents all employment-based decisions that are "cruel or shocking to the average man's conception of justice."


72. In Cort v. Bristol-Myers Co., 431 N.E.2d 908 (Mass. 1982), the Massachusetts Supreme Court considered whether management could force three long-term sales employees to answer certain questions on an employment "biographical summary," which sought information about serious illness, operations, accidents, nervous disorders, smoking and drinking habits, off-duty problems, worries, medication, age and health of parents, and other medical and business matters. While the court ruled
b. Health and Appearance

In an effort to hire only "healthy" employees, can management refuse to hire employees who are smokers, drug users, or "unattractive" because of weight or grooming preferences? While there is some support for the proposition that public-sector management should not be allowed to impose a no-smoking ban that applies to an employee's off-duty conduct, there is in the public-sector authority to the contrary. Similarly, at common law that there was no invasion of privacy because the employees did not complete the questionnaires, the court went on to state:

[If the questionnaires sought to obtain information in circumstances that constitutes an "unreasonable, substantial, or serious interference with [the employee's] privacy in violation of the principles expressed in G.L. c.214, sect. 1B, the discharge of an employee for failure to provide such information could contravene public policy and warrant the imposition of liability on the employee for discharge.]

Id. at 912 (footnote omitted).

73. See, e.g., Rossie v. State, 395 N.W.2d 801, 805 (Wis. Ct. App. 1986) (upholding Wisconsin Department of Revenue directive banning smoking in certain areas of state building, noting that regulation does not prevent smoking "in the lunchroom, at home, or on the street.").

74. See, e.g., Grusendorf v. Oklahoma City, 816 F.2d 539 (10th Cir. 1987) (finding rational basis between no-smoking regulation and promotion of health and safety of firefighter trainees).

We have found no private-sector case holding that management cannot impose a no-smoking rule, both on and off duty.

Numerous states have enacted statutes prohibiting employers from discriminating against an employee because he is a smoker. See, e.g., IND. CODE § 22-5-4-1 (1991) (prohibiting off-duty use of tobacco); KY. REV. STAT. ANN. § 344.040 (Baldwin 1990); LA. REV. STAT. ANN. § 762 (West 1991) (prohibiting discrimination by employer for use or non-use of tobacco); MISS. CODE ANN. § 71-7-33 (1991) (protecting smokers' privileges during non-working hours); N.J. REV. STAT. § 34:6B-1 (1991) ("No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against an employee with respect to compensation, terms, conditions or other privileges of employment because that person does not smoke or use other tobacco products, unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."); N. M. STAT. ANN. § 50-11-3 (Michie 1991) (making it unlawful to refuse to hire, to discharge or to disadvantage because of use or non-use of tobacco); R.I. GEN. LAWS § 23-20.7.1-1 (1990) ("No employer . . . shall require, as a condition of employment, that any employee or, prospective employee refrain from smoking or using tobacco products outside the course of his or her employment . . . ."); S.C. CODE ANN. § 41-1-85 (Law Co-op. 1990) ("The use of tobacco products outside the workplace must not be the basis of personnel action, including, but not limited to, employment, termination, demotion, or promotion of an
management can dismiss an employee who is deemed medically unfit because of drug problems\textsuperscript{75} or presents a grooming or appearance problem for a company.\textsuperscript{76} Most weight and grooming challenges are litigated under Title VII,\textsuperscript{77} the Rehabilitation Act,\textsuperscript{78} or before arbitrators.\textsuperscript{79} Accordingly, health and grooming issues will be discussed in later sections.

c. Sexual Propriety and Privacy

To what extent can management at common law inquire into or otherwise regulate the sexual activities of its employees? While most reported cases in this area relate to privacy under the constitution\textsuperscript{80} or challenges under a collective bargaining agreement, a number of cases involve management’s right to inquire into areas deemed private by the employee or the employer’s right to engage in off-duty surveillance of an employee suspected of falsification of disability or sick-leave abuse.\textsuperscript{81}


\textsuperscript{76} See Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989) (terminating employee for head lice, reporting to work in dirty uniform, and urinating in mop bucket while on duty); cf. Wood v. Jim Walter Homes, Inc., 554 So. 2d 1028 (Ala. 1989) (cancer); Wilson v. Weight Watchers, 474 N.W.2d 380 (Minn. Ct. App. 1991) (qualified privilege to inquire about employee’s alcohol problem).

\textsuperscript{77} See infra notes 193-205 and accompanying text.

\textsuperscript{78} See infra notes 277-86 and accompanying text.

\textsuperscript{79} See infra notes 477-83 and accompanying text.

\textsuperscript{80} See infra notes 397-419 and accompanying text.

In the few reported cases in this area the courts are in agreement that an at-will private-sector employee has no protection against dismissal for homosexuality, adultery, or shenanigans involving moral turpitude repugnant to his employer. Thus, in *Staats v. Ohio National Life Insurance Company*, a federal court held that a life insurance agent could not bring an action for wrongful discharge either in tort or contract under a public policy theory when he was terminated for showing up at his employer's convention with a person not his wife. Reflecting the majority view, the court reasoned that freedom of association may be an important right, but there was no right under Pennsylvania law to "associate with' a non-spouse at an employer's convention without fear of termination ..." The federal court for the Eastern District of Pennsylvania, sitting in diversity jurisdiction, similarly ruled that a private-sector employee had no constitutional right under the First and Fourth Amendments to be free of unreasonable searches regarding alcohol and drug testing.

82. *See e.g.*, Joachim v. AT&T Info. Serv., 793 F.2d 113 (5th Cir. 1986) (sustaining dismissal of homosexual employee).

83. In those states prohibiting discrimination because of marital status, an employee may have a cause of action. *See, e.g.*, Slohoda v. UPS, 475 A.2d 618, 620 (N.J. Super. Ct. App. Div. 1984) (reversing summary judgment for employee allegedly dismissed for engaging in adultery with co-worker, reasoning that "if an employer's discharge policy is based in significant part on an employee's marital status, a discharge resulting from such policy violates N.J.S.A. 10:5-12"—a prohibiting discharge based on marital status).


86. *Id.* at 120.

87. *Id.* at 120; *see also* Morris v. Coleman Co., 738 P.2d 841 (Kan. 1987) (affirming reversal of summary judgment on tortious interference claim of dismissed unmarried company secretary and married employee who accompanied each other on plane trip).

Black letter law in this area holds that at-will private-sector employees have no First Amendment freedom of speech rights or, for that matter, any other constitutional rights, vis-a-vis their employers. When an employee's off-duty speech bothers management, he can be dismissed, whether or not a nexus to the job exists. As stated by one court: "[t]here is no public policy prohibiting an employer from discharging an ineffective at-will employee. The fact that [the employee's] job duties included public speaking does not alter that rule." The most expansive application of the public policy exception in the area of speech (and arguably other constitutional rights) is *Novosel v. Nationwide Insurance Co.*, a decision by the Third Circuit. In that case the employer was lobbying for a no-fault insurance law in Pennsylvania. Novosel, an employee of Nationwide from December 1966 until November 1981, was a district claims manager. When Novosel refused to lobby, and then in private said disparaging things about the campaign, his employment was terminated. Novosel sought damages, reinstatement, and declaratory relief. The district court granted Nationwide's motion to dismiss.

On appeal, the Third Circuit ruled that Novosel's wrongful discharge claim was cognizable under Pennsylvania law because the "employment termination contravenes a significant and recognized public policy." What is especially noteworthy is that the appellate court relied on Novosel's First Amendment rights even though free speech protection had traditionally been interpreted as only protecting against governmental interference. The court...
found that concern for the rights of political expression and association of public employees was sufficient to state a public policy under Pennsylvania law. 99 Further, the court found no infirmity in the absence of a statutory declaration of a public policy. 100

Taking Novosel one step further is Hennessey v. Coastal Eagle Point Oil Co., 101 where a New Jersey Superior Court held that an oil company could not institute random workplace drug testing for its employees. 102 According to the court, drug testing/screening of employees without reasonable individualized suspicion violates public policy which applied to public as well as private employment. 103 A similar result was reached by the Supreme Court of West Virginia. 104

B. Summary: How Far Can Private-Sector Employers Extend Their Jurisdiction Over Employees at Common Law?

Is there a window of opportunity at common law for the at-will employee who is not covered under a collective bargaining agreement with a lifestyle repugnant to his employer? The common law rule that an employer has an absolute right to discharge an at-will employee is, in most jurisdictions, now modified by the principle that where management’s motives for the retaliatory action contravenes some substantial public policy, a cause of action will lie either in tort or contract. In selected jurisdictions, those employees who are discharged in retaliation for either having exercised a statutorily-conferring personal right or having fulfilled a statutorily-imposed duty will have a cause of action in tort. The courts that have adopted the public-policy exception, however, have focused on a specific policy consideration rather than the general equities of the particular fact situation. Matters that are the subject of

99. Id.


personal preference, ethics, or morality which are not overlapped by specific legislative-type declarations have, as a general rule, little chance of finding protection by the courts. Courts talk of the balancing of interests in arriving at a decision, but unless an employee can point to a specific statutorily right or duty, the balancing will inevitably result in a resolution adverse to the employee. Thus, an employee who shows up at his employer's convention with a person not his wife, but presented as his wife, has no public policy defense to a wrongful termination.\(^\text{105}\) If he worked for a public-sector employer he may or may not have a constitutional right to "associate" with a person not his spouse depending on his job and the agency he worked for,\(^\text{106}\) but his claim to privacy or right to pursue a particular lifestyle will fall on deaf ears by a reviewing court. Only conduct that is extreme and outrageous, amounting to claims for outrage\(^\text{107}\) or intentional or reckless infliction of emotional distress,\(^\text{108}\) may result in relief for the individual.

Absent a cause of action in tort, an employee challenging a discharge must rely on contract theory. The principle that every contract of employment, whatever its duration, is subject to an implied covenant of good faith and fair dealing (thereby making every employment relationship subject to a de facto standard of "just cause") has not been adopted by the courts.\(^\text{109}\)


106. See infra notes 397-419 and accompanying text.


108. See RESTATEMENT (SECOND) OF TORTS § 46 (1965) (requires that the conduct be "extreme and outrageous"); White v. Monsanto Co., 585 So. 2d 1205, 1208 (La. 1991) (noting that "[m]ost states now recognize intentional infliction of emotional distress as an independent tort, not 'parasitic' to a physical injury or a traditional tort such as assault, battery, false imprisonment or the like."); see also Boggs v. Avon Prod., 564 N.E.2d 1128, 1134 (Ohio Ct. App. 1990) (discussion of § 46); Madani v. Kendall Ford, 794 P.2d 1250 (Or. Ct. App. 1990) (allowing cause of action for intentional infliction of emotional distress for employee dismissed for refusal to pull down pants and expose himself to co-workers in portion of workplace open to public view, but disallowing claim for wrongful discharge under public policy exception to at-will rule); cf. Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985) (refusing to participate in activities such as "mooning" constitute public policy exception to at-will rule).

109. See, e.g., Therrien v. United Air Lines, 670 F. Supp. 1517 (D. Colo. 1987) (rejecting implied covenant of good faith and fair dealing); Salazar v. Furr's, Inc., 629 F. Supp. 1403, 1409 (D.N.M. 1986) (holding that discharged at will-employee has no cause of action for tort of wrongful discharge for marriage to employee of company's competitors, rejecting implied covenant of fair dealing contractual approach); Holmes v. Union Oil Co., 760 P.2d 1189, 1193-94 (Idaho Ct. App. 1987) ("the Idaho courts have not deemed it appropriate articulate a covenant so broad that it would go beyond the public policy exception to the at-will doctrine creating liability for termination of
Selected courts have enforced promises of job security in contracts of indefinite duration, but these decisions appear limited to extreme cases where legitimate expectations were created by the employer that dismissal would be for just cause only. Similarly, courts have rejected employee handbooks and personnel manuals as a basis per se for implying a just cause standard for all at-will employees. As stated by one federal court, an employment manual is only a unilateral expression of company policy and is not bargained for and, accordingly, it cannot be the basis of an employment contract.\(^{110}\) Similar reasoning may even be applied to oral representations that are not mutually negotiated.\(^{111}\) Courts that have found a cause of action in contract have determined that a just cause provision is contained in a handbook or manual, or that management has orally promised not to dismiss except for cause.\(^{112}\)

What results, then, is that management has significant discretion at common law to regulate the lifestyles and off-duty conduct of its employees. Courts are unwilling to incorporate constitutional-type rights into private employment relationships. The reason for not expanding public policy exceptions to the common law at-will rule, as articulated by one court, is that "application of constitutional values such as individual privacy to private relationships carries the danger that those values will 'expand like a gas to fill up the available space.'"\(^{113}\) Private-sector employees, desiring protection

\(^{110}\) Rouse v. Peoples Natural Gas Co., 605 F. Supp. 230 (D. Kan. 1985); see also Joachim v. AT&T Info., 793 F.2d 113 (5th Cir. 1986) (sustaining dismissal of homosexual employee notwithstanding employee handbook provides that sexual preference would not be basis for job discrimination or termination); Tohline v. Central Trust, 548 N.E.2d 1223 (Ohio Ct. App. 1988) ("Absent mutual assent, a handbook becomes merely a unilateral statement of rules and policy which creates no obligations and rights.").


\(^{112}\) See, e.g., Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) (oral statement to employee); cf. Mers v. Dispatch Printing Co., 483 N.E.2d 150, 154 (Ohio 1985) ("An additional limit on an employer's right to discharge occurs where representations or promises have been made to the employee which fall within the doctrine of promissory estoppel.").


employees whose activities were not otherwise worthy of judicial protection.")
from officious employers, must look to statutes or labor arbitrators for protection.

III. STATUTORY RESTRICTIONS IMPACTING MANAGEMENT’S RIGHT TO DISCHARGE EMPLOYEES WITH UNHEALTHY OR UNUSUAL LIFESTYLES

Background. The once inflexible rule that an employer can discharge a worker at any time and for any reason is no longer controlling. Statutes now limit the right of employers to terminate employees to such an extent that employers arguably have less freedom than employees to terminate employment. Unlike the employer, a disgruntled employee can terminate the employment relationship whatever the reason.

Specifically, since 1964, managerial discretion has been significantly limited with respect to employees’ civil rights. No longer can management discriminate against employees (or applicants for employment) because of race, color, religion, sex, national origin, or age. At the state level, management discretion may be limited in the areas of marital or sexual preference, physical disability, and creed or political affiliation. The following sections discuss major civil rights and other employment-related legislation, court decisions, and federal guidelines affecting management’s ability to discharge employees because of any unhealthy or unusual lifestyles.

(Alaska 1989)).


A. Federal statutes

1. Title VII of the Civil Rights Act of 1964, as Amended

Title VII of the Civil Rights Act of 1964, as amended in 1972 and again in 1978 (the pregnancy amendment), is an all-encompassing federal statute regulating virtually every facet of personnel management. The Act explicitly prohibits discrimination in employment as to hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. Since 1972, the Act has applied to employers engaged in an industry affecting commerce who have fifteen or more employees each working day in twenty or more calendar weeks of the current calendar year. It also applies to employment agencies procuring employees for such an employer, and to almost all labor organizations. The 1972 amendments also extend coverage to all state and local governments; government agencies; political subdivisions, excluding elected officials, their personal assistants, and immediate advisors; and the District of Columbia departments and agencies, except where subject by law to the federal competitive service.

Any person claiming to be aggrieved under the statute may file a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC is vested with the authority to investigate individual charges of discrimination, to promote voluntary compliance with the statute, and to institute civil actions against parties named in a discrimination charge. The EEOC cannot adjudicate claims or impose administrative sanctions. Rather, the EEOC can (if it so elects) prosecute violations in the federal courts, which are authorized to issue injunctive relief and to order such affirmative action as may be appropriate.

To effectuate the purposes and policies of the statute, Congress prohibited employers from retaliating against employees who initiate complaints under

118. Id.
119. Id. §§ 2000e(b), 2000e-2(a).
120. Id. §§ 2000e(c), 2000e-2(b).
121. Id. §§ 2000e(d), 2000e-2(c).

124. Id. §§ 2000e-5(f), (g).
Title VII. The retaliation provision has been held to afford protection to employees even though the conditions and conduct complained of do not constitute a violation of Title VII.\textsuperscript{125} Moreover, even relatives of persons who exercise rights under the statute are protected from employer retaliation.\textsuperscript{126}

Under Title VII, discrimination based on religion, sex, or national origin is regulated by a different statutory standard than that applied to race or color. Employment discrimination with respect to religion, sex, or national origin is tolerated only where religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business.\textsuperscript{127} There is no statutory BFOQ for race or color.

Accordingly, the statute mandates a two-step analysis in employment discrimination cases. First, the EEOC or a court must find that the defendant (usually an employer) has discriminated against an employee or applicant on a basis prohibited by the Act.\textsuperscript{128} Only after a determination that a prohibited form of discrimination has occurred will the second step be considered. Thus, if discrimination is found, the employer has the opportunity to demonstrate that the discrimination was justified as a BFOQ.\textsuperscript{129} The reach of Title VII’s prohibitions against employment discrimination has been expanded by the courts to include even neutrally-stated and indiscriminately-administered employment practices (in the absence of demonstrable business necessity) if the practice operates to favor an identifiable group of white employees over a protected class.\textsuperscript{130}


\textsuperscript{127} Section 703(e) provides:

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular enterprise. . . .


\textsuperscript{129} Id.

The statute has also been used to protect whites. In *McDonald v. Santa Fe Trial Transp. Co.*, the Supreme Court held that the terms of Title VII are not limited to discrimination against members of any particular race. To rule otherwise, the Court said, would "constitute a derogation of the Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians."

a. Structure of Title VII

Title VII forbids discrimination only under specific circumstances. Under Title VII, "discrimination" is an unlawful employment practice only if: (1) committed by someone covered by the Act; (2) on a "basis" (race, color, religion, sex, national origin) cognizable under Title VII; (3) with regard to an "issue" (hiring, discharging, compensation, terms and conditions of employment, etc.) cognizable under the statute; and (4) with a causal connection or "nexus" between the basis and the issue. Simply stated, not all discrimination is prohibited by the statute. A person not covered by the Act (for example, an employer with less than 15 employees) can discriminate on the basis of race, color, religion, sex, or national origin and not violate Title VII (but such an employer may violate a state anti-discrimination statute). Similarly, discrimination by an employer with 3,000 employees on the basis that the applicant is a Green Bay Packer fan does not violate the Act. It is only discrimination that is based on race, color, religion, sex, and national origin that the federal statute addresses. If race, color, religion, sex, or national origin is not involved, the federal statute is simply inapplicable to the conduct at issue.

Further, the discrimination must be linked in some way to employment or terms and conditions of employment. For example, it is not a violation of the statute for a city government (otherwise covered by the statute) to exclude girls from playing little league hardball because no employment is involved. Such conduct may violate a state statute that prohibits sex discrimination in public accommodations, but the federal anti-discrimination statute is not violated.

Finally, there must be a causal connection between the "basis" (race, sex, etc.) and the "issue" (terms and conditions of employment) in order to make

132. *Id.* at 280.
133. *Id.* at 279-80 (quoting EEOC decision No. 74-31, 7 Fair Empl. Prac. Cas. (BNA) 1326, 1328 (1973)).
134. See BARBARA SCHLEI & PAUL GROSMAN, EMPLOYMENT DISCRIMINATION LAW 1 (1983).
out a violation of Title VII. Thus, it is not a violation of Title VII for an employer to simply fail to hire a black, or a female, or a Catholic if there is no causal connection or "nexus" between the "basis" (race, sex, or religion) and the "issue" (the decision to hire).

b. The Concept of "Discrimination" Under Title VII

Title VII was not designed to right all wrongs in an employment setting, nor was it designed to mandate that employers act reasonably toward employees. The touchstone of the Act is "discrimination." If there is no discrimination, the statute does not apply.

Two theories by which discrimination may be proved are disparate treatment and disparate impact. The most easily understood type of discrimination is disparate treatment, which involves treating an individual less favorably than others similarly situated because of race, color, religion, sex, or national origin.135 Proof of a discriminatory motive is usually required in disparate treatment cases, although it may be inferred from the mere fact of a difference in treatment.136 The plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination.137 Disparate impact involves employment practices that are facially neutral but which have a discriminatory effect when applied.138 If the practice cannot be justified as a business necessity, the statute is violated.139

136. Id.
137. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981). The burden is not onerous. Id. at 253.
   (1) whether blacks (or women or black women) as a class or at least blacks (or women or black women) in a specified geographical area are excluded by the suspect practice at a substantially higher rate than whites (or men); (2) the percentages of class member applicants [employees] that are actually excluded by the practice or policy, or (3) the level of employment of blacks (black women) by the employer in comparison with the percentage of blacks in the relevant labor market or geographic area.
Id. at 948 (citing Green v. Missouri Pac. R.R. Co., 523 F.2d. 1290, 1293-94 (8th Cir. 1975)).
139. Id.
The issue of whether a test, or any other selection device that excludes an employee with a particular lifestyle repugnant to management, is a valid predictor of job performance, or is otherwise necessary for the safe or efficient operation of the business, arises in employment discrimination cases only after the plaintiff has demonstrated that the challenged criterion exerts a disparate impact on a protected class. In other words, under Title VII an employer defending a charge of disparate impact discrimination is not compelled to demonstrate business necessity unless the selection criterion is first found to have a discriminatory impact.

140. In the case of a test, once it is shown to have an adverse impact, the employer, in order to escape liability under Title VII, must demonstrate that it is valid. Validation is merely a showing that the device predicts job-performance. In this regard, the first step in the validation process is for the employer to formulate a proper definition of the job. While the EEOC Guidelines do not provide specific procedures for conducting a job analysis, they do state that any professional method of job analysis is acceptable if it is comprehensive and otherwise appropriate for the specific validation strategy used. A validation-type study is then performed.

The Guidelines cite three validity strategies for showing that a test is job related: (1) Criterion-related validity — a statistical demonstration of a relationship (correlation) between scores on a test and actual job performance; (2) Content validity — a demonstration that the content of a test is representative of important aspects of the job. For example, a typing test given to an applicant for a secretarial position, or a driving test given an applicant for a fork-lift job. Content validity is present to the extent that the actual content of a test contains samples of job performance; (3) Construct validity is present where there is a relationship between a "construct" or a "trait," and that trait is important for successful job performance. To validate a test through this method it is first necessary to determine through job analysis that a particular trait or construct (honesty, for example) is actually related to job performance (cashier). Second, it must be demonstrated that the test used does in fact measure the specific trait. Finally, it must be demonstrated that success on the test is a predictor or measure of success on the job.

141. The current Uniform Guidelines on Employee Selection Procedures define "adverse impact" as "a substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a race, sex or ethnic group." 29 C.F.R. § 1607 (1989). Although not a legal definition of discrimination, the Guidelines provide that an adverse impact exists when the selection rate for a particular group is less than 4/5 or 80 percent of the selection rate for other groups. Id. For example, if 70 percent of the male applicants are selected and 60 percent of the female applicants are selected, no adverse effect exists because 60 percent, the female selection rate, is 86 percent of 70 percent, the male selection rate. However, if 60 percent of the male applicants and 40 percent of the female applicants are selected, an adverse impact exists because 40 percent is only 67 percent of 60 percent. Smaller differences in selection rates may still constitute adverse impact, where they are significant in both statistical and practical terms or where an employer's actions have discouraged applicants disproportionately.
c. Standards Limited by Law

After the Griggs decision,¹⁴² and the October, 1991, congressional and

It should be noted that the number of candidates may be so small that the statistical results do not reflect the reality of the employment situation, or that the statistical universe is so small that the results achieved are due mainly to chance or random distribution.

142. The granddad of disparate impact cases is Griggs v. Duke Power, 401 U.S. 424 (1971). The facts are straightforward. Prior to the effective date of Title VII, Duke Power Company openly discriminated on the basis of race in the hiring and assigning of employees. Id. at 426-27. The plant was organized into five operating departments: (1) Labor, (2) Coal Handling, (3) Operations, (4) Maintenance, and (5) Laboratory and Testing. Id. at 427. Blacks were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four operating departments in which whites were employed. Id. Promotions were normally made within each department on the basis of seniority. Id. Transferees into a department usually began in the lowest position. Id.

In 1955 the Company instituted a policy of requiring a high school education for initial assignment to any department except Labor, and for transfer from Coal Handling to any inside department (Operations, Maintenance, or Laboratory). Id. When the Company abandoned its policy of restricting blacks to the Labor Department in 1965, completion of high school was also made a prerequisite to transfer from Labor to any other department. Id.

The Company added a further requirement for new employees on the effective date of Title VII. Id. To qualify for placement in any but the Labor Department it became necessary to register satisfactory scores on two professionally developed aptitude tests, as well as to have a high school diploma. Id. at 427-28. Completion of high school alone continued to render employees eligible for transfer to the four desirable departments from which blacks had been excluded if the incumbent had been employed prior to the time of the new requirement. Id. at 428. Subsequently, the Company began to permit incumbent employees who lacked a high school education to qualify for transfer from Labor or Coal to an "inside" job by passing two other tests—the Wonderlic Personnel Test and the Bennett Mechanical Aptitude Test. Id. Since a smaller percentage of blacks relative to whites had received a high school degree (34 percent as opposed to 12 percent in North Carolina), and because whites fared better on the tests than blacks (58 percent vs. 6 percent), the requirement was found by the Court to have an adverse or disparate impact on blacks. Id. at 430 n.6.

More important, no relationship was shown between obtaining a high school diploma and successful job performance (it was found that a large percentage of whites without a high school diploma had performed successfully in the cited jobs). Id. at 431. The Griggs Court made it clear that the statute procribes not only overt discrimination, but also employment practices that are fair in form but discriminatory in operation. If a test operates to exclude a protected class cannot be shown to be related to job performance, the practice is prohibited. Id. at 436. The Court stated that "any tests used must measure the person for the job and not the person in the abstract."
presidential backing of a compromise civil rights bill, any recruiting, hiring, promotion, or retention criterion that has a disparate impact on a protected class must be shown to be job related to avoid liability under the statute. As noted, under disparate impact analysis an employment practice


The most significant provisions of the bill concern the Court-created business necessity test first announced in *Griggs*, discussed *supra* note 142. In a 1989 case, Wards Cove Packing v. Antonio, 490 U.S. 642 (1989), the Supreme Court, in *dictum*, stated that once a plaintiff shows that a disparate impact results from an employment practice, plaintiffs still had the burden of proving that the employer's practice did not serve in a significant way legitimate employment goals. *Id.* at 659. The compromise legislation overturns the dicta in *Wards Cove* and returns to the *Griggs* standard where the burden shifts to the employer to show a "manifest relationship to the employment in question" once plaintiff demonstrates that the practice has a disparate impact. Under the new Act, unlawful discrimination can be demonstrated if the employer cannot rebut a *prima facie* case by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity." The language found in the 1991 Act—"job related and consistent with business necessity"—is identical to that found in the Americans with Disabilities Act (ADA). The ADA is discussed at notes 296-316 and accompanying text.

The 1991 statute identifies the following language as declaring the intent of Congress in referring to "practice" and "business necessity":

When a decision-making process includes particular, functionally-integrated practices which are components of the same criterion, standard, method of administration, or test, such as the height and weight requirements designed to measure strength in Dothard v. Rawlinson, 433 U.S. 321 (1977), the particular, functionally-integrated practices may be analyzed as one employment practice. Business necessity is otherwise not defined.

Under the 1991 Act, management must now demonstrate that an employment practice shown to be responsible for disparate impact really is necessary as opposed to simply being useful or convenient. Moreover, if disparate impact can be established but not traced to any particular employment practice (the case in *Wards Cove*), the employer will have the burden of demonstrating that it needs the whole complex of employment practices from which the disparate impact flows.

Title VII was also amended to create the ability to sue for backpay, compensatory damages, and in extreme cases punitive damages. There are no limits on awards of backpay. All other damages (mental anguish, pain and suffering and punitive damages) would be limited to $50,000 for employers of 16 to 100, $100,000 for employers of 101 to 200, $200,000 for employers of 201 to 500, and $300,000 for employers of 501 or more.
must first be shown to have a disparate impact before the employer’s obligation to demonstrate job relatedness comes into play. Title VII does not mandate that all selection criteria be job related, but only those criteria that have an adverse impact on the employment opportunities of members of a race, color, religion, sex, or national origin. A selection criterion may not be job related, yet if the impact on both non-minorities and minorities is the same, Title VII is not violated. In other words, an employer is entitled to use a job criterion that does not predict performance on the job (weight, for example), so long as the criterion does not have a disparate impact on a member of a protected minority. One can, of course, question why an employer would ever use a selection device that has no predictive utility whatsoever. Nevertheless, the law does not require rationality (making it difficult for employees with unconventional lifestyles), but only that the criteria used be non-discriminatory.

d. Hiring Standards Applicable to Employee Lifestyle

Although management has much discretion in designating job qualifications, the courts have applied fair employment laws in such a manner as to limit an employer’s consideration and use of factors that might otherwise be used in screening job applicants. Of special interest relating to an employee’s lifestyle are the following topics: (1) police or criminal history records; (2) garnishment, financial status, or credit references; (3) unwed mothers; (4) sexual preference and change of sex; (5) race association ( interracial marriage and associations); (6) weight and other personal appearance restrictions; (7) drug and alcohol addiction; and (8) religion.

(1). Police or Criminal History Records

Many employment applications ask applicants if they have prior arrest or conviction records. If the applicant’s lifestyle has resulted in arrests or convictions, there may be relief under Title VII or a state fair employment statute.

Both the EEOC and the courts have distinguished pre-employment arrest inquiries from inquiries concerning convictions. Inquiries into an applicant’s arrest records have been struck down unless shown to be job-related.

144. See, e.g., Glaz v. Ralston Purina Co., 509 N.E.2d 297 (Mass. App. Ct. 1987) (holding no public policy exception to at-will rule in discharging employee who had been arrested, convicted, and imprisoned in Hungary for bribery, even though dismissal resulted from employer’s policies).

Courts have recognized that blacks, in disproportionate numbers, are subject to arrest for serious crimes. However, with few exceptions, conviction inquiries have been held to constitute a legitimate employer concern. Still, employers are advised not to adopt a blanket policy of excluding any applicant with a conviction record. In Green v. Missouri Pacific Railroad, the Eighth Circuit held that an employer violated Title VII by using a conviction as an absolute bar to employment. The court reasoned that because blacks are convicted at a higher rate than whites, the employer’s practice of summarily rejecting all applicants with a conviction record (minor traffic offenses were excluded) had an adverse impact on a protected class under the statute.

The EEOC has consistently taken the position that reasonable cause exists to believe that the statute is violated when applicants are automatically eliminated from job consideration because of a conviction. The reasoning of the Commission usually follows the same pattern: Because blacks are convicted at a rate significantly in excess of their percentage in the population, an employment practice of disqualifying persons for employment because of conviction records can be expected to have a discriminatory impact upon blacks and, therefore, be unlawful under Title VII in the absence of a justifying business necessity. To establish business necessity the employer must demonstrate that the nature of a particular criminal conviction (retail theft, for example) disqualifies the individual job applicant from performing the particular job in an acceptable, business-like manner (cashier). The most important factor in this determination is the job-relatedness of the conviction. If it is established that the conviction is not job-related, it is unlawful under Title VII to disqualify the individual because of the conviction.

Contrary to the position taken by the Commission, however, most courts have not found that a policy of rejecting applicants with a conviction record has a per se disparate impact on minorities. Rather, to establish a prima facie case of discrimination, the rejected applicant is required to show that the conviction rate for blacks is higher than that for non-minorities in the relevant

146. 523 F.2d 1290 (8th Cir. 1975).
147. Id. at 1298-99.
148. Id. at 1295, 1298-99.
149. Id. at 1298-99.
labor market. Again, employers need not demonstrate that its policy is job-related absent a showing of discriminatory impact.

It is of note that numerous states have enacted legislation addressing the use and dissemination of information concerning an applicant's arrest or conviction record in an employment setting. The effect of this legislation is, in most cases, a mandate that management cannot consider arrests that have not resulted in convictions or, alternatively, convictions that have been expunged from the employee's record.

(2). Garnishment, Financial Status, and Credit References

Some lifestyles result in bankruptcy or other financial problems. While at common law an individual could be dismissed for credit-history problems, both the courts and the EEOC have taken the position that since minorities are more frequently garnished than non-minorities, a policy of


(Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied. The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or part on criminal history record information.);

R.I. Gen. Laws § 28-5-7(7) (Supp. 1991) ("unlawful employment practice" to "inquire either whether the applicant has ever been arrested or charged with any crime; provided, however, that nothing herein shall prevent an employer from inquiring whether the applicant has ever been convicted of any crime."); Tex. Educ. Code Ann. § 51.215 (West Supp. 1991) (allowing institution of higher education to obtain from any law enforcement agency "criminal history information" to evaluate applicants for security-sensitive positions); Va. Code Ann. § 19.2-392.4 (Michie 1990).

discharging employees after several garnishments violates Title VII. Some courts, however, will require that the plaintiff use the debt-paying characteristics of the employer's work force rather than the population at large in establishing disparate impact.

Also of note is the Consumer Credit Protection Act\(^\text{154}\) which provides that an employer may not discharge an employee because his earnings have been subjected to garnishment for any one indebtedness.\(^\text{155}\) Further, under the Fair Credit Act,\(^\text{156}\) any employer who denies a job to an applicant based on information contained in a "consumer report\(^\text{157}\)" must advise the applicant of this fact and provide the name and address of the consumer reporting agency who compiled the report.\(^\text{158}\) The anti-discrimination provisions of the Federal Bankruptcy Code may also provide relief to employees who are debtors under Chapter 11.\(^\text{159}\)

Finally, at the state level, employer discretion to use garnishments or credit history\(^\text{160}\) as employment criterion may be limited in some respects but, more often than not, the statutes specifically permit employers to use credit information for employment purposes.

\text{154.} 15 \text{U.S.C. § 1674 (1988).}
\text{155.} Id. § 1674(a).
\text{156.} 15 \text{U.S.C. § 1681 (1970).}
\text{157.} A "consumer report" is defined in 15 \text{U.S.C. § 1681(a)(d) (1988) as "any written or oral information bearing on the person's credit history, character, reputation, or mode of living prepared by a reporting agency."
\text{158.} Id. § 1681m(a).
\text{159.} The Bankruptcy Amendments and Federal Judgeship Act of 1984, in relevant part provides:

No private employer may terminate the employment, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor is bankrupt—

(1) is or has been a debtor under this title or the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

\text{160.} All states have laws concerning garnishments. Arizona, California, Maine, Massachusetts, New Hampshire, New Mexico, and New York have specifically addressed the use of credit references. See also Greeley v. Miami Valley Maintenance, 551 N.E.2d 981 (Ohio 1990) (holding that employee discharged solely because of court order that child-support payments be withheld from wages has civil cause of action for damages under Ohio statute prohibiting such retaliation).
Section 701(k) of Title VII prohibits employers from discriminating against an employee because she is pregnant. Suppose an employer seeks to remove or avoid hiring a woman because she is pregnant and unmarried? An employer who applies a legitimacy rule to one sex and not the other discriminates on account of sex under Title VII. It makes no difference that the resulting discrimination is between all males and some females (non-unwed mothers) versus some females (unwed mothers). Discrimination between members of a protected class is nevertheless sex discrimination under Title VII.

The more interesting question is whether an unwed mother rule can be supported by a bona fide occupational qualification (BFOQ) or, in a disparate impact case, a business necessity defense. Courts have considered the argument by employers that they should be allowed to discriminate against unwed mothers because they are poor role models. In *Andrews v. Drew Municipal Separate School District*\(^1\)\(^\text{161}\) two unwed mothers challenged under the constitution (Title VII was never argued) a policy that prohibited the district from hiring any teachers or teachers' aides who were unmarried parents.\(^1\)\(^\text{162}\) The Fifth Circuit rejected the school district's argument that unmarried pregnant employees would be bad role models for students.\(^1\)\(^\text{163}\) The court of appeals also found unpersuasive the argument that the presence of unmarried teachers or teachers' aides would encourage teenage pregnancy.\(^1\)\(^\text{164}\)

In *Harvey v. Young Women's Christian Association*,\(^1\)\(^\text{165}\) a federal court found that an unwed female employee was fired because of her desire to offer herself, as an unwed mother, as an alternative lifestyle role model to the young females in her community.\(^1\)\(^\text{166}\) The court found discrimination on account of sex, but because her alternative lifestyle was in conflict with both the moral and religious philosophy of the YWCA, the court found that management had met the burden of articulating a legitimate, nondiscriminatory reason for discharge.\(^1\)\(^\text{167}\) Conversely, in *Dolter v. Wahlert High School*,\(^1\)\(^\text{168}\) a federal court for the Northern District of Iowa, in denying defendant's

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162. *Id.* at 612.
163. *Id.* at 617.
164. *Id.*
165. 533 F. Supp. 949 (W.D.N.C. 1982).
166. *Id.* at 956.
167. *Id.* at 957.
motion to dismiss, held that a Catholic high school's asserted BFOQ defense for the discharge of an unwed mother who was a Catholic lay teacher of English, appeared to relate more to religious and moral qualifications, rather than to sexual qualifications. The court noted that a code of moral conduct regarding unwed parents could constitute a religious BFOQ. However, the code must apply equally to both male and female employees. The court found no infirmity in extending Title VII's prohibitions against sex discrimination to a sectarian school. To the extent that Sue Dolter could show that other single teachers violated the code of conduct, management's BFOQ defense could be seen as pretextual.

The federal court for the Northern District of Nebraska, in Chambers v. Omaha Girls Club, agreed with the employer that an unwed mother served as a bad role model for the youth that the club served. The court conceded that while Chambers may be a good example of hard work and independence, it is just as likely that she will serve as a negative role model and may defeat the objective of the Girls Club, which was to reduce the number of teenage pregnancies. Finding that the Girls Club may be seen as "tacitly" approving of teenage pregnancies, the court held that Chambers' discharge was "necessary and adequately related to the core purpose" of the club.

In an especially bizarre case (and the only arbitration case we know of involving the dismissal of an unwed mother for immorality), Arbitrator Sidney Mogul, in Hawthorn School Dist. No. 17, Marengo, Illinois v. Jeanne Eckman, ruled that a school board could not dismiss a former novitiate resident in a Catholic Convent who became pregnant as a result of a rape. Citing Andrews, the arbitrator held that the dismissal of the teacher violated due process under the United States and the State of Illinois Constitutions. In the words of Mogul, "an individual's private life is no basis for dismissal where the teacher's teaching ability is not affected."

In limited environments (sectarian schools) management may have a legitimate interest in endorsing a specific lifestyle or role model for its market. Outside of the narrow situations present in Chambers and Harvey (we are not asserting that Chambers is decided correctly), we see little justification,

169. Id. at 267-68.
170. Id. at 271.
172. Id. at 926.
173. Id. at 927-28.
174. Id.
175. An unpublished 1982 decision.
176. The School Board of Marengo gives new meaning to the old adage that it is management that creates labor unions.
economic or otherwise, for unwed parent rules. Such cases (especially *Marengo*) are the stuff that comprise made-for-TV movies.

(4). Sexual Preference and Change in Sex

Title VII’s prohibitions against discrimination on account of sex does not extend to discrimination on account of sexual preference. The Ninth Circuit, in *De Santis v. Pacific Telephone & Telegraph Co.*,\(^ {177} \) rejecting both a disparate treatment and disparate impact theory of discrimination, held that Title VII was meant to put women on equal footing with men in terms of employment activities, and that the prohibition of sex discrimination found in Title VII applies only to discrimination on the basis of gender and should not be extended to include sexual preferences. If an employee, discriminated against because of sexual preference, has any statutory recourse it is at the state or local level. To date, however, only four states outlaw discrimination on this basis\(^ {178} \) and only one, Wisconsin, applies to private-sector employees. As the recent California experience illustrates, politically the trend may be against further legislation.\(^ {179} \)

Title VII has also not been found to extend to transsexuals or those undergoing sex change operations. The Seventh Circuit, in *Ulane v. Eastern Airlines, Inc.*\(^ {180} \) recognized that while there may be differences between homosexuals and transsexuals, the same reasons apply for not extending Title

\(^ {177} \) 608 F.2d 327 (9th Cir. 1979).


Cities and counties which have enacted anti-discrimination legislation on the basis of sexual preference include Tucson, Arizona; Berkeley, Cupertino, Davis, Laguna Beach, Los Angeles, Mountain View, Oakland, Sacramento, San Francisco, San Jose, Santa Barbara, Santa Cruz, and West Hollywood, California; Aspen and Boulder, Colorado; Hartford, Connecticut; District of Columbia; Atlanta, Georgia; Honolulu, Hawaii; Champaign, Chicago, Evanston, and Urbana, Illinois; Iowa City, Iowa; Baltimore and Montgomery County, Maryland; Amherst, Boston and Malden, Massachusetts; Ann Arbor, Detroit, East Lansing, Ingham County, Lansing and Saginaw, Michigan; Hennepin County, Minneapolis, and Mankato, Minnesota; Alfred, Buffalo, Ithaca, New York City, Rochester, and Troy, New York; Chapel Hill, Durham, and Raleigh, North Carolina; Columbus, Cuyahoga, and Yellow Springs, Ohio; Portland, Oregon; Harrisburg and Philadelphia, Pennsylvania; Austin, Texas; Clallam County, King County, Olympia, Pullman, and Seattle Washington; Dane County, Madison, and Milwaukee, Wisconsin.


\(^ {180} \) 742 F.2d 1081 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985).
VII protection to both.\(^{181}\) A public-sector employee who is discriminated against because of his sexual preference or transsexuality may fare better asserting a due process or equal protection claim.\(^{182}\) Because sexual preference discrimination often stems from a perception that homosexuals are "sick," one commentator has suggested that gay and lesbian employees might attempt to challenge discriminatory practices under Section 504 of the Federal Rehabilitation Act (discussed infra).\(^{183}\) We have found no case supporting this view.\(^{184}\)

(5). Race Association (Interracial Marriage and Associations)

Does Title VII prohibit the refusal to hire or the firing of an employee because of the race of the people the employee associates with? Courts have gone both ways on this issue. In *Ripp v. Dobbs Houses, Inc.*\(^{185}\) and *Adams v. Governor's Committee on Post-Secondary Education*\(^{186}\) the courts held that white persons who have been discharged because of their interracial marriages (*Adams*)\(^{187}\) or association (*Ripp*)\(^{188}\) with other races do not have

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181. *See also* Sommers v. Budget Mktg., 667 F.2d 748 (8th Cir. 1982) (upholding discharge of a male who claimed he was a female when he applied for the job); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (allowing dismissal the employee after learning that employee was preparing to have a sex change operation).

182. *See infra* notes 397-404 and accompanying text.


187. While plaintiff Adams alleged that he was dismissed because of his marriage to a black woman, the court found that he was discharged because his employer lost confidence in him. In dictum, however, the court stated that "neither the language of the statute [Title VII] nor its legislative history supports a cause of action against a person because of relationship to persons of another race." *Id.* at 1351. Interestingly, the court stated that Adams could state a claim under 42 U.S.C. § 1981, discussed *infra* notes 227-31 and accompanying text, which proscribes racial discrimination in employment. According to the court, "[i]t is settled that the nature of the discrimination in this case—taking adverse action against a white person because of his association with blacks—falls under § 1981." *Id.* (quoting *Fiedler v. Marumscro Christian School*, 631 F.2d 1144, 1150 (4th Cir. 1980) (white female student expelled for dating black male denied right to contract because of racial association in violation of § 1981), *cert. denied*, 422 U.S. 1006 (1975)). Having decided that the real reason
a cause of action under Title VII because the discrimination did not occur because of the white person's race. However, other courts have held that employment discrimination on the basis of interracial association or marriage is prohibited by Title VII. Relying on Whitney v. Greater New York Corporation of Seventh Day Adventists\textsuperscript{189} and quoting from Reiter v. Center Consolidated School District, No. 26-JT\textsuperscript{190} the court of appeals in Parr v. Woodmen of the World Life Insurance Co.\textsuperscript{191} held that the employer could not refuse to hire Parr because of his interracial marriage. The court concluded that when the plaintiff alleged discrimination because of an interracial marriage or interracial association he was in essence alleging discrimination based on his race because he was denied employment opportunities because his race was different from his wife's.\textsuperscript{192}

(6). Weight and Other Personal Appearance Restrictions

Management's preference for employees who have the appropriate dress, look, and weight frequently clash with the employee's desire for a different lifestyle with respect to dress, grooming, and weight. In all three areas courts accord significant discretion to management. Courts have taken a "common sense" approach and have recognized management's right to formulate and enforce dress, grooming, and weight restrictions, even where the employer's

\textsuperscript{188} The holding in Ripp is an aberration. The better rule for employers is articulated by the 11th circuit in Parr as follows: "When a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." Parr, 791 F.2d at 891. Employers intent on discriminating against their employees or applicants for employment because management is displeased with their off-duty associations face liability under Title VII.

\textsuperscript{189} 401 F. Supp. 1363 (S.D.N.Y. 1975) (where a white female employee was dismissed because she had a relationship with a black male).

\textsuperscript{190} 618 F. Supp. 1458 (D. Colo. 1985) (where the employee alleged she had not been hired because of her involvement with the Hispanic community).


\textsuperscript{192} On remand, the trial court dismissed Parr's complaint because he was not genuinely interested in the job and that he was only trying to create a basis for EEOC charges. To have a claim under Title VII, the plaintiff must have been a bona fide applicant for the job. Parr v. Woodmen Life Ins. Co., 657 F. Supp. 1022, 1032 (M.D. Ga. 1987).
only interest is in enhancing its image with the public.\textsuperscript{193} Title VII may, under certain circumstances, provide some relief.

It is not a per se violation of under Title VII when management formulates a dress or grooming code. However, when an employer applies a dress or grooming code to members of one sex and not the other, management's rule is likely to be invalidated by a court under Title VI.\textsuperscript{194} Further, when dress or grooming codes impose a more defined standard of uniformity on female employees than male employees, a violation of Title VII may result.\textsuperscript{195} Thus, when management requires female accountants to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have [their] hair styled, and wear jewelry,"\textsuperscript{196} and do not apply similar requirements to male employees, as Professor Harold Hill would say, "folks, ya got trouble in River City."\textsuperscript{197} Still, courts, as well as arbitrators, have

\textsuperscript{193} In Fagan v. National Cash Register Co., 481 F.2d 1115, 1120-21 (D.C. Cir. 1973), the appellate court declared:

Perhaps no facet of business life is more important than a company's place in public estimation. That the image created by its employees dealing with the public when on company assignment affects its relations is so well known that we may take judicial notice of an employer's proper desire to achieve favorable acceptance. Good grooming regulations reflect a company's policy in our highly competitive business environment. Reasonable requirements in furtherance of that policy are an aspect of managerial responsibility.

\textit{See also} Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979) ("The decision to project a certain image as one aspect of company policy is the employer's prerogative which employees may accept or reject. If they choose to reject the policy, they are subject to such sanctions as deemed appropriate by the company. An employer is simply not required to account for personal preferences with respect to dress and grooming standards.").

\textsuperscript{194} Laffey v. Northwest Airlines, 366 F. Supp. 763 (D.C. 1973) (requirement forbidding only female cabin attendants to wear eyeglasses violative of Title VII).


\textsuperscript{197} \textit{Cf.} MEREDITH WILSON, \textit{The Music Man}, (Ya Got Trouble).

Query: Can management insist that their female employees wear makeup? Or is wearing makeup "an impermissibly cabined view of the proper behavior of women" (to borrow a term in Price Waterhouse v. Hopkins, 490 U.S. 228, 236-37 (1989)).

We know of no case on point. The Eleventh Circuit, in Tamimi v. Howard Johnson Co., 807 F.2d 1550 (11th Cir. 1987), sustaining the trial court, ruled that a motel that adopted a mandatory makeup rule for the purpose of discharging a pregnant desk clerk violated Title VII's prohibitions against sex discrimination. Sondra Tamimi
was the only woman who did not wear makeup. Management's discontent with her looks began the day that Tamimi informed management that she was pregnant. The makeup rule was adopted two days later. According to the trial court, "[i]t was only when plaintiff became pregnant which caused her face to 'break out,' that [management] implemented the rule which he knew plaintiff would not obey." Id. at 1554. While the trial court indicated that it "need not decide whether an employer under certain circumstances may require its female employees to wear makeup," id., the court went on to declare:

Based on [management's] testimony, there is no doubt that if plaintiff had not become pregnant, she would not have been dismissed from her job. To require that plaintiff wear makeup because she appears less attractive [sic] when pregnant, even though the employer had no such requirement of plaintiff or any other employee prior to plaintiff's pregnancy, is a form of sexual discrimination. Pregnancy is a "fundamental sexual characteristic" that is a protected characteristic under Title VII. Accordingly, the Court finds that the mandatory makeup rule was conceived, implemented and applied to plaintiff in a discriminatory manner because of plaintiff's pregnancy, and further finds that, in dismissing plaintiff from her job, defendant discriminated against plaintiff on the basis of her sex.

*Id.* (Citations omitted). The court of appeals affirmed.

While an employer cannot take gender into account in making employment decisions, except in those cases where gender is a BFOQ, it is unclear whether requiring makeup is, as Justice Brennan pointed out in *Price Waterhouse*, an impermissible sexual stereotype. According to Brennan:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"


In *Price Waterhouse*, Justice Brennan noted that "[w]e need not leave our common sense at the doorstep when we interpret a statute." *Price Waterhouse*, 490 U.S. at 241. Because the class created by a makeup requirement is some women (those who wear it) and some women (those who don't) and all (or virtually all) men (what can we say here?), and because a makeup requirement does not significantly limit the employment opportunities of women nor impact a fundamental right, we see no infirmity under Title VII when an employer requires women, as part of a grooming code, to wear makeup. But we're not sure! See also *Drinkwater v. Union Carbide Corp.*, 56 Fed. Empl. Prac. Cas. (BNA) 483 (1990) (undue preoccupation with what female employees look like is not permissible under anti-discrimination laws if some kind of attention is not paid to male employees; comments to female employees about
ruled that different standards of dress are not discriminatory so long as employment opportunities of one sex are not disadvantaged relative to the other sex. In *Fountain v. Safeway Stores, Inc.*, 198 the Ninth Circuit ruled that there was no violation of Title VII when a male was dismissed for failing to wear a tie even though no such requirement existed for females.199 Likewise, another federal court ruled that there was no violation of race or sex under Title VII when an employee was dismissed for wearing a "corn row" hairstyle in violation of hospital policy.200 The employee's "lifestyle" regarding her hair was beyond the reach of Title VII proscriptions against race or sex discrimination.

Other circuits reason that grooming and dress codes do not violate Title VII unless the requirements affect immutable characteristics or constitutionally-protected activities, such as marriage or child-rearing, which present insurmountable obstacles to one gender.201 Under this standard, it would not be impermissible for an employer to enforce a no-beard regulation, although the rule would clearly have a disparate impact upon males. A beard is not an "immutable" trait of being male, nor is it a constitutionally protected activity to grow a beard.202

makeup, eyeshadow, and clothing insufficient in themselves to support hostile environment claim).

198. 555 F.2d 753 (9th Cir. 1977).

199. See also Baker v. Taft Broadcasting Co., 549 F.2d 400 (6th Cir. 1977) (grooming codes requiring different lengths of hair for men and women not violative of statute); Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975) (permitting employer's regulation of hair length for men but not women employees); Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), cert. denied, 422 U.S. 1046 (1975) (suit by male employee dismissed for violating hair length policy allowing women to wear their hair longer than men properly dismissed).


201. See, e.g., Earwood v. Continental South Eastern Lines, 539 F.2d 1349 (4th Cir. 1976); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084 (5th Cir. 1975) (grooming regulation applicable to males with long hair not sex-based discrimination because employer applied personal grooming code to all employees); Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), cert. denied, 404 U.S. 991 (1971), on remand, 56 F.R.D. 420 (N.D. Ill. 1972) (unlawful to restrict employment of married females but not married males, even though most flight attendants female).

Similarly, management is not precluded from having height and weight requirements for its employees, although height and weight requirements that have a disproportionate effect upon women are impermissible under Title VII unless shown to be job-related. 203

The more difficult case is where the pool of job applicants is limited to women and, at the same time, the employer maintains a height or weight restriction that eliminates some, but not all, women for consideration. In light of the Supreme Court's rejection of a "bottom line" defense to discrimination,204 employers are advised to examine their height and weight requirements and discard those that have an illegal discriminatory effect. Even though there appears to be no discrimination in the process of selecting women for positions when the "bottom line" or end result is examined, if the criterion has an impermissible disparate impact that cannot be justified under a business necessity test, it is violative of Title VII.

Title VII was never intended to interfere in the promulgation and enforcement of nondiscriminatory personal appearance regulations by employers.205 An employer may require male employees to adhere to different modes of dress, grooming, and weight standards than those required of female employees and still not run afoul of the statute.

(7). Drug and Alcohol Addiction

Employees whose lifestyle resulted in a drug or alcohol problem have little or no recourse under Title VII. In New York City Transit Authority v. Beazer,206 the Supreme Court considered the Transit Authority's blanket policy of not employing persons who use narcotic drugs.207 The Supreme Court, reversing both the district court and the court of appeals, found that

203. Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (policy of requiring only female flight attendants to comply with weight requirements violative of Title VII).

204. Connecticut v. Teal, 457 U.S. 440 (1982). In Teal, a group of black employees challenged under a disparate impact theory of discrimination management's use of a facially neutral examination which a disproportionate number of blacks failed. The Court rejected the employer's bottom-line defense that he took corrective measures to insure that the number of black employees reflected the relevant labor market.


207. In relevant part, the Authority's rule provided: "Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director—Chief Surgeon of the System." Id. at 571.
management's policy of refusing employment to any person (car cleaner, track repairman, bus driver) who is on a methadone-maintenance program was not violative of Title VII or the Equal Protection Clause of the Constitution. Mr. Justice Stevens, writing for the majority, stated that a prima facie violation of Title VII could be established by statistical evidence showing that the practice had the effect of denying the members of one race equal access to employment opportunities. Even assuming that the employees established the necessary disparate effect upon blacks, the Court ruled that the Authority rebutted the prima facie case by demonstrating that its narcotics rule, and its application to methadone users, was job related. The majority found that the Authority's rule bore a "manifest relationship to the employment in question."

(8). Religion

Sometimes an employee's lifestyle regarding his religious practices will disqualify him for employment. Illustrative is State of Minnesota v. Sports & Health Club,209 where management asked prospective employees whether they attended church, read the Bible, were married or divorced, prayed, engaged in pre-marital or extra-marital sex, believed in God, heaven or hell.210 Applicants were also asked whether they lived with a person of the opposite sex and whether they were antagonistic to the Bible regarding homosexuals and fornicators.211 To what extent can management attempt to convert others to their own beliefs when management's beliefs conflict with the employee's religious lifestyle? Can an employee clothe a particular lifestyle in the garb of religion and preclude management from effecting a termination? For example, the authors know of a high-school teacher who wears a crucifix upside down. When informed one day by a student that her cross was upside down, she responded that it was part of her Satanic faith. Is this protected under Title VII?212

208. Id. at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424 (1971)).
210. Id. at 847.
211. Id.
212. Cf. United States v. Board of Ed. for School Dist. of Philadelphia, 911 F.2d 882 (3d Cir. 1990) (upholding state law prohibiting teachers from wearing anything in classroom indicating membership in religious organization; argument that state law conflicted with Title VII and that district could have accommodated Muslim teacher's request to teach in head garb without undue hardship rejected). See also Cooper v. Eugene School Dist. No. 4J, 723 P.2d 298 (Or. 1986), appeal dismissed, 480 U.S. 942
Section 703(a)(2) of Title VII prohibits employment discrimination on the basis of religion. The 1972 amendments to the act define the term "religion" to include "all aspects of religious observance and practice, as well as belief" and provide that an employer cannot discriminate on the basis of religion unless the employer can demonstrate inability "to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."213 The difficulty comes in ascertaining whether conduct is a religious belief or practice. This is important because only true, bona fide religious beliefs and activities require employer accommodation.

Suppose an employee has a "religious" practice that is totally repugnant to management, Satanic worship, for example? Must management accommodate this employee on October 31st the feast of All Saints' Day or "All Hallow E'en"—the holy day for Satanic believers? In United States v. Seeger,214 and Welsh v. United States,215 two conscientious objector cases, the Supreme Court broadly defined religious practices to include moral or ethical beliefs as to what is right and wrong, sincerely held with the strength of traditional religious views. The EEOC has been liberal in its interpretation of what constitutes a religion, adopting the Court's definition in Seeger and Welsh. What is particularly distressing for the practitioner is the absence of a workable definition of religion. After Seeger and Welsh, one might define religion to include anything that an individual decides is religious in his own scheme of things. Such a definition would avoid the courts in the constitutional problem of entanglement with religion, but would create havoc in the workplace and due process problems for employers who would have no way of implementing such a broad and vague scheme if charged with an affirmative duty to accommodate an employee's religious observances.

As an alternative, one might determine that an individual's belief was not religious as a matter of law because it fell outside the protection intended by Title VII. This, however, would require a court to read the statute as protecting only certain established religion, and such a reading would have serious constitutional problems.

(1987) (upholding garb statute against claim that school district could have accommodated Sikh wearing white clothes and white turban while teaching, rejecting free exercise argument and stating that "rule against such religious dress is permissible to avoid the appearance of sectarian influence, favoritism, or official approval in the public school.") Id. at 308.

215. 398 U.S. 333, 339-40 (1970) (expanding Seeger to include moral or ethical beliefs which assume the role and function of a religion of a religion in the objector's life).
Noting the warning issued by the Supreme Court that "it is no business of the courts to say ... what is a religious practice or activity," the courts, with few exceptions, have accorded great deference to the religious claims of individuals under Title VII. This does not mean that management must accommodate an employee merely because an individual characterizes some form of conduct as religious and asserts that it is sincerely held. As stated by one court, if one were an avid sports fan, one could not use that enthusiasm, however intense, to require permission to attend a sports event. Dr. Timothy Leary once argued that the use of marijuana was necessary to the free exercise of his religion, yet no person would seriously contend that his conduct, if the basis of an employment decision, was a religion under Title VII. Many claims by employees can be characterized as mere philosophies that are not entitled to protection. For example, membership in the Ku Klux Klan has been held not to be a protected religious belief. As such, an individual who wants to attend a "religious" rally in Louisiana will not have to be accommodated.

The paradox here is apparent. At one extreme, there is no obligation to relieve an employee who wants to play golf on Sunday. No matter how sincere the employee is and no matter that the belief in the religion of golf occupies in the employee's life a position parallel to that of the belief sanctioned in Seeger, golf is not a religion under Title VII. At the other extreme, traditional, established tenets of religion, such as special Sabbath observance by Seventh Day Adventists, Orthodox Jews, or members of the Worldwide Church of God, are clearly religious for purpose of the statute and thus deserving of accommodation. The difficult cases are those where the employee claims that a practice is religious, but where the practice does not have the "ring of religion." In Wessling v. Kroger, a Sunday school teacher was not protected under the statute for leaving work early to assist her church in preparations for a Christmas play after being denied permission by management. Similarly, a federal employee, in Marcus v. Veterans Administration, did not establish religious discrimination in the form of retaliation for failing to attend an office Christmas party.

The lesson is that under Title VII an employee will not be able to take a particular facet of his lifestyle—sexual preference, political association,

221. 692 F.2d 759 (7th Cir. 1982).
speech, hair length, drug use, weight, or even prostitution and announce to management that it is a protected religious practice and expect a safe harbor from discharge, although, in certain cases, an employee may be able to don some form of religions garb or even maintain facial hair.

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223. See Judge Weighing Claims of a Religion Based on Sex, N.Y. TIMES, May 2, 1990, at A4-A5 (discussing a first amendment claim to rights to a religion based primarily on "absolution" through sex and "sacrifice" through a payment of money).

224. Karriem v. Oliver T. Carr Co., 38 Fair Empl. Prac. Cas. (BNA) 882 (D.D.C. 1985) (prohibiting employer from preventing Muslim security guard from wearing Islamic pin where pin bore no resemblance to badge of local police); EEOC Case No. 81-20 (Apr. 8, 1981), 27 Fair Empl. Prac. Cas. (BNA) 1809 (1981) (finding reasonable cause that statute violated by common carrier's refusal to consider for employment female of Pentecostal faith, which forbids women to wear pants, where carrier rejected applicant's offer to wear uniform-color skirts which would not interfere with operation of bus, and applicant had driven bus three years while wearing skirt); EEOC Dec. No. 71-779 (Dec. 21, 1970), 3 Fair Empl. Prac. Cas. (BNA) 172 (1970) (reasonable cause found by discharge of nurse whose "Old Catholic" faith requires her head to be covered at all times).

But see Goldman v. Weinberger, 475 U.S. 503, 570 (1986) (First Amendment does not prevent Air Force from applying uniform dress requirement in forbidding Jewish rabbi from wearing yarmulke while on duty); Abdush-Shahid v. New York State Narcotics Addiction Control Comm'n, 475 U.S. 503, 570 (N.Y. 1976) (upholding decision prohibiting rehabilitation officer from wearing 'Sunni Muslim dress' as part of religious garb).


But see Tamimi v. Howard Johnson Co., 807 F.2d 1550, 1555 (11th Cir. 1987) (no religious bias in dismissing female who refused to wear makeup where employee did not communicate religious belief to management); EEOC v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 91-92 (N.D. Ga. 1981) (no violation in refusal to consider Sikh job applicant for position of restaurant manager because of religious-based refusal to shave facial hair; employer could not accommodate where exemption from clean-shaven rule would affect company image and would impose risk of non-compliance with sanitation regulations); EEOC Dec. No. 71-1529 (May 9, 1971), 3 Fair Empl. Prac. Cas. (BNA) Cases 952 (1971) (reasonable cause did not exist to find violation of statute where employer refused to consider for employment male with shoulder-
because of a bona fide religion. Furthermore, an individual need not believe in any particular god to claim protection (atheism has been held to be religion),226 but the belief, to be cognizable under Title VII, must be based on some deity or have some spiritual type of focus, a necessary requirement if golf and marijuana use are to be excluded as "religions." We have found no cases on point, but case law suggests that even Satanic worship qualifies.

2. Civil Rights Acts of 1870 and 1871

The Civil Rights Act of 1870227 in relevant part provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings . . . ." The significance of this statute is that it applies to claims of discrimination in private employment apart from the federal remedy of Title VII.228 Indeed, in certain cases the Civil Rights Act of 1866 will cover certain forms of discrimination, such as alienage, which are not otherwise prohibited under Title VII.229 Finally, this statute, unlike Title VII, contains no stated limitations period in which a complaint must be filed. And unlike Title VII, backpay awards are not limited to two years. In view of the Supreme Court's decision in Patterson230 holding that section 1981 does not apply to a claim for a discriminatory discharge, 1981 has little utility in lifestyle cases for current employees.231

The Civil Rights Act of 1871,232 in relevant part, declares that "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

226. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).
230. See supra note 226.
231. The Civil Rights Act of 1991, discussed supra note 143, has reversed the Court's decision in Patterson by amending § 1981 to provide that "the term 'make and enforce contracts' includes . . . the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." The 1991 Act is significant for plaintiffs interested in obtaining unlimited punitive damages, which are not available under Title VII of the Civil Rights Act. The 1991 Act may accordingly have some relevance to plaintiffs that are able to assert a cause of action under § 1981.
Constitution and laws, shall be liable to the party, injured in an action at law . . . . " This section, similar to the Civil Rights Act of 1866, has been held applicable to claims of discrimination independent of Title VII. However, state action is required for a successful claim under the 1871 Act. Any claimed infringement of constitutional rights to free speech or association can be maintained against a governmental official who deprives an employee of a protected right.233

3. Rehabilitation Act of 1973

Individuals with a physical or mental handicap may be protected by the Vocational Rehabilitation Act of 1973, as amended,254 or state law prohibitions against handicap discrimination applicable to private or public employers.255

Section 503 of the Rehabilitation Act requires that any contract in excess of $2,500 entered into by any federal department or agency for the procurement of personal property and nonpersonal services (including construction) include a provision requiring contractors to seek to employ handicapped individuals.256 On the other hand, contractors with transactions in excess of $50,000 and who employ 50 or more employees must maintain a written affirmative action program within 120 days after receiving the contract, and must update the program annually.257 Although section 503 requires affirmative action programs to hire and advance qualified handicapped employees, these programs do not require goals and timetables.258 Section 503 does not outlaw discrimination but, rather, requires affirmative action covenants in government contracts. The current regulations specify that a complaint may be filed with the Director of the Labor Department’s Office of Federal Contract Compliance Programs (OFFCP) and that the Director is responsible for investigating the complaints.259 Section 503 does not provide a private right of action for handicapped individuals against the Federal government or federal contractors.260

235. All states prohibit discrimination against the handicapped. Puerto Rico and the Virgin Islands have no state statute. Alabama, Arkansas, and Mississippi prohibit handicap discrimination only by public employers. ALA. Code § 21-7-8 (1988); ARK. CODE ANN. § 20-14-301(b) (Michie 1988); MISS. CODE ANN. § 25-9-149 (1989).
237. Id.
238. Id.
239. Id.
240. Id.
Section 504 of the statute prohibits discrimination against any individual on the basis of handicap in any program receiving federal financial assistance. Specifically, the statute provides that:

No otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.241

A handicapped individual is defined as any person who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."242 The applicable regulations define "major life activity" as "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."243 Having "a record of such impairment" is defined as "a history of, or has been classified (or misclassified) as having a . . . physical impairment that substantially limits one or more major life activities."244 "Regarded as having such an impairment" is defined as:

(1) has a physical . . . impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical impairment that substantially limits major life activities only as a result of the attitude of an employer toward such an impairment; or (3) has none of the impairments defined in 29 C.F.R. sect. 1613.702(b) but is treated by an employer as having such an impairment.245

The term "handicap" does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such alcohol or drug abuse, would constitute a direct threat to the property or the safety of others.246 Employees or applicants for employment who test positive for drugs are accordingly not handicapped under the Act.247

243. 29 C.F.R. § 1613.702(c) (1988).
244. Id. § 1613.702(d).
245. Id. § 1613.702(e).
There is no affirmative action requirement in section 504. A handicapped individual may bring a court action on his own behalf where a violation of section 504 is claimed, regardless of whether the primary objective of the federal funds is to provide employment opportunities.248 The burden of proof in Rehabilitation Act cases follows the scheme under Title VII case law.249

The significance of this statute for labor and management is illustrated by Southeastern Community College v. Davis,250 a decision involving a post-secondary institution. During an initial interview of a person seeking admission to a nursing program, it became apparent to the interviewer that Davis was having trouble hearing the questions being asked of her.251 Upon further investigation, Davis was found to have a severe hearing impairment.252 An adjustment of her hearing aid was made, but even this allowed only the hearing of "gross sound" occurrences.253 Lip reading would be necessary for Davis' full understanding of what was being said.254 The admission committee subsequently rejected Davis' application for admittance into the program reasoning that it would be detrimental to patient safety to allow Davis to become a nurse.255 Davis then filed a complaint in federal court alleging both a violation of section 504 and a denial of equal protection and due process.

The Supreme Court held "otherwise qualified" to mean "qualified in spite of the handicap" rather than "qualified except for the handicap." Therefore, "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."256

While the question whether an individual meets the statutory definition of handicapped must be considered on a case-by-case basis, the implications of Davis for employers is clear. Management may properly take into account the physical requirements of a job in all phases of employment. An employee

248. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (Supreme Court approved the availability of backpay recovery by a private plaintiff under section 504 without affirmatively declaring the existence of a private cause of action).


251. Id. at 400.

252. Id. at 401.

253. Id.

254. Id.

255. Id. at 401-02.

256. Id. at 405-06.
facing an "insurmountable impairment barrier," i.e., where the handicap itself prevents the individual from fulfilling the essential requirements of the position, is not "otherwise qualified" for the job under section 504. Moreover, a fair reading of Davis is that an individual facing a "surmountable employment barrier," a barrier to job performance that can be overcome with accommodation, is not otherwise qualified if accommodation requires a substantial modification in the requirements of the job, or would result in an undue administrative and financial burden to the employer. The burden of proving inability to accommodate rests with the employer. Factors considered in assessing hardship include the size of the program, the type and duration of the program, and the nature and cost of accommodation. A business necessity test is used in determining whether accommodation of a handicapped individual is required. Accordingly, an employer (covered by the statute) may not deny any employment or training opportunity to a qualified handicapped employee, applicant, or participant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee.

a. AIDS as a Handicap under the Rehabilitation Act

Suppose management only wants healthy employees? Can management (assuming coverage by the Act) exclude an AIDS victim (someone who is HIV-infected and shows signs of AIDS-related diseases) from employment consideration? The question of whether AIDS is a handicap under the Federal Rehabilitation Act has not been addressed by the Supreme Court. However, in view of the Court's 1987 opinion in School Board of Nassau County, Florida v. Arline, there is every reason to believe that employers cannot take adverse employment action against an AIDS victim based simply upon an individual's ability to transmit the disease or fear or contagion (coworkers, customers, public). In that case plaintiff Arline, an elementary


258. "AIDS is a clinical definition developed in 1982 by the Public Health Service's Centers for Disease Control to allow monitoring of conditions typically associated with severe breakdown of immunologic defenses against viral, bacterial and parasitic infections, subsequently found to be caused by [the Human Immunodeficiency Virus (HIV)]." Local 1812, AFGE v. U.S. Dep't of State, 662 F. Supp. 50, 52 n.2 (D.D.C. 1987).

school teacher, was discharged after suffering a third relapse of tuberculosis within two years.\textsuperscript{260} Arline sued the school district under Section 504 of the Rehabilitation Act. The Court ruled that in defining a "handicapped individual" the contagious effects of the individual's disease upon others cannot be meaningfully distinguished from the disease's physical effects upon the individual.\textsuperscript{261} Thus, it would be unfair, reasoned the Court, to allow an employer to seize upon the distinction between the effects of the disease upon others and the effects of the disease upon the individual, at least where the contagiousness and the individual's physical impairment result from the same underlying condition.\textsuperscript{262} According to the Court, the Act does not exclude individuals based upon fear of contagiousness.

According to the regulations promulgated by the Department of Health and Human Services (HHS), physical or mental impairments include: "(A) any psychological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine."\textsuperscript{263}

In addition, the Civil Rights Restoration Act of 1987,\textsuperscript{264} which codified the decision in \textit{Arline}, specifically provides that discrimination against otherwise qualified handicapped individuals solely on the basis that the handicap is a contagious disease is impermissible.\textsuperscript{265} In 1988 the Department of Justice, reversing an earlier position, likewise concluded that AIDS is a handicap under the Act.\textsuperscript{266}

\begin{enumerate}
\item Id. at 276.
\item Id. at 282.
\item Id.
\item 45 C.F.R. § 84.3(j)(2)(i) (1988).
\item The relevant provision specifically provides:
\begin{quote}
For the purpose of sections 503 and 504, as such sections relate to employment, ["individual with handicaps"] does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health and safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.
\end{quote}
\end{enumerate}
Under current medical knowledge, AIDS does not present a threat of infection to coworkers or customers through casual workplace contact. Accordingly, most AIDS victims would be considered "qualified" to hold jobs until the disease renders them physically incapable of working.267 This was the position taken by the Ninth Circuit in Chalk v. United States District Court Central District of California,268 where the court of appeals ruled that a teacher of the hearing impaired, diagnosed as having AIDS, could not be denied his former teaching position in favor of an administrative assignment. If, however, AIDS is later determined to present a significant threat of infection to coworkers or customers, management could arguably discriminate against AIDS victims based on fear of contagion. At any rate, numerous states have enacted laws on the subject of HIV and AIDS-related diseases,269 most of which deal with testing and the confidentiality of test results.270


268. 840 F.2d 701, 705 (9th Cir. 1988). See also Doe v. Centinela Hospital, 57 U.S.L.W. 2034 (C.D. Cal. 1988) (holding that seropositive persons are "handicapped" under Rehabilitation Act because they are "regarded as having an impairment.").


270. See, e.g., FLA. STAT. ANN. § 760.50(3)(a)-(c) (West 1989) (prohibiting employers from requiring HIV-related tests as a condition of hiring, promotion or continued employment, unless absence of HIV infection is a bona fide occupational qualification BFOQ for the job in question); HAW. REV. STAT. § 325-101(c) (1989) (stating that "no person shall be compelled . . . to disclose whether that person has been tested for the presence of HIV infection, in order to obtain or maintain . . . employment."); IOWA CODE § 601A.6(1)(d) (1989) (prohibiting testing as a condition
Some states have included AIDS within the definition of physical handicap for purposes of their fair employment or civil rights statutes. As a result, an employer living in a jurisdiction with such a statute cannot take adverse action because an individual is afflicted with full-blown AIDS or is sero-positive (HIV-infected).

Whether a public-sector employer can compel an employee to submit to an AIDS test is a more difficult question. Although distinguishable on their facts, the two cases to reach the courts of appeal are arguably split on the

271. See, e.g., Md. REG. CODE ANN. § 14.03.02.01-14.03.02.05 (1986) (declaring that HIV infection physical handicap under Maryland law); Mo. REV. STAT. § 191.655.1 (1986) (including AIDS and AIDS-related complex (ARC) within definition of handicap); PA. HUMAN RTS. COMM. DIRECTIVE, REAFFIRMATION OF PHRC AIDS POLICY, POLICY No 88-01 (June 2, 1988) (declaring AIDS a handicap for person regarded or treated as having AIDS).

272. Query whether a symptomless HIV-infected person is handicapped under the Rehabilitation Act? See Local 1812, AFGE v. United States Dep't of State, 662 F. Supp. 50, 54 (D.D.C. 1987) (where the court stated that an HIV-infected person is not an "otherwise qualified individual" for worldwide Foreign Service duty).

Are all HIV carriers physically impaired because of measurable deficiencies in their immune systems even where disease symptoms have not yet developed? Aline appears to require that management make an individual determination and, thus, an employer covered under the Act cannot make a generalization with respect to all HIV-infected persons.
issue. Employers who disclose the results of an employee's test risk tort liability for invasion of privacy.

It is of note that arbitrators, when deciding AIDS cases, apply traditional notions of just cause, and require management to demonstrate that the afflicted employee cannot perform the assigned work before dismissal is allowed. In this respect arbitrators track the intent of the Act.

b. Obesity as a Disability under Section 504 of the Rehabilitation Act

While merely being overweight is not a handicap under the Rehabilitation Act, no court has held that obesity can never be a handicap under Section 504 of the Act. Most courts, never bothering to discuss the difference between severe or morbid obesity, obesity, and simply being overweight.

273. Compare Glover v. East Neb. Community Office of Retardation, 867 F.2d 461, 464 (8th Cir.), cert. denied, 493 U.S. 932 (1989) (state administrative agency's policy of requiring certain employees to submit to AIDS and hepatitis B test in order to provide safe environment for mentally retarded clients unreasonable search and seizure) with Leckelt v. Board of Comm'rs, 909 F.2d 820, 827 (5th Cir. 1990) (allowing dismissal of male homosexual nurse, who had long-term relationship with man who ultimately dies from AIDS-related condition, for failing to disclose results of AIDS test).

See also Doe v. Attorney General, 723 F. Supp 452 (N.D. Cal. 1989) (upholding testing for physician by health care facility); Local 1812, AFGE v. United States Dep't of State, 662 F. Supp 50 53 (D.D.C. 1987) (allowing testing by State Department of Foreign Service employees).


276. We are thankful to Lynette Labinger, of Roney & Labinger, the Rhode Island Affiliate of the American Civil Liberties Union, Providence, Rhode Island, for sharing their pleadings and motions with us from Cook v. State of Rhode Island, C.A. 90-0560-T, a case involving obesity under the Rehabilitation Act.


278. As stated by one court, "the difference between 'obesity' and 'overweight' is not merely one of semantics." Id. at 95. Obesity is not simply a physical characteristic but a clinically ascertainable and observable medical condition. See, e.g., State Division of Human Rights v. Xerox Corp., 480 N.E.2d 695, 698 (N.Y. Ct. App. 1985) ("[T]he Commissioner could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the respondent's own physician, constituted an impairment and therefore a disability within
have held that "obesity" is not a handicap, and thus failing to hire or discharging an individual based on his weight is not unlawful discrimination in violation of the Act. Courts have based this conclusion on the fact that the obesity adversely affects job performance, and that employers are entitled to control productivity by refusing to hire or by discharging those employees who are likely to be absent often and who are less productive. Additionally, even though the statute does not differentiate between voluntary and involuntary conditions, courts have found that obesity should not be considered a handicap because the condition is able to be altered, unlike other handicaps such as lameness or blindness.

Suppose that a person is clinically obese, or regarded by the employer as clinically obese, or has a record of being clinically obese, through no fault of the individual, and the obesity substantially limits a major life activity (walking, breathing, or even working, for example)? Is that person handicapped under the Act? There is some reason to conclude that, under these circumstances, severe or morbid obesity is a handicap under the statute. In Civil Service Commission of Pittsburgh v. Pennsylvania Human Relations Commission, the court relied on a "perceived handicap" analysis to affirm an agency finding that obesity is a handicap under Pennsylvania law. A comparison of the Pennsylvania statute with the Rehabilitation Act indicates that the state statute tracked the Rehabilitation Act's definition of handicap. Similarly, in State Division of Human Rights v. Xerox, the Court of Appeals for New York held that a female, 5 feet, 6 inches and weighing 249 pounds, seeking a job as a computer programmer, suffered from a "disability"

the contemplation of the statute.

Being overweight, on the other hand, is a lay term that could refer to being above the suggested weight and height tables.


281. Philadelphia Elec. Co., 448 A.2d at 707 (accepting principle that morbid obesity could fall within definition of handicap or disability under state law, but holding that it was not a handicap per se).


283. 480 N.E.2d 695, 698 (N.Y. 1985).
under New York's Human Rights Law (which included medical impairments in its definition of disability). What is particularly interesting is that the court rejected management's arguments that it could deny employment because of the statistical likelihood that Catherine McDermott's obese condition would produce impairments in the future.\textsuperscript{284} The court also rejected the company's argument that the statute applied only to immutable disabilities and not to those which are correctable.\textsuperscript{285}

Case law suggests that a claim that clinical obesity is a handicap should not be dismissed by a trial court for failure to state a claim unless it is clear to the court that relief could not be granted under the Act under any set of facts that could be proved consistently with the allegations.\textsuperscript{286} Consistent with the decisions of the Pennsylvania and New York courts, before rejecting a claim of handicap discrimination regarding obesity, an individualized, fact-intensive examination should be conducted. The fact that obesity is not included in the federal definition promulgated by HHS is not dispositive of the issue.

c. Drug and Alcohol Addiction

As noted, under the federal statute the term "handicap" does not include any individual who is an alcohol or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question.\textsuperscript{287} Thus, drug addicts and alcoholics are not categorically excluded from coverage of the Rehabilitation Act. They are excluded only if their current use prevents them from performing the duties of the job or if their employment "would constitute a direct threat to property or the safety of others."\textsuperscript{288}

\textsuperscript{284} Id. at 697.

\textsuperscript{285} Id. at 698.

\textsuperscript{286} Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").


\textsuperscript{288} Id. Query under what conditions would addiction to nicotine would prevent someone from currently performing a job or would constitute a direct threat to property or to the safety of others? Under the law we see no reason why management cannot exclude smokers as a class because of their economic impact on the organization. \textit{See} Leila B. Boulton, Comment, \textit{Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries}, 36 CATH. U.L. REV. 643, 645 n.11 (1987) (asserting that medical care and lost productivity costs due to cigarette smoking total about $65,000,000,000 annually).
Similarly, several states have statutes that expressly exclude alcohol or drug abusers from protection under their handicap acts. In those states that do not address the issue, the courts are split. We know of no case that does not allow for the dismissal of an employee who reports for work under the influence of drugs or alcohol.

d. Smoking as a Handicap under the Rehabilitation Act

It is unclear whether smoking caused by nicotine addiction is a handicap under the Rehabilitation Act. Under the Court's test in Arline, an argument can be advanced that a long-time smoker or, alternatively, one addicted to nicotine, is a handicapped individual because he has a "physical impairment" of a "body system" that limits the "life activities" of breathing and working. Under this logic, management would have to accommodate smokers. One commentator, points out that even if smoking is found to be a handicap, smoke-cessation classes, restricted smoking areas, and distributing nicotine gum might be considered reasonable accommodation for employees who smoke.


292. Joan Vogel, Comment, Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?, 62 NOTRE
An alternative remedy for a smoker who has been excluded from employment consideration or otherwise discriminated against because of his addiction is a Title VII suit under a disparate impact theory. If it can be demonstrated that blacks as a class have a higher percentage of smokers than whites, management will be compelled to demonstrate a business necessity test for an off-duty, no-smoking rule which, in many cases, may be a difficult burden for management to meet.

4. The Americans With Disabilities Act

On July 13, 1990, Congress enacted the Americans with Disabilities Act (ADA) which broadened the scope of protection available under the Rehabilitation Act (which covers only employers who contract with the federal government). While the Act regulates a variety of areas including real estate transactions and public accommodations, the provisions dealing with employment are particularly important for employers attempting to regulate their employees' lifestyle or, alternatively, divest themselves of employees whose disabilities may result in higher medical or insurance costs.

The Act defines an employer as any person or his agent having 15 or more employees. Employers with less than 15 employees are not covered by the Act. The ADA excludes the federal government or any corporation owned by the federal government. All other public employers are covered.

The ADA protects "qualified individuals with disabilities." The statute provides that a qualified individual with a disability may not be discriminated against if with "reasonable accommodation" the individual can


293. See the discussion of disparate impact theory, supra notes 138-41 and accompanying text.

294. In 1986, the Centers for Disease Control found that black men smoked at a rate of 32.5 percent while white men smoked at 29.3 percent. Black women smoked at 25.1 percent compared to 23.7 percent for white women. See John C. Fox and Bernadette M. Davison, Smoking in the Workplace: Accommodating Diversity, LAB. L. J. 387, 388 n. 5 (1989) (citing Cigarette Smoking in the United States, 1986, MORBIDITY AND MORTALITY WEEKLY REPORT 582 September 11, 1987).


296. 42 U.S.C. § 12111(A) (Supp. 1990); 29 C.F.R. § 1630.2(e)(1) (1990). The provisions of the ADA do not become effective until July 26, 1992, for those employers with 25 or more employees. The effective date for those employers with less than 25 but more than 14 is July 26, 1994.


perform the essential functions of the position sought or held. The Act defines a qualified individual with a disability as one:

"who with reasonable modification of rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provisions of auxiliary aids and services, meets the essential eligibility for participation in programs or activities or receipt of service provided by a public entity." This definition also protects the qualified individual from hiring and employment practices that are discriminatory.

Under the ADA a "covered disability" is defined as a "physical or mental impairment that substantially limits one or more major life activities." A record of prior impairment, or being regarded as having such an impairment is also considered a covered disability. Physical or mental impairments include: (1) physiological disorders or conditions; (2) cosmetic disfigurement; (3) anatomical loss affecting a number of designated systems; (4) mental or psychological disorders, including (a) mental retardation, (b) organic brain syndrome, (c) emotional illness, (d) mental illness, (e) special learning disabilities; (5) disease or infections, including HIV infection (AIDS), cancer, heart disease, drug addiction, and alcoholism.

A physical or mental impairment is not a disability if it does not substantially limit one or more "major life activities." According to the ADA, a major life activity includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, reaching, learning, and working." To have a disability, one must have an actual physical or mental impairment and not simply a physical condition. Thus, an individual with a visual impairment would be covered but a person with two broken legs would not be covered even though that condition would impair working. Further, the disability must be serious enough to affect some form of major life activity.

The second and third definition of disability, which tracks the definition in the Rehabilitation Act, includes persons with a record or history of impairment and persons regarded as being disabled. The person with a history of past disability is protected by the ADA, even if he has recovered from the impairment. The Act covers individuals who associate with people with disabilities. Thus, if a person is excluded from employment because he lives

299. Id.
300. Id. § 12131(2).
301. Id. § 12102(2)A.
302. Id. § 12102(2)B, C.
304. Id. § 1630.2(b)2.
305. Id. § 1630.2(g)(i).
306. Id. § 1630.2(i).
307. Id. § 1630.2(g)(2).
with an HIV-infected person, the Act provides a safe harbor if management discriminates against that person because of that association.

A number of disabilities are excluded from the statute. Section 114(a) of the Act states that employees or applicants engaged in illegal drug use are excluded from the Act's protection. The "drug user" exclusion applies to any individual whose drug use is current. Thus, a person who has successfully completed a drug rehabilitation program and is no longer using drugs is protected under the Act. Similarly, a person who is erroneously regarded as an illegal drug user is protected. The Act allows testing for illegal drugs.

Also specifically excluded are homosexuals, bisexuals, transsexuals, transvestites, pedophiles, exhibitionists, voyeurs, kleptomaniacs, compulsive gamblers, pyromaniacs, and persons with other sexual disorders. Employees whose lifestyles include any of the above are not protected by the ADA.

What is management prohibited from doing? The ADA prohibits a covered employer from discrimination with respect to hiring an employee against "qualified individuals with disabilities" because of the person's disability. The ADA lists a number of different forms of discrimination, including (1) limiting, segregating or classifying disabled persons; (2) enacting standards, criteria, and methods of administration that effectuate discrimination; (3) enacting standards, criteria, and methods of administration that effectuate discrimination; (4) excluding or denying jobs or benefits because of a relationship to individuals with disabilities; (5) using qualification standards, employment tests, all other selection criteria that effectuate discrimination. Employers' medical examinations cannot ask applicants if they have a disability or require applicants to take a medical exam before a job is offered. However, after offering a job the employer can require the employee to take a medical exam but only if required of all employees and the results are kept confidential. Of course, management can always ask an applicant if he can perform the job.

Finally, the ADA provides that failure to make reasonable accommodation may not be actionable if there would be undue hardship on the employer. The Act defines undue hardship as an act requiring significant difficulty or expense. If a qualified individual is discriminated against in violation of

311. Id. § 12112(b)(2).
312. Id. § 12112(b)(3)A.
313. Id. § 12112(b)4.
314. Id. § 12112(b)6.
315. Id. § 12111(10)(B)(i); (iii), (iv). Various factors taken into account include: (1) the nature of the cost accommodation required; (2) the overall financial resources
the ADA, numerous remedies are available. Temporary or preliminary relief, such as temporary restraining orders, permanent injunctions, additional backpay, and equitable relief are available. The employer may also be forced to pay the employee’s attorney’s fees if a violation is found. 316

5. Section 510 of the Employee Retirement Income Security Act (ERISA)

An employee who can establish a causal connection between a medical risk and the loss of benefits and an adverse employment action may have relief under the Employee Retirement Income Security Act (ERISA). Section 510 of ERISA, 317 makes it unlawful:

for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, [or this title] . . . . It shall be unlawful for any person to discharge, fine, suspend, expel or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this [Act] . . . . 318

Section 510 is relevant because it may provide redress for employees who are dismissed or otherwise discriminated against because they are considered insurance or medical risks. 319 Section 510 also applies to beneficiaries—a person designated by a participant or one entitled to receive benefits under the terms of an employee’s benefit plan. It does not cover job applicants or employees who have no benefits. Accordingly, an applicant who is refused

of the facility invoked in the provision of the reasonable accommodation; (3) the number of persons employed at the facility; (4) the effect of the reasonable accommodation on expenses and resources; (5) the impact of the accommodation on the operation of the facility; (6) the overall financial resources of the covered entity; (7) the overall size of the covered entity’s business with respect to the number of employees; (8) the number, type, and location of its facilities; (9) the type of operations of the covered entity, including the composition, structure, and function of its workforce; (10) the geographic separateness of the facility; and (11) the administration or fiscal relationships of the facility to the covered entity. Id. All factors should be taken into account when determining whether a particular accommodation is reasonable under the ADA.

316. Id. § 12117(a).
318. Id.
319. See generally Vogel, supra note 283, at 1024.
employment because of his anticipated medical costs has no cause of action under section 510.

In a decision with far-reaching implications for employees with AIDS or drug or alcohol problems, the Fifth Circuit, in *McGann v. H & H Music Co.*,320 ruled that a self-insured employer can change its policy to reduce coverage for workers who develop costly illnesses.321 John McGann, an employee of H & H Music, discovered that he was afflicted with AIDS in December of 1987.322 McGann submitted his first claims for reimbursement under the employer's group medical plan and informed management that he had AIDS.323 In July 1988, H & H Music informed its employees that effective August 1, 1988 changes would be made in their medical coverage.324 These changes included limiting benefits for AIDS-related claims to a lifetime maximum of $5,000.325 Before the change, the lifetime coverage was $1 million.326 Other changes included increased individual and family deductibles, elimination of coverage for chemical dependency treatment, adoption of a preferred provider plan, and increased contribution requests.327 No limitation was placed on any other catastrophic illness.328 H & H Music also became a self-insurer under the new plan.329 By January 1990, McGann had exhausted the $5,000 limit on coverage for his illness.

In August 1989, McGann sued H & H Music under section 510 alleging that the company discriminated against him in violation of both prohibitions of section 510. He claimed that the provision limiting coverage for AIDS-related expenses was directed specifically at him in retaliation for exercising his rights under the plan and for the purpose of interfering with the attainment of a right to which he may become entitled as a beneficiary under the plan.330 The employer, conceding the factual allegations of McGann's complaint, moved for summary judgment. The district court granted summary judgment,331 reasoning that management had an absolute right to alter the terms of the plan, regardless of intent. The district court also held that even if the issue of discriminatory motive were relevant, summary judgment would

320. 946 F.2d 401 (5th Cir. 1991).
321. Id. at 402-05.
322. Id. at 402.
323. Id.
324. Id.
325. Id.
326. Id.
327. Id.
328. Id.
329. Id.
330. Id.
331. Id.
still be proper because the employer’s motive was to ensure the future existence of the plan and not specifically to retaliate against McGann.332

In sustaining the lower court, the appellate court pointed out that, at trial, McGann would bear the burden of proving the existence of the employer’s discriminatory intent as an element of either of his claims.333 McGann conceded that the reduction in AIDS benefits will apply equally to all employees filing AIDS-related claims and the effect of this reduction will not be felt only by him. Also, he did not allege that the company’s reduction had any other purpose other than to reduce costs. As such, McGann could not make the necessary showing sufficient to show that management had a specific intent to retaliate against him to survive summary judgment.

Similarly, McGann failed to adduce evidence of the existence of "any right to which [he] may become entitled under the plan."334 The court made it clear that the right referred to in section 510 "is not simply any right to which an employee may conceivably become entitled, but rather any right to which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer."335 There was nothing to indicate that H & H Music ever promised that the $1 million coverage limit was permanent and there was no evidence that any oral or written representations were made to McGann that the coverage limit would be lowered. The court refused to rule that section 510 prohibits any discrimination in the alteration of an employee benefit plan that results in an identifiable employee or group of employees being treated differently than other employees. Reflecting the better weight of authority, the court concluded:

[Section 510] does not prohibit welfare plan discrimination between or among categories of diseases. Section 510 does not mandate that if some, or most, or virtually all catastrophic illnesses are covered, AIDS (or any other particular catastrophic illness) must be among them. It does not prohibit an employer from electing not to cover or continue to cover AIDS, while covering or continuing to cover other catastrophic illnesses, even though the employer's decision in this respect may stem from some "prejudice" against AIDS or its victims generally. The same, of course, is true of any other disease and its victims. That sort of "discrimination" is simply not addressed by section 510.336

332. Id.
333. Id. at 403-04.
334. Id. at 404.
335. Id. at 404-05.
336. Id. at 405.
The implications of *McGann*, and similar cases, are staggering for employees who develop a catastrophic illness and work for an employer that is self insured. Under federal law, employers are free to discriminate in the creation, alteration or termination of employee benefits plans. Employers are not free to retaliate against an employee, such as effecting a dismissal, or to deprive an employee of an *existing* right. A fair reading of the law is that companies that adopt self-insurance programs, and thus are able to avoid state regulation, are, in effect, free to classify risks and eliminate coverage at whim. It is difficult to imagine any employer who cannot articulate a legitimate business purpose, such as saving money, for eliminating coverage.

**B. State Statutes**

1. State and Local Fair Employment Statutes

Virtually all states have enacted statutes or ordinances prohibiting discrimination on the basis of race, color, religion, sex, national origin, or age. Because Title VII requires the EEOC to initially defer processing charges of employment discrimination to those states that have enacted a comprehensive fair employment statute (defined as a "706 agency"), the operation of a state or local statute should have particular relevance for the labor or management practitioner. As noted, state statutes are important to employees with unconventional lifestyles because many states will cover forms of discrimination (marital status and sexual orientation, for example) which are excluded under Title VII.

2. Developments in State Laws Aimed at Preserving an Employee’s Privacy-Type Rights

Some states have enacted statutes or have constitutions that apply constitutional-type rights, such as privacy, to all employees, regardless of

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338. Over half of all employees work for companies that are partially or fully self insured. R. Pear, *Court Approves Cuts in Benefits in Costly Illness*, THE N.Y. TIMES Nov. 27, 1991 at 1.


340. See *supra* notes 1-3 and accompanying text.
whether they work for a public or private sector employer. When applicable, employees may find a safe harbor for lifestyle protection.

IV. CONSTITUTIONAL STANDARDS

To what extent is the constitution a "safe harbor" for employees with bizarre or unconventional lifestyles? Suppose management disapproves of the sexual partners, associations, or speech of its employees? Can a public employer dismiss or fail to hire such employees? This section addresses the constitution as a limitation on management's power to regulate the lifestyles of its employees.

Background. A public-sector employee dismissed because of off-duty lifestyle conduct may be protected under the constitution. Specifically, at the state level the Fourteenth Amendment prohibits deprivations of life, liberty, or property without due process of law. Application of this prohibition requires a two-stage analysis: a court will first determine whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty, or property"; if protected interests are implicated, the court then decides what procedures constitute "due process of law" or, stated differently, the type of notice and hearing to which the individual is entitled under the amendment. As the Supreme Court has noted, "The


The Fourteenth Amendment provides in part that "[no state] shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV. The Fifth Amendment is a limitation only upon the actions of the federal government, Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), and in part provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. It is settled that although not explicitly drafted in the language of the Fifth Amendment, the due process clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating among individuals or groups. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

While most case law regarding off-duty conduct involves a state as employer, the discussion in this section has applicability to the federal government as employer although, in many instances, the forum for resolving federal employee constitutional claims will not be the courts but arbitration under a collective bargaining agreement. See 5 U.S.C. § 7121 (1988) (providing that all collective bargaining agreements in the
question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.\textsuperscript{343}

The significance of concluding that an individual has a protected property or liberty interest in some aspect of his employment is that he cannot be denied that interest without due process of law. From a procedural standpoint, an employee facing discipline or discharge for questionable conduct who has some property or liberty interest in continued employment is entitled to procedural due process. Equally important, substantive guarantees are also inherent in the due process clause. Justice John Harlan, rejecting the view that the due process clause is a guarantee only of procedural fairness, declared that the due process clause contains both a substantive and a procedural component. As stated by Justice Harlan, if due process was simply "a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Thus the guarantees of due process, . . . have in this country "become bulwarks also against arbitrary legislation."\textsuperscript{344}

In a nutshell, substantive due process means fundamental fairness. The test applied for finding a violation of substantive due process involves a "balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals.\textsuperscript{345} Thus,

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\textsuperscript{343} Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
\textsuperscript{344} Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (citations omitted) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).
\textsuperscript{345} Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).
\end{flushleft}
an employee with an unconventional lifestyle asserting a violation of due process must convince a court that his conduct encompasses a property or liberty interest worthy of constitutional protection.

A. Property Interests

In a 1985 case the Supreme Court declared that property interests "are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'"346 The leading case in this area continues to be Board of Regents v. Roth,347 where the Court discussed the basis for a public employee's claim of a property right in continued employment. In that case a university professor argued that his employer's failure to provide any reason or hearing for his nonrenewal violated procedural due process.348 The Court reasoned that, prior to determining what form of hearing is required under the due process clause, it must first be ascertained whether a liberty or property interest has been denied.349 Although the Court recognized that the re-employment of Roth by the university was of major concern to him, the Court nevertheless held that the nonrenewal decision violated neither a liberty nor a property interest where the state did not make any charge that might seriously damage Roth's standing in the community or impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment.350 The Court further stated that in order to have a property interest in a benefit one must have more than an abstract demand for it; a "legitimate claim of entitlement" is mandated.351 Roth's property interest in employment, the Court reasoned, was created and defined in the terms of his employment, and since the university made no provisions whatsoever for renewal, no procedural infirmity existed in the denial of a hearing.

In Perry v. Sindermann,352 a companion case to Roth, the Court made it clear that implied promises may give rise to a property interest under the due process clause. Sindermann involved another professor serving on a year-to-year basis whose employment was not renewed and who had not been granted a hearing. The Court ruled that a potential property interest in

347. 408 U.S. 564 (1972).
348. Id. at 565.
349. Id.
350. Id.
351. Id. at 577.
352. 408 U.S. 593 (1972).
continued employment existed where the university had a de facto tenure system for professors after seven or more years of service. In remanding the case to the district court, the Court found that Sindermann, who had taught at a state college for 10 years, must be accorded the opportunity to establish that his property interest was secured by explicit rules and understandings of the institution.

The Court, in Bishop v. Wood, stated that where a property interest is created by state law, the issue of what satisfies due process is determined by reference to the appropriate state statute creating that right. Of particular note in the employment area, the Court declared that the due process clause "is not a guarantee against incorrect or ill-advised personnel decisions." More recently, however, the Court said in 1985 that "[w]hile the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'

B. Liberty Interests

In Meyer v. Nebraska, the Supreme Court, discussing the nature of a liberty interest, stated:

[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

The Supreme Court, in a series of cases, has placed several limitations upon a public employee's ability to prove a deprivation of liberty under the Constitution. The Court has held that in order to make a successful claim

353. Id.
354. Id. at 602-03.
356. Id. at 350.
358. 262 U.S. 390 (1923).
359. Id. at 399.
360. In Robb v. City of Philadelphia, 733 F.2d 286, 294 (1984), the Third Circuit stated that

[a]n employment action implicates a fourteenth amendment liberty interest only if it (1) is based on a 'charge against [the individual] that might
of liberty deprivation, an employee must demonstrate that the dismissal resulted in the publication of information that either put the employee's reputation or integrity at stake, or was stigmatizing. The information must have the general effect of curtailing the employee's future freedom of choice or action. A liberty interest is not implicated merely because nonretention on one job, taken alone, might make an individual somewhat less attractive to other employers. As pointed out by one commentator, "To rise to the level of a deprivation of liberty, the foreclosure of other employment opportunities [has] to be more severe, like the foreclosure achieved through regulations barring an employee from future employment in a particular jurisdiction." Simply stated, "[t]he mere fact of discharge from a government position does not deprive a person of a liberty interest," although it may deprive an individual of a property interest, as in the case of a tenured public employee.

In Paul v. Davis, and Siegert v. Gilley, the Court held that reputation alone is not a protected liberty interest when the action is not accompanied by an alteration of the individual's legal status. As such, a defamation unaccompanied by an adverse personnel action or, alternatively, minor "personnel actions—such as reprimands, internal transfers, and investigatory reports now escape procedural scrutiny under" the Davis and Gilley decisions.

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seriously damage his standing and associations in the community . . . for example, that he had been guilty of dishonesty, or immorality" or (2) "impose[s] on him a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities."

Id. at 294 (citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972)).

362. Roth, 408 U.S. at 573.
363. Sipes v. United States, 744 F.2d 1418, 1422 (10th Cir. 1984) ("a liberty interest may be impinged if the Government 'imposed on him a stigma or disability that foreclosed his freedom to take advantage of other employment opportunities.'") (quoting Roth, 408 U.S. at 573, citing Asbill v. Choctaw Housing Auth., 726 F.2d 1499 (10th Cir. 1984) (no denial of liberty interest because intra-governmental dissemination of reasons for employee's dismissal does not constitute "published")).
364. Roth, 408 U.S. at 574 n.13.
368. 111 S. Ct. 1789 (1991) (stating that "[d]efamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation.")
369. See Developments in the Law, supra note 338, at 1790.
C. What Process Is Due?

Once an individual proves that a property or liberty interest has been impermissibly infringed upon by the state, a determination must be made as to what procedural process is due. It is often the case that a state statute, an ordinance, or even a collective bargaining agreement sets out the specific procedures to be followed where an individual has been adversely affected. In this situation the procedures must be substantially followed and must not be less restrictive than the minimal constitutional constraints of due process.

With respect to the minimal constitutional guarantees, the Court, as early as 1854, made it clear that a government entity is not free to make any process "due process," and that the courts, in effecting the due process guarantee, must examine "not [the] particular forms of procedure, but the very substance of individual rights to life, liberty, and property." In this respect, due process does not necessarily mandate a court proceeding in every case where property or liberty interests are affected.

More recently, the Court stated that "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest"; however, the Court, in a footnote, did recognize that there are "some situations in which a

370. See, e.g., Parrett v. City of Connersville, 737 F.2d 690, 696 (7th Cir. 1984) (indicating in dictum that grievance procedure providing for arbitration might be procedurally adequate); Hamilton v. Adult Educ. Dist., 118 L.R.R.M. (BNA) 3197 (E.D. Wis. 1985) (holding that plaintiff-janitors' collective bargaining agreement "provided all the process that was due them");

371. See the discussion by Justice White, writing for the majority, in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540 (1985) (rejecting the argument that where the legislature which confers the substantive right also sets out the procedural mechanism for enforcing that right the individual "must take the bitter with the sweet").


373. The late Justice Felix Frankfurter, in suggesting a balancing test, stated that every case must be considered by itself:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.


post deprivation hearing will satisfy due process requirements, commenting, "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." What is particularly interesting is that, in balancing the competing interests, the Court appeared to accord more than passing note to "the significance of the [employee's] private interest in retaining employment." Case law suggests that a public employer, in dismissing a nonprobationary employee, should provide either oral or written notice of the charges and an opportunity for a pretermination hearing of some kind. The hearing need not be a full adversarial evidentiary hearing prior to governmental action, but may simply be a request that the employee provide his or her side of the story in person or in writing to management. While the pretermination hearing "need not definitively resolve the propriety of the discharge," it should serve as an initial check against clearly incorrect decisions. As stated by the Court, it should be "essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."

375. Id. at 542.
376. Id. at 545 (quoting Mathews v. Eldridge, 424 U.S. 319, 343 (1976)).
377. Id. at 543.

With respect to the government's interests in immediate termination, the Court said:

[A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Id. at 544 (footnotes omitted).

378. The Court, in Loudermill, 470 U.S. at 546-47, noted that in only one case, Goldberg v. Kelly, 397 U.S. 254 (1970), has the Court required a hearing of this type.
379. Id. at 532-33.
380. Id. at 533.
D. Deprivation of Protected Interests

There is no question that otherwise "terminable-at-will government employees, while they may generally be discharged for any number of reasons or for no reason at all, may not be discharged for exercising their constitutional rights."\(^{381}\) At the same time, the courts have indicated that the state may have a greater interest in regulating the conduct of its employees than the activities of the population at large.\(^{382}\) Although there is overlap between them, four areas are of particular interest in the off-duty lifestyle areas: (1) political affiliation or patronage, (2) privacy, (3) association and speech, and (4) morality standards.

1. Political Association

The Seventh Circuit has stated the black letter law regarding limitations on a public employee's political affiliations as follows: "A public agency that fires an employee because of his political beliefs or political affiliations infringes his freedom of speech."\(^{383}\) The court went on to note that "there are exceptions to this principle, carved out to minimize its adverse impact on the effective functioning of government."\(^{384}\) Employees at the policymaking level of government can therefore be fired on political grounds.\(^{385}\) The Seventh Circuit, for example, has recognized that a public employer cannot run a government with officials who are forced to keep political enemies as their confidential secretaries.\(^{386}\) In *Branti v. Finkel*,\(^ {387}\) the Supreme Court stated that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."\(^ {388}\) Applying this test, the Court concluded that the continued

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383. Soderbeck v. Burnett County, 752 F.2d 285, 288 (7th Cir. 1985).
385. Shakman v. Democratic Org. of Cook County, 722 F.2d 1307 (7th Cir. 1983).
386. Soderbeck, 752 F.2d at 288; see also De La Cruz v. Pruitt, 590 F. Supp. 1296 (N.D. Ind. 1984) (reversing dismissal of government nonpolicymaking and nonconfidential employee for political beliefs).
388. Id. at 518.
employment of an assistant public defender could not properly be conditioned
upon his allegiance to the political party in control of the county government. If an employer cannot demonstrate that the employee’s party affiliation is an appropriate requirement for the effective performance of the job, dismissal cannot be effected. The focus is on the powers of the office and not on the tasks of the officeholder.

2. Privacy

Although the Constitution does not explicitly mention any right of privacy, in a line of decisions going back to 1891, the Supreme Court has recognized a right of personal privacy, or a guarantee of certain areas or "zones of privacy," that exist under the First, Fourth, Fifth, and Ninth Amendments, or in the concept of liberty granted by the Fourteenth Amendment.389 "[O]nly rights that are ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in the right to privacy.390 Privacy rights extend to two types of interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.391

The Supreme Court has developed a three-tier test to review a state’s ability to regulate personal liberties. The top-tier or strict scrutiny test applies to fundamental rights or suspect classifications. Under this test a regulation limiting the exercise of a fundamental right must be justified by a "compelling state interest and that legislative enactments must be narrowly drawn to empress only the legitimate state interest."392 When a fundamental right is not present, the lower-tier test is applied and requires only that the regulation have a rational relationship to some legitimate state objective.393 The Court has developed a middle-tier analysis to apply to conduct which is not considered a fundamental right, but is significantly sensitive or intimate. This analysis requires that a regulation must "serve important governmental objectives and must be substantially related to achievement of those objectives.394

Many public employees have successfully argued that regulation of off-duty behavior by the state, unaccompanied by any nexus to the job, is an

unconstitutional invasion of privacy. Case law indicates that public management can discipline employees for off-duty conduct without constitutional infirmity if that conduct does not involve a "fundamental" right. If it is determined that an employee's conduct involves a "fundamental right," it can only be abridged to the extent necessary to achieve a strong, clearly articulated state interest. The Supreme Court has not exhaustively articulated those rights that are "fundamental" or the kinds of interests that are within the "zone of privacy" protected against unwarranted government intrusion. Instead, the Court has taken a case-by-case approach. In certain contexts the Court has extended a guarantee of privacy to marriage, procreation, contraception, family relationships, child rearing and education, abortion, and the private possession of obscene matter.\(^{396}\)

Most of the decisions that define the parameters or boundaries of legitimate employer concern with an employee's off duty conduct are those dealing with an employee's sexual practices. For example, several courts have refused to recognize homosexual conduct as a privacy interest, although the better view is that a public employee cannot be dismissed from employment merely because he is a homosexual.\(^{397}\) One federal court pointed out that the rationale for these decisions is that dismissal solely because of one's status as a homosexual is "so arbitrary and capricious as to violate due process."\(^{398}\)

395. See Roe, 410 U.S. at 152-53.


398. Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 n.8 (E.D. Pa. 1979) (quoting Society for Indiv. Rts., 63 F.R.D. at 400); see also Morrison v. State Bd. of Educ., 461 P.2d 375, 391 (Cal. 1969) (holding that male teacher who engaged fellow male teacher in noncriminal physical homosexual relationship not subject to disciplinary action under statute authorizing revocation of teacher's life diploma for immoral or unprofessional conduct or moral turpitude absent nexus to ability to teach, stating "[management] offered no evidence that a man of petitioner's background was
Where dismissals or other disciplinary actions have been upheld, there has generally been a showing that the homosexual conduct was open and notorious, or a finding that the state's interest in discipline, morale, or efficiency outweighed the employee's privacy interests.\(^{399}\) In Padula v. Webster,\(^{400}\) for example, the D.C. Circuit, applying an equal protection analysis, found permissible the FBI's refusal to hire Margaret Padula because she was a homosexual. Ruling that a challenged classification of homosexuality need only satisfy a minimum standard of rationality,\(^{401}\) the court refused to recognize homosexuality as comparable to race, alienage, and national origin, the three classifications recognized by the Supreme Court as deserving of heightened scrutiny.\(^{402}\) Citing the Supreme Court's decision in Bowers v. Hardwick,\(^{403}\) a decision holding that the right to engage in consensual homosexual sodomy\(^{404}\) is not constitutionally protected, the appellate court reasoned that "[i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class [homosexual], it is hardly open to a lower court to conclude that the state-sponsored discrimination against the class is invidious."\(^{405}\)

any more likely than the average adult male to engage in any untoward conduct with a student.").

399. See Rich v. Secretary of the Army, 735 F.2d 1220, 1228 (10th Cir. 1984) ("even if privacy interests were implicated in this case, they are outweighed by the Government's interest in preventing armed service members from engaging in homosexual conduct."); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971) (denial of university employment because of "activist" role concerning the social status to be accorded homosexuals), cert. denied, 405 U.S. 1046 (1972); Endsley v. Naes, 673 F. Supp. 1032, 1038 (D. Kan. 1987) (upholding dismissal of female police officer because of rumors of her relationship with another); Naragon v. Wharton, 572 F. Supp. 1117, 1124 (M.D. La. 1983) (sustaining reassignment of graduate assistant for having homosexual relationship with university student not her student, rejecting argument that employee's freedom of association was restricted).

400. 822 F.2d 97 (D.C. Cir. 1987).
401. Id. at 104.
402. Id. at 102.
404. The crime of "sodomy", punishable by imprisonment for up to twenty years, was defined by Georgia law as "any sexual act involving the sex organs of one person and the mouth or anus of another." GA CODE ANN. § 16-6-2 (Michie 1984). The statute applies to all persons, whether married or single, heterosexual or homosexual. Georgia is one of 19 states that outlaw all forms of sodomy, in contrast to those states that criminalize only homosexual acts. See, e.g., ARK. CODE ANN. § 41-1813 (Michie 1988); KAN. STAT. ANN. § 21-3505 (1989).
Similarly, extramarital heterosexual cohabitation has sometimes been accorded constitutional protection but, more often, courts have denied this activity protected status. Some public-sector employers, with concurrence


Aside from consensual homosexual sodomy, the Supreme Court has yet to answer the question whether and to what extent the Constitution prohibits state statutes from regulating private consensual sexual behavior among adults. In addition, "[n]o Supreme Court case has held that married persons have a constitutional right to engage in adultery." Andrade v. City of Phoenix, 692 F.2d 557, 563 (9th Cir. 1982). See generally K. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980); Michael A. Woronoff, Note, Public Employees or Private Citizens: The Off-Duty
from selected courts, have asserted that extramarital off-duty relationships are permissible so long as the affair is "clandestine" rather than "open." When the affair is exposed or, for whatever reason, becomes "unconventional" (practicing polygamy, for example), the employee’s privacy interest is often outweighed (in the eyes of the courts) by the public employer’s interest in "conventional" employees. In Shuman v. City of Philadelphia, for example, a federal district court recognized that even though activities may be within the protected "zone of privacy," this protection is by no means absolute. It stated that "if the sexual activities of a public employee were open and notorious, or if such activities took place in a small town, the public employer might very well have an interest in investigating such activities and possibly terminating an employee." According to the court, "[i]n such a case, the actions of the public employee with respect to his or her private life could be deemed to have a substantial impact upon his or her ability to perform on the job."

Likewise, an individual may give up any reasonable expectation of privacy when he or she makes public the conduct that is arguably protected. Joining swingers clubs, appearing on televised talk shows, and having your picture in Beaver or Screw Magazine is not consistent

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407. See, e.g., Potter v. Murray City, 760 F.2d 1065 (10th Cir.), cert. denied, 474 U.S. 849 (1985), where the court of appeals rejected the argument that a constitutional right of privacy prevented the State of Utah from discharging a police officer for entering into a polygamous marriage.


409. Id.

410. Id.


412. See Pettit v. State Bd. of Ed., 513 F.2d 889, 890-91 (Cal. 1973) (holding that teacher that joined "swingers" club, and who was observed by undercover police officer committing three separate acts of oral copulation with three different men at a party, was properly terminated for immoral and unprofessional conduct evidencing unfitness to teach).

413. Id. at 890 ("appearing on Joe Pyne show discussing "nonconventional sexual life styles").

with the assertion that one’s privacy rights have been violated. An employee who commences a tort action may also relinquish what would otherwise be a privacy right as part of the discovery process.\footnote{415} Applying the better rule, in \textit{Swope v. Bratton},\footnote{416} a federal court stated that a police department has an interest in and may investigate some areas of the personal sexual activities of its employees \textit{"if the activities have an impact upon job performance."}\footnote{417} The court noted, however, that \textit{"in the absence of a nexus between the personal, off-duty activities and poor job performance, inquiry into these activities violates the constitutionally protected right of privacy; a party’s private sexual activities are within the ‘zone of privacy’ and protected from unwarranted governmental intrusion."}\footnote{418} In this case the court concluded that a police chief did not have the right to order a policeman to refrain from developing a "more than casual relationship" with a police dispatcher, at least where the relationship was not "open and notorious" and there was no "public outcry" or complaints by any citizen. \textit{Swope} suggests that public outcry and citizen complaints can be a criterion in determining constitutional rights, a position long accepted by labor arbitrators\footnote{419} in deciding off-duty misconduct cases.

3. Association and Speech

There is no question that the constitutional guarantee of freedom of association is, like speech and assembly, a fundamental right. As noted by one judge, \textit{"[s]ince speech, assembly and association all serve a common purpose—to promote the free exchange of ideas—defeating any one of these rights might defeat them all. Freedom of association therefore stands as a fundamental right in a free society."}\footnote{420} The Supreme Court has made it clear that mere membership in an organization without specific advocacy of any illegal conduct by the organization is protected by the Constitution.\footnote{421}

\footnote{415} Ferrel v. Glen-Gery Brick, 678 F. Supp. 111 (E.D. Pa. 1987) (employee bringing claim for intentional infliction of emotional distress not entitled to protective order forbidding disclosure of notes of psychiatrist, reasoning that when an employee places her physical or mental condition at issue the privacy right is waived). \textit{But see} Vinson v. Superior Court, 740 P.2d 404, 410 (Cal. 1987) (recognizing some privacy interest for employee commencing sexual harassment action).

\footnote{416} 541 F. Supp. 99 (W.D. Ark. 1982).

\footnote{417} \textit{Id.} at 108.

\footnote{418} \textit{Id.}

\footnote{419} \textit{Id.} at 109.


\footnote{421} Hess v. Indiana, 414 U.S. 105, 109 (1973) (advocating illegal conduct at
At the same time, however, not all public employees can rely on this standard. For example, the courts have been consistent in holding that law enforcement agencies are qualitatively different from other branches of government. In *McMullen v. Carson,*\(^\text{422}\) the Eleventh Circuit stated:

> [t]he First Amendment does not protect personal behavior in the law enforcement context to the same extent that it does in other areas of Governmental concern. The need for high morale and internal discipline in a police force led this Court to hold that "a reasonable likelihood of harm generally is . . . enough to support full consideration of the police department’s asserted interests in restricting its employees’ speech."\(^\text{423}\)

Illustrating the extent to which a public employer can discipline a protective service employee for off-duty association is *Shawgo v. Spradlin,*\(^\text{424}\) a decision by the Fifth Circuit. In that case a patrolwoman and a police sergeant were suspended from their jobs, and the sergeant demoted to patrolman, 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.\(^\text{425}\) The district court ruled that the officers did not have a protected property or privacy interest.\(^\text{426}\) The Fifth Circuit, although recognizing a property interest, affirmed the decision, and the

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\(^{422}\) 754 F.2d 936 (11th Cir. 1985).

\(^{423}\) 701 F.2d 470 (5th Cir. 1983).

\(^{424}\) Id. at 478.

\(^{425}\) Id. at 473.
Supreme Court, declining to review,\(^{427}\) let the ruling stand. The court of appeals rejected the officers’ argument that the state could not regulate their off-duty association, reasoning that "th[e] argument fails to take into account the fact that the right to privacy is not unqualified, . . . and that the state has more interest in regulating the activities of its employees than the activities of the population at large."\(^{428}\) The court went on to point out that the burden on the police officer is onerous in attacking management’s regulations: the officer, to sustain an attack, must demonstrate "that there is no rational connection between the regulation, based as it is on the county’s method of organizing its police force, and the promotion of safety of persons and property."\(^{429}\) In this case the court found a rational connection between "forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit."\(^{430}\)

There are limits, however, even in the protective services. The Fifth Circuit, in \(Wilson \text{ v. } Taylor\),\(^{431}\) overturned a decision of a lower court that had ruled in favor of a police department that had fired an officer because of his association with the daughter of a convicted felon and reputed crime figure. The court of appeals pointed out that the fact that the individual is a policeman does not obviate the need to balance the interests of the employee

\(^{427}\) 464 U.S. 965 (1983). Justice Brennan, joined by Justices Marshall and Blackmun, dissented to the denial of a writ of certiorari, because he believed that petitioners’ conduct involved a fundamental right. Justice Brennan commented, "[t]he intimate, consensual, and private relationship between petitioners involved both the ‘interest in avoiding disclosure of personal matters [and] the interest in independence in making certain kinds of important decisions’ . . . that our cases have recognized as fundamental." \(Id.\) at 971 (Brennan, J., dissenting) (quoting Whalen \text{v.} Roe, 429 U.S. 589, 599-600 (1977)).

\(^{428}\) Shawgo, 701 F.2d at 482-83 (quoting Kelley \text{v.} Johnson, 425 U.S. 238, 245 (1976)).

\(^{429}\) \(Id.\) at 483 (quoting \(Kelly\), 425 U.S. at 245).

\(^{430}\) \(Id.\); see also Swank \text{v.} Smart, 898 F.2d 1247, 1250 (7th Cir.) (upholding discharge of police officer for giving female student off-duty motorcycle ride, rejecting claim that ride constituted First Amendment right to speech or association), \textit{cert. denied}, 111 S. Ct. 147 (1990); Baron \text{v.} Meloni, 556 F. Supp. 796 (W.D.N.Y. 1983) (sheriff’s order that deputy sheriff cease associating with wife of reputed mobster not violative of deputy’s constitutional right of privacy), \textit{cert. denied}, 474 U.S. 1058 (1986); Wilson \text{v.} Swing, 463 F. Supp. 555, 563-64 (M.D.N.C. 1978) (no First Amendment right of association protecting police officer who had extra-marital affair with another officer, reasoning that state has substantial interest is discouraging adulterous conduct); Morrissette \text{v.} Dilworth, 89 A.D.2d 99 (N.Y. 1982) (discipline sustained for police officer’s association with "Jukebox Tony", a known felon, applying "exact scrutiny" test).

\(^{431}\) 658 F.2d 1021 (5th Cir. 1981).
against the interests of the governmental employer: "[P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Still, the court noted that "several courts have read into the balance more deference to the state interest in preserving the morale and integrity of police departments than might be appropriate in other contexts." Similarly, the Fifth Circuit, in Battle v. Mulholland, ruled that a black police officer could not be dismissed because he and his wife permitted two white single women to board with them. Absent a showing that his associations "would materially and substantially impair his usefulness as a police officer," the court rejected the argument that his living situation may have an adverse impact upon the racial tension in a southern town. Another federal court, in Burns v. Pomerleau, held that a police department could not refuse the application for position of probationary patrolman solely because the applicant was a member of a nudist club. Applying strict scrutiny, the court reasoned that, "[i]t is too late in the day to doubt that this freedom of association extends only to political or conventional associations and not to the social or the unorthodox."

In Curle v. Ward, the New York Court of Appeals upheld the decision of the trial court directing reinstatement of a correctional officer for membership in the Ku Klux Klan. Since the employer failed to tender sufficient evidence of the claimed detrimental impact of employee membership in the Klan upon the operation of the facility or the inmates, the court of appeals refused to address the broader constitutional issue of association.

In an education case, a school board dismissed a middle-aged female teacher for engaging in "social misbehavior that is not conducive to the maintenance of the integrity of the public school system" because she allowed a 26-year-old male visitor to stay at her apartment overnight. The Eighth Circuit, declining to consider the dismissal on the basis of association or privacy, instead reversed the termination on substantive due process grounds. Applying a de facto nexus requirement, the court of appeals found the teacher could successfully argue that her dismissal was arbitrary and

432. Id. at 1027 (quoting Garrity v. New Jersey, 385 U.S. 493, 500 (1967)).
433. Id. at 1027 (citing Byrd v. Gain, 558 F.2d 553 (9th Cir. 1977), cert. denied, 434 U.S. 1087 (1978); Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977).
434. 439 F.2d 321 (5th Cir. 1971).
435. Id. at 324.
437. Id. at 65.
439. Id. at 1071.
441. Id. at 376.
capricious if she could prove "that each of the stated reasons [underlying her dismissal] is trivial, or is unrelated to the educational process or to working relationships within the educational institution, or is wholly unsupported by a basis in fact."{}^{442}

Another federal court, in High Tech Gays v. Defense Industrial Security Office,{}^{443} held that the Department of Defense could not require an expanded security investigation because an applicant belonged to a gay organization. The court found that there was no rational basis for the government subjecting all gay applicants to expanded investigations while not doing the same for "straight" applicants.{}^{444} Further, the court ruled that subjecting gays to additional scrutiny interferes with their First Amendment right to associate.{}^{445} "Governmental actions that significantly impair an individual’s First Amendment rights must survive exacting scrutiny,"{}^{446} and this, said the court, "is clearly not the least restrictive means to achieving the governmental interests in protecting national security."{}^{447}

Courts have similarly held that while a state’s interest in regulating the speech of its employees differs from the state’s interest in regulating the speech of the general citizenry, an employee’s First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee."{}^{448} Thus, in National Gay Task Force v. Board of Education,{}^{449} the Tenth Circuit declared unconstitutional a portion of a statute that allowed punishment of teachers for "public homosexual conduct," defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees."{}^{450} According to the court, although a teacher could properly be dismissed for public homosexual conduct, discipline for mere "advocacy" would be barred since it does not necessarily imply incitement to immediate

\begin{footnotes}
\footnote{442. Id. at 377 (citing McEnteggart v. Cataldo, 451 F.2d 1109, 1111 (1st Cir. 1971), cert. denied, 408 U.S. 943 (1972)).}
\footnote{443. 668 F. Supp. 1361 (N.D. Cal. 1987).}
\footnote{444. Id. at 1373.}
\footnote{445. Id. at 1378.}
\footnote{446. Id.}
\footnote{447. Id.}
\footnote{448. National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1274 (10th Cir. 1984) (citing Childers v. Independent Sch. Dist. No. 1, 676 F.2d 1338, 1341 (10th Cir. 1982)).}
\footnote{449. 729 F.2d 1270 (1984), aff'd, 470 U.S. 903 (1985).}
\footnote{450. Id. at 1272.}
\end{footnotes}
First Amendment rights have also been found for a police officer who had part ownership in a video store that stocked sexually explicit videos. The Tenth Circuit, in Flanagan v. Munger, ruled that a police department could not require removal of objectionable films from the store's stock by the owner, who was also an officer in the department.

In Rowland v. Mad River Local School District, the Supreme Court in 1985 let stand the Sixth Circuit's holding that it was permissible for a school district not to renew the contract of Marjorie Rowland, a high school guidance counselor, because she was bisexual and revealed her sexual preference. Although a jury found that the employee's mention of her bisexuality did in any way "interfere with the proper performance of [her or other school staff members'] duties or with the operation of the school generally," the Sixth Circuit nevertheless reasoned that nonrenewal based on her workplace statements was permissible under the First Amendment because, under the Supreme Court's test in Connick v. Myers, her speech was not "a matter of public concern.

451. Id. at 1274.
452. 890 F.2d 1557 (10th Cir. 1989).
453. Id.
455. 730 F.2d 444 (6th Cir. 1984).
456. Id. at 447.
458. Rowland, 730 F.2d at 447. In a 1983 decision, Connick v. Myers, 461 U.S. 138 (1983), the Supreme Court considered the discharge of a state employee for circulating a questionnaire concerning internal office matters. The plaintiff, Sheila Myers, as assistant district attorney, circulated a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. After distributing the questionnaire to 15 assistant district attorneys, Myers was terminated. The Supreme Court, reversing the district and appellate courts, pointed out that the repeated emphasis in Pickering v. Board of Educ., 391 U.S. 563 (1964), "on the right of a public employee 'as a citizen, in commenting on matters of public concern,' was not accidental." Justice Byron White, writing for the majority, noted that, unlike the issues that Myers addressed, the subject matter in Pickering "was 'a matter of legitimate public concern' upon which 'free and open debate is vital to informed decision-making by the electorate.'" Connick, 461 U.S. at 145 (quoting Pickering, 391 U.S. at 571-72.) Justice White wrote:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the
The Seventh Circuit has stated that "public employers do not lose their ability to control behavior and speech in the work-place merely because they are governmental bodies subject to the restraints of the First Amendment." 459 The key is whether the employee's speech touches a matter of "public concern," and according to the Connick Court, this is determined by the content, form, and context of a given statement. 460 Case law indicates that when the employee's speech deals with personnel disputes or individual grievances with management, it will not be protected under the Constitution. Such information, however meritorious, adds little to the public's evaluation of the performance of government, and, accordingly, is not a matter of concern to the public. Even when the speech does touch a matter of public concern, if the speech or activity adversely affects the efficiency, discipline, or administration of the public employer, 461 the employee's conduct may still be subject to regulation. Arbitrators have taken a similar approach when

employee's behavior. ... Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state. Id. at 147 (citation omitted).

According to the majority, "Myers' questionnaire touched upon matters of public concern in only a limited sense." Id. at 153. The Court concluded that the survey "is most accurately characterized as an employee grievance concerning internal office policy." Id.

459. Yoggerst v. Hedges, 739 F.2d 293, 295 (7th Cir. 1984).
issues of speech have triggered discharges. In all cases the key for public management is establishing a nexus between the conduct and job performance.

4. Morality Standards

When considering the issue of public employers’ promulgation of rules and regulations relating to an employee’s lifestyle or off-duty conduct, two additional considerations should be addressed. The first is whether a public employer possesses the power to enact a morality standard for its employees. The second issue, applicable only if the employer is found to have this power, is whether the power has been exercised consistently with the mandates of due process. The courts considering the validity of enacting standards of morality have consistently held that the state may indeed enact rules prescribing the moral standards of its employees, especially in teaching and the protective services. The Supreme Court, however, has stated that if a state designates

462. See, e.g., City of Detroit, 83-2 Lab. Arb. Awards (CCH) 8562 (1983) (McCormick, Arb.), where an arbitrator, citing Pickering, sustained the suspension of a city auditor who, during an interview on a network television station, implicated city officials in a coverup of improprieties in a contract with an oil company; Town of Plainville, 77 Lab. Arb. Rep. (BNA) 161, 162-63 (1981) (Sacks, Arb.) (finding Pickering "and the host of decisions which have followed it" relevant); Douglas County, 79-2 Lab. Arb. Awards (CCH) 8522 (Doyle, 1979) (upholding suspension of employee for making public statements that care provided by hospital-employer was inadequate; Pickering distinguished); see also Los Angeles Harbor Dep’t, 84 Lab. Arb. Rep. (BNA) 860, 862 (1985) (Weiss, Arb.) (quoting Pickering, 391 U.S. at 568) (holding city employer properly suspended employee for writing letter to newspaper referring to department head as "head inquisitor," and applying both Pickering and Connick, stating "[h]ere, it is the interest 'of the State, as an employer, in promoting efficiency of the public services it performs through its employees' which must take precedence."); Department of the Navy, 75 Lab. Arb. Rep. (BNA) 889 (1980) (Aronin, Arb.) (holding employees’ use of media to resolve grievance disputes was permitted, reasoning, in part, that the activity was protected under the First Amendment).

463. See, e.g., Beilan v. Board of Pub. Educ., 357 U.S. 399, 405, 408-09 (1958); Hoska v. United States Dep’t of the Army, 677 F.2d 131, 135 (D.C. Cir. 1982) (stating that a pronouncement of 'immorality' tends to discourage careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude," and holding that Army failed to provide any "careful analysis" of connection between incidents of alleged immoral or improper behavior and employee's ability to execute responsibilities); Velasquez v. City of Colorado Springs, 23 Fair Emp. Prac. Cas. (BNA) 621 (D. Colo. 1980) (noting that "lack of sufficient moral character" defense is suspect on its face because it is highly subjective); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980) (rejecting argument that Catholic Church cannot be held liable for sex discrimination where standards of morality for teachers were not in accord with moral and religious precepts of church
some form of moral character as a criterion for bestowing a benefit or imposing a burden, it must be based on present moral character. 464

E. Synthesis: Cases Involving Employees' Lifestyle 465 and Existing Constitutional Restraints

Case law indicates that when a public employer regulates the off-duty conduct or lifestyle of its employees, it must do so consistent with the mandates of procedural and substantive due process. At a minimum, this means that there must be some rational connection between the off-duty behavior and the employee's job. An employer will not be able to effect the dismissal of an employee for off-duty conduct if management can articulate no interest whatsoever for its action. If the employee's conduct involves a fundamental right such as association or speech, or is within an individual's recognized "zone of privacy", a public employer will have to show more than a de minimus interest before it can justify a discharge for engaging in protected conduct. At times the employer's interest must be "compelling," depending upon the particular occupation at issue and the specific conduct of the employee. Finally, if a court finds that the employee has a property interest in continued employment, or that the discharge affects a "liberty" interest, certain procedural guarantees must be accorded the individual prior to the dismissal.

When, then, should freedom to associate or engage in an unconventional lifestyle bow to the government's interest? As the cases indicate, the easy answer is when there is a significant nexus between the employee's job and his off-duty conduct. The most difficult cases involve military and para-military organizations, such as police, fire, or security-sensitive positions in government. While these organizations have an acknowledged interest in promoting security and effectiveness this, however, does not mean that simple declarations that the state's interests outweigh the employee's privacy interests concerning unwed pregnancy); Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27 (N.D. Miss. 1973), aff'd, 507 F.2d 611 (5th Cir. 1975); see also Thorne v. City of El Segundo, 726 F.2d 459, 470 (9th Cir. 1983) ("We do not hold that the City is prohibited by the Constitution from questioning or considering the sexual morality of its employees."); cert. denied, 469 U.S. 979 (1984); Smith v. Price, 616 F.2d 1371 (5th Cir. 1980) (providing for dismissal of employee for failure to meet prescribed standards of work, morality, and ethics, to an extent that makes employee unsuitable for any kind of employment in city's service); Bruns v. Pomerleau, 319 F. Supp. 58, 67 (D. Md. 1970) ("[behavioral pattern] can only be limited to such associations or off duty activities that affect his morals and integrity or are inimical to the Department.").

465. Sexual practices, homosexuality, political affiliations, morality standards.
should be enough for a reviewing court or arbitrator. In the privacy area, for example, courts should not rule that any employee should be disqualified from employment simply because that employee sleeps with a member of his own sex. Moreover, we do not believe that the Supreme Court’s decision in Hardwick is dispositive of anything.\(^6\) Just as an individual cannot be punished for mere membership in an organization that has both illegal and legal objectives, under the constitution an individual should not be presumed to violate sodomy (or similar statutes) because that person professes an "unconventional" sexual preference or orientation.\(^7\)

Other dimensions of the problem of balancing the rights of employers and employees in lifestyle cases are explored in the next section and in our conclusion. One proposition advanced is that an employee with a lifestyle repugnant to management may fare better in an arbitration proceeding than in a court applying a mere rational basis test.

V. ARBITRAL STANDARDS UNDER "JUST CAUSE" PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

The discussion in this section\(^8\) concerns arbitral rulings when unions challenge management’s right to discipline or discharge an employee under a just cause provision of a collective bargaining agreement\(^9\) because

\(^6\) In Doe v. Casey, 796 F.2d 1508, 1522, (D.C. Cir. 1986), the appellate court pointed out that Hardwick "did not reach the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of [their] sexual orientation." See also Watkins v. United States Army, 837 F.2d 1428 (9th Cir. 1988) (distinguishing Hardwick, reh’g., 875 F.2d 699 (9th Cir. 1989).

\(^7\) Jantz v. Muci, 759 F. Supp. 1543 (D. Kan. 1991) (reversing school district’s denial of employment to teacher because of perception that he had "homosexual tendencies," distinguishing Hardwick).

\(^8\) This section is taken in part from MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, MANAGEMENT RIGHTS 193-217 (1986); MARVIN F. HILL, JR. & MARK KAHN Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards, in ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS OF THE 39TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 121-54 (1986).

\(^9\) Recent survey reports by the Bureau of National Affairs (BNA) Inc., reveal that discharge and discipline provisions are found in 96 percent of collective bargaining agreements analyzed—99 percent in manufacturing and 92 percent in non-manufacturing. BNA also reports that grounds-for-discharge provisions, found in 94 percent of their sample, are generally of two types—discharge for "cause" or "just cause" (found in 86 percent of the agreements), or discharge for a specific offense (found in 75 Percent of the contracts in the database). BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 7 (12th ed. 1989).
management disagrees with certain aspects of an employee's lifestyle or, in some cases, the results of the lifestyle. What rules or standards do arbitrators follow? Does it make a difference whether the arbitrator is deciding a case in the public as opposed to the private sector? Do arbitrators track court rulings and apply a balancing or a multi-tier test depending on the conduct at issue and the interest asserted by the employer? Most (but not all) of the cases dealing with lifestyle issues involve off-duty conduct and whether management can establish a nexus between the employee's conduct and his job or, alternatively, the employer's product or reputation. The late dean of the Yale Law School, Harry Shulman, observed that management cannot regulate the lives and conduct of its employees outside of their employment relation and "[w]hat the employee does outside of the plant after working hours is normally no concern of the employer." Shulman went on to note that the jurisdictional line which separates the cases with which the employer may be concerned from those with which he may not, is not always a "physical line which bounds his property on which his plant is located." The problem is determining when an employee's off-duty lifestyle (generally his sexual, health, criminal, or other conduct that the employer disapproves of)

Even if no "just cause" provision is found in the collective bargaining agreement, the better weight of authority holds that absent a clear indication to the contrary, a just cause standard is implied in the labor agreement. See, e.g., B.F. Goodrich Tire Co., 36 Lab. Arb. Rep. (BNA) 552, 556 (1961) (Ryder, Arb.); David E. Feller, The Remedy Power in Grievance Arbitration, 5 INDUS. REL. L.J. 128, 134-35 (1982).

Despite the high frequency of arbitration cases dealing with discharge and discipline (about one out of three grievances deals with discharge or discipline), few contracts contain a definition of "just cause." While no set criteria exists, arbitrators have uniformly held that any determination of just cause requires two separate considerations: (1) whether the employee is guilty of misconduct or a serious or faulty lapse in job performance, and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case.

Professors Abrams and Nolan propose that:

Just cause ... embodies the idea that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with his employer's business by his activities on or off the job.


The universal rule in grievance arbitration is that the employer must carry the burden of proof on just cause in a discharge case.


471. Id.
can result in discipline or even termination by management. Like most areas of the law, there are more questions than answers.

A. Just Cause Criteria

An examination of published and unpublished awards reveals a number of standards or criteria arbitrators use to evaluate discharge or discipline for off-duty conduct. These include (1) injury to the employer’s business, (2) inability to report for work, (3) unsuitability for continued employment, and (4) co-employee refusal to work with the off-duty offender or danger to other employees. Like many categories mentioned in this article, there is frequently overlap between the categories.

1. Injury to Employer’s Business

Employers often assert that an employee’s conduct should be subject to management’s jurisdiction when the conduct causes an actual or potential business loss or, alternatively, the company’s reputation is injured or is likely to be injured by retaining the employee. As a general rule, where actual business loss or injury to reputation is not established or, alternatively, is not apparent from the misconduct itself, arbitrators are reluctant to sustain a discharge based on this argument.

a. Actual or Potential Business Loss

Discharge for an employee’s off-duty misconduct is most likely to be upheld where an employer can link the conduct to an actual, as opposed to a potential or speculative, business loss. But not always. Frequently a discharge has been upheld where the arbitrator determined that a business loss was only a possibility. In Baltimore Transit Co.,472 a bus operator was publicly identified as the acting grand dragon of the state branch of the Ku Klux Klan. In upholding the discharge, Arbitrator Clair Duff acknowledged that, unless the discharge was sustained, there existed a clear and present danger of physical violence and an inevitable economic boycott against the company. In finding that there was just cause for dismissal, the arbitrator also pointed out that there was considerable support for a wildcat strike by the grievant’s fellow employees. The arbitrator reasoned that the grievant’s conduct, not his beliefs, were at issue in the case. The employee’s "public utterances were widely publicized and the admitted aims and objectives of the Klan made it eminently clear that the target of his activities was not mere

words but action contrary to the rights of a large segment of the population . . . at least 50% of patrons of the Company’s bus lines.\textsuperscript{473} Likewise, in \textit{Gas Service Co.},\textsuperscript{474} Arbitrator A.J. Granoff held that a criminal conviction, coupled with numerous arrests, a known habit of consorting with criminals and prostitutes, and a job requiring the employee to work alone in customer homes reading meters amounted to enough "potential" harm to a utility that discharge was justified even though no actual business loss was demonstrated. Granoff noted that "an employment relationship imposes some responsibilities upon an employee which, as has been well stated, ‘transcend the time and place of employment.’"\textsuperscript{475} Granoff found that "Grievant’s manner of living during leisure hours defies scavenging."\textsuperscript{476}

Arbitrator Marcia Greenbaum, in an unpublished decision (November 18, 1985), considered the case of a commission salesman for a small producer and distributor of phonograph records. The salesman had been discharged after Postal Service inspectors, equipped with a search warrant, found several carts of pornography, including child pornography, in the salesman’s home. The event received considerable local publicity on television and in the press. Inspection of the affidavit by the company indicated that the employee had been trading in child pornography, although no indictment had yet been issued against him. Even though the grievant had not yet been convicted of any crime, Arbitrator Greenbaum sustained the discharge. In so doing, she referred not only to the adverse reaction that had already taken place but also to probable future hazards for the company:

\[\text{T}\text{he next [flurry of information], if indictment and a trial with full disclosure, might bring further reactions, including reprisals of no longer dealing with the Company, if it were known that [the Company] had continued to employ [the grievant] after knowing what was contained in the affidavit. A company should not be subjected to such a possible consequence, nor its employees risk the loss of work, because one of their number had continued amongst them under these circumstances. . . .}\]

An example of a dismissal that was reversed when management was unable to demonstrate some, but not significant, business damage was an unpublished decision reported by Arbitrator Benjamin Aaron (June 4, 1987). At issue was the dismissal of a male flight attendant who had plead guilty to soliciting an undercover male police officer for prostitution, a misdemeanor, and lying about it to his supervisors (significantly for the grievant, his

\textsuperscript{473} \textit{Id.} at 66.
\textsuperscript{475} \textit{Id.} at 1028.
\textsuperscript{476} \textit{Id.}
supervisors were two women). The offense occurred while the employee was on layover. Because of his arrest, the employee missed his trip causing the flight to be understaffed, resulting in diminished service to passengers. In finding the penalty excessive, the arbitrator focused on the consequences of the employee's offense:

It is true that the flight he missed was understaffed and that the Company had to pay understaffing pay to those flight attendants who made the trip. That in itself, however, hardly seems to justify so severe a penalty as discharge. The Company suffered no adverse publicity; its business has not been affected by the incident.

One of the reasons why theft is so grave an offense is that there is always the likelihood that it will be committed again on the job. Flight attendants have many opportunities to take property that is not their own, and the Company's consistent policy of terminating those found guilty of stealing, no matter how trivial the amount involved, is entirely defensible. [Grievant's] offense, however, is not one likely to be repeated on the job, if at all.

Management often asserts that dress, grooming and weight restrictions are necessary because of the image that the company is trying to project to its market. In an effort to present a business-like image and maintain revenues, employees are disciplined or even dismissed when they fail to observe grooming and weight restrictions. When the employer's rules regarding dress, grooming, and weight restrictions are based on health, safety, or legitimate business interests, and are administered in a non-discriminatory manner, the regulation can be expected to be upheld by an arbitrator if challenged in an arbitral proceeding. A dress or grooming standard that is based only on the personal preference of a particular individual within the organization will, in all probability, not survive a "reasonableness" challenge in the grievance procedure. Perhaps the best summary of current arbitral standards is provided by Arbitrator Peter Maniscalco, in Missouri Public Service Co., where he applied what appears to be a rational-basis-plus test and observed:

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477. See also supra notes 193-205 and accompanying text.
478. See the discussion of Arbitrator George Fleischli in Arrow Redi-Mix Concrete, Inc., 56 Lab. Arb. Rep. (BNA) 597, 602 (1971) (Fleischli, Arb.) ("The arbitrator does not consider such personal likes or dislikes to be a legitimate basis for the establishment of a rule that impinges on the conduct of employees both on and off the job.").
The prevailing theory is that the Company has a right to require its employees to cut their hair and shave, when long hair and beards can reasonably threaten the Company's relations with its customers or other employees, or a real question of safety is involved, and an employer should be able to expect that his employees will practice personal hygiene and will clothe themselves in a neat manner, at least when the employee meets the public.

However, there must be a showing of reasonable relationship between the Company's image or health and safety considerations and the need to regulate employee appearance. Therefore, management's right to regulate in this area is not absolute. Its exercise in any specific manner may be challenged as arbitrary, capricious or inconsistent with the objective for which the right is being exercised.\textsuperscript{480}

When the concern of management is "public image," arbitrators have generally accorded great deference to the employer's standards in balancing the interests of management with the off-duty privacy interests of the employee.\textsuperscript{481} Management is not always successful. When grooming regulations are struck down, it is usually because the standard is unreasonable as applied to a particular employee and not because the rule is per se unreasonable.\textsuperscript{482} Laxity in enforcement may also preclude management from disciplining an employee for not observing the rule.\textsuperscript{483}

\textsuperscript{480} Id. at 976.


\textsuperscript{482} Frito-Lay, Inc., 81-2 Lab. Arb. Awards (CCH) 8562 (1981) (Forsythe, Arb.) (finding no-beard rule unreasonable for route salesman operating in rural community near college where beards were regularly worn in the community).


\textsuperscript{483} See, e.g., Rosauer's, Inc., 82-2 Lab. Arb. Awards (CCH) 8594 (1981) (LaCugna, Arb.) (allowing management to enforce grooming code prohibiting beards against all new employees but not against the grievant); Beatrice Foods Co., Butterkrust Bakeries Div., 77 Lab. Arb. Rep. (BNA) 44 (1981) (Kulkis, Arb.) (employers not permitted to reinstate policy requiring employees to wear uniforms when they had been permitted to wear blue denims); United States Dept. of Justice, 81-2 Lab. Arb. Awards (CCH) para. 8607 (1981) (Meiners, Arb.); cf. VALTIN, supra note 482, at 251 ("Hair and beard rules must be capable of uniform application and must,
Another theme arbitrators often find persuasive when upholding management's regulation of the employees' off-duty lifestyles (or, in this case, the results of the lifestyle) is the potential civil liability that may result if the employee is retained. In *College of St. Scholastica*,\(^{484}\) Arbitrator William Berquest upheld a Catholic college's dismissal of a part-time maintenance/janitor who had been arrested on a domestic sexual abuse charge (subsequently dismissed) and had a prior conviction of sexual misconduct (unknown to the college at the time of his hire). The arbitrator found that "the College would be adversely affected if the grievant is reinstated and retained because of the potential civil liability of the College if the grievant should commit misconduct of the nature disclosed by the prior conviction."\(^{485}\) Reviewing case law on the nature of liability, Arbitrator Berquest stated that while the law is not clear as to liability, in his opinion "the Employer would be held civilly liable for damages for the conduct of the grievant primarily on the basis of negligent hiring and retention. The risk is too great for this arbitrator to expect the Employer to assume."\(^{486}\)

### b. Injury to the Company's Reputation

Damage to the employer's reputation is an often-cited standard because it connotes embarrassment to the company and a potential loss in business. Determining whether an employee's lifestyle has injured the company's reputation is difficult and is often highly subjective in the absence of any objective measurement of actual harm. Where it is argued that a company's reputation is injured, arbitrators look at the source and degree of adverse publicity,\(^{487}\) the type of misconduct,\(^{488}\) and the position held by the

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\(^{485}\) *Id.* at 253.

\(^{486}\) *Id.* at 253-54; *see also* Pepsi-Cola San Joaquin Bottling Co., 93 Lab. Arb. Rep. (BNA) 58, 63 (1989) (Lange III, Arb.) (sustaining dismissal of service technician who pled guilty to sexual offense involving stepdaughter, noting potential financial liability should there be similar incident involving the grievant).


employee in determining the extent of "injured reputation." Where certain felonies are committed (murder or sexual assault) it may not matter what position the employee holds. In these cases it is the potential for adverse public opinion that may be deemed sufficient to warrant a dismissal, even without an objective showing that the company's reputation has indeed been affected. The more public the position and the more serious the crime, the easier it becomes for management to sustain a dismissal. Arbitrator Berquist, in College of St. Scholastica, provided the following analysis of the problem:

As to the effect of reinstatement and retention of the grievant upon the reputation and business of the College, I realize that the Employer has not adduced any specific substantive evidence of loss of reputation or adverse effect upon the business, such as the declining of enrollment or complaints and comments from students as well as the public. At this point, and when the grievant was terminated, it was virtually impossible for the Employer to adduce evidence of this nature because it acted responsibly and as soon as it could after it became aware of the prior misconduct of the grievant. In other words, the College is not obligated to continue the employment of the grievant on a wait and see basis, that is to see if there is any adverse effect upon the reputation and actual business loss as a consequence. In my opinion such an adverse effect is reasonably foreseeable and consequently the College was not obligated to wait it out for such a determination.

The status of an institution of higher learning causes it to be held up to closer scrutiny in reference to safety and care of its students than other companies such as manufacturing, or retail. There is no question that to retain the grievant would, in my opinion, be to affect detrimentally the high reputation accorded the College and would adversely affect its business in the future.

The Employer in this instance is obviously in the best position and most qualified to assess the impact which might and probably would occur on its reputation. It indicates that it will be adverse. Its continuation as a viable college of higher learning is dependent upon its maintenance of a high degree of public confidence in it as an institution of higher learning and that it will protect and secure to the best of its reasonable ability, the interest and safety of its students.

491. Id. at 254; see also Motor Cargo, Inc., 96 Lab. Arb. Rep. (BNA) 181 (1990) (E. Jones, Jr., Arb.) (upholding dismissal for off-duty cocaine use while in possession of company truck, reasoning that employer was liable for injury for grievant's usage of truck).
At times, the employer's plant or work rules will address the issue. For example, American Airlines' Rule No. 34 provides in part, "[a]ny action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal." But in most cases it is left to the arbitrator to determine the effect or nexus between the conduct and the company's reputation.

In Trailways Southeastern Lines, Inc., Arbitrator Robert Gibson considered the discharge of a driver for violating the following rule: "Words or acts hostile to the Company, or words or acts which result in damage to the Company's reputation, property or service, are cause for disciplinary action." The grievant had entered a guilty plea to breaking and entering his estranged wife's house with intent to commit murder, as well as trying to burn down another house belonging to his wife. In sustaining the discharge, the arbitrator reasoned that the employee's conduct "could not help but result in damage to the reputation of the Company ... because of the notoriety Grievant received in the newspaper reports.

Arbitrator Robert Mueller, in Cashton Cooperative Creamery, considered the discharge of an employee who had entered a plea of nolo contendere to taking indecent liberties with his 14-year-old daughter. In sustaining the discharge the arbitrator noted that the conviction resulted in widespread publicity throughout the small community where the employer operated in a highly competitive industry. Moreover, the arbitrator also recognized the importance of the views of the grievant's colleagues by pointing out that, at the hearing, the employer presented a signed statement by 13 out of 18 employees to the effect that they did not want the grievant back as a coworker.

Arbitrator Elvis Stephens, in Gulf Oil Co., likewise

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494. Id. at 713-14.
495. Id. at 713.
497. 61-1 Lab. Arb. Awards (CCH) 8008 (1960) (Mueller, Arb.).
498. Id. at para. 8009-10.
499. Id.
500. Id.
ruled that management could terminate a 31-year employee who pleaded guilty to having sexual intercourse with a retarded 12-year-old girl. The arbitrator found the felony morally reprehensible, the community close-knit, and few employees were willing to work with the grievant.

Arbitrator Mark L. Kahn, in an unpublished decision (February 18, 1986), sustained the discharge of a female flight attendant based on her guilty plea to felony charges of lewd and lascivious acts with a 12-year-old boy who was living with his mother and brother in the grievant’s home. The 36-year-old flight attendant was an employee with 17 years of service and a good work history. The record indicated that the grievant’s arrest, indictment, conviction, her referral to the state medical facility, and sentencing were each reported in the local newspapers, with the grievant identified by name and described as an "airline stewardess" but with no mention of the name of her employer. Although finding that her return to duty would not place unaccompanied children at risk nor give rise to an in-flight problem with co-workers, Kahn held that the critical factor for sustaining the dismissal was the effect of the grievant’s conviction on the company’s reputation. Kahn noted that a flight attendant is among those job classifications with duties that involve substantial first-hand customer relations and, accordingly, the employer was entitled to greater concern about the adverse impact of unfavorable publicity relating to off-duty behavior. Explaining the basis of his decision, the arbitrator had this to say:

I reach this conclusion [that just cause existed for the discharge] based on the gravity of this kind of misconduct as perceived by the traveling public; the fact that it involved the abuse of a youngster who was a boarder in grievant’s home and who has been placed in grievant’s care, for tutoring, by his mother; the fact that the misconduct was not a single thoughtless act but continued over a period of many [eight] months; the fact that the affair received substantial local newspaper publicity over a period of time, identifying grievant by name and as an "airline stewardess" although her employer was not named; because there is a high risk of additional publicity adverse to the Company that could be generated by her reinstatement; and because there also remains a risk, of unknown dimension, that such off-duty misconduct might reoccur: an event that could subject the Company to the probability of substantial adverse public notice compounded by grievant’s previous identification as a felony sex offender. The Company is not obligated, in my judgment, to assume such risks because of grievant’s off-duty misconduct.

(sustaining dismissal of employee for taking photo of nude teenage boy).

503. *Id.*
In *Quaker Oats Co.*, discharge was not sustained for an employee who pleaded guilty to contributing to the delinquency of a minor. The arbitrator noted that the employee's position did not place him in direct contact with the public and no complaints were received as a result of the incident. Similarly, another arbitrator refused to allow discharge of an employee with 19 years' seniority who faced an assault charge for shooting his wife. Even though adverse publicity resulted from the incident, the arbitrator commented: "If [the employee] has lost his acceptability to customers that fact, too, will quickly appear and the Company will have concrete evidence, rather than speculation, on which to base its decision."

Likewise, in *Vulcan Asphalt Refining Co.*, Arbitrator Henry Welch reversed the discharge of an employee for selling a former classmate (working as an undercover narcotics agent) a small amount of marijuana. The arbitrator pointed out that while the incident was common knowledge in the small town and had been the subject of newspaper reports, it did not in any noticeable degree harm the company's reputation or product. He also noted that the misconduct did not render the employee unable to perform his duties, and that his arrest and conviction could not be expected to cause refusal, reluctance, or inability on the part of other employees to work with the grievant.

Proving injury to the company's reputation is more difficult than demonstrating that the employer's business suffered a financial loss due to the grievant's conduct. Indeed, some arbitrators have viewed "business reputation" as too nebulous a concept to be useful, although these arbitrators are in the minority. When confronted with arguments that a grievant's off-duty misconduct damaged the company's reputation, most arbitrators have required a clear showing before sustaining discharges. This may be accomplished by reference to adverse media coverage or, in selected cases, by direct reference

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505. Id. at 43.
507. Id. at 56.
509. Id. at 1312.
510. Id.
511. Id. at 1313.
512. Movielab, Inc., 50 Lab. Arb. Rep. (BNA) 632, 633 (1968) (McMahon, Arb.) ("violation of the criminal law and having charges filed against him or even being convicted of a criminal offense for acts committed outside working hours and while off employer's premises, does not necessarily constitute a proper basis for disciplinary action unless there is an adverse effect upon the employer-employee relationship . . . .").
to the conduct itself. As a note of caution to employers, it may be difficult for an employer to argue that the off-duty criminal conduct of a grievant adversely affects its reputation where the company has in the past hired ex-convicts who have proved to be able and trustworthy employees.

2. Inability to Report for Work

When an employee's lifestyle results in a jail sentence, he may have little recourse if dismissed by management. However, arbitrators generally look for a violation of a specific provision of the collective bargaining agreement before sustaining discharge. In *Dorsey Trailers, Inc.*, an employee was detained in jail for armed robbery. The company had a plant rule that any employee failing to report for work without giving notice to the employer within three days lost all employment rights under the agreement. The arbitrator sustained the discharge.

Arbitrator John Murphy, in *Sperry Rand Corp.*, summarized the better weight of authority in this area as follows:

Whether or not confinement of an employee in jail will authorize his employer to take some sort of disciplinary action depends upon all the circumstances, including, among other things:

a. The language of their contract.

b. The length of confinement.

c. The nature of the cause for confinement; i.e., whether as the result of an arrest and inability to post bond, or as the result of a sentence.

d. The nature of the conduct resulting in confinement, i.e., its degree of seriousness and impropriety.

e. The nature of the disciplinary action to be taken or which results.

f. The employee's previous work and disciplinary record.

g. The extent to which the absence affected the employer's production, etc.

h. The effect upon plant morale.

i. Whether or not the conduct occurred on plant property or during working hours.

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514. Id. at 197-98.
515. Id. at 198.
516. 60 Lab. Arb. Rep. (BNA) 220 (1973) (Murphy, Arb.).
517. Id. at 222-23; see also Bethlehem Steel Co., 32 Lab. Arb. Rep. (BNA) 543, 544-45 (1959) (Seward, Arb.).
Employers will fare better if the dismissal is based on the employee’s unavailability for work and not simply on the jail sentence or the specific crime warranting the jail term.

3. Unsuitability for Continued Employment

What makes an employee unsuitable for continued employment? Mere lack of trust by management? When does conviction of a crime, for example, impair the employee’s usefulness to the employer? May an employee’s usefulness be impaired even though there is no media publicity of the off-duty misconduct? A major consideration is always the employee’s job and how the misconduct affects his job responsibility or relates to his duties. Similar to the reasoning of the courts in constitutional cases involving the privacy claims of police, arbitrators appear to give greater deference to management in cases involving guards and the protective services than non-military-type positions.

An individual may possess the physical capacity to perform a job but, because of the nature of the off-duty misconduct, may be considered unsuitable for continued employment. Arbitrator Alfred Dybeck, in Fairmont General Hospital,\textsuperscript{518} considered the discharge of a hospital maid for shoplifting at a local department store.\textsuperscript{519} Because the hospital had experienced a recent problem of theft, and even though the maid was not accused of stealing from the hospital, the arbitrator upheld discharge because her actions created a serious doubt as to her trustworthiness as an employee.\textsuperscript{520}

The question of an employee’s honesty in dealing with his employer forced the arbitrator, in Southern California Edison Co.,\textsuperscript{521} to sustain a discharge. The employee failed to give notice of his absence and lied to the employer about his off-duty arrest for possession of marijuana (the employee said that he had been arrested for drunk driving).\textsuperscript{522} The employee did not attempt to make alternate arrangements and was away from work for several days to take care of legal matters. His failure to tell the truth led the arbitrator to conclude that the discharge was for cause.\textsuperscript{523}

Similarly, in Safeway Stores, Inc.,\textsuperscript{524} Arbitrator James Doyle ruled the company had just cause to discharge an employee for "proven dishonesty" after he was convicted for stealing a vacuum cleaner at another store. In so ruling, the arbitrator rejected the argument that the words "proven dishonesty"

\textsuperscript{518} 58 Lab. Arb. Rep. (BNA) 1293 (1972) (Dybeck, Arb.).
\textsuperscript{519} Id. at 1294.
\textsuperscript{520} Id. at 1295-96.
\textsuperscript{521} 59 Lab. Arb. Rep. (BNA) 529 (1972) (Helbling, Arb.).
\textsuperscript{522} Id. at 530.
\textsuperscript{523} Id. at 533.
in the contract^256 meant only dishonesty relating to the grievant's employment.\footnote{525}

In American Airlines,\footnote{527} however, an employee was given a "second chance" after being convicted of shoplifting while off duty and not in uniform.\footnote{528} The arbitrator reasoned that the employee had not given the employer any reason to question her honesty during her previous four years of employment and should be given the benefit of the doubt. No publicity was given the incident.\footnote{529}

In general, off-duty convictions will not always warrant a termination, especially when the employee is long-term and does not falsely report his situation to management.\footnote{530}

\begin{itemize}
\item 525. \textit{Id.} at 1294. The agreement stated, "[e]mployer shall not discharge any employee without just cause." \textit{Id.} The contract further stated, "[a]n employee shall have at least two (2) written warning notices of the specific complaint against the employee before discharge except in cases of proven dishonesty . . . ." \textit{Id.}
\item 528. \textit{Id.} at 1246.
\item 529. \textit{Id.} at 1248.

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4. Objectionability or Danger to Other Employees

In some cases an employee's off-duty misconduct will cause co-employees to refuse to work with the grievant. When confronted with such a claim, arbitrators generally require a clear demonstration that this is true. Otherwise, discharge may be viewed as too harsh.

Refusal to work with a fellow employee may stem from an employee's conviction of a serious crime. This was the case in Robertshaw Controls Co.,531 where an employee pleaded guilty to sodomy and corrupting the morals of children.532 The employee was a scoutmaster in the community where he worked with parents, friends, and relatives of the victimized children.533 Arbitrator Clair Duff restated the principle set forth in the often-quoted Chicago Pneumatic Tool Co.,534 decision.

Arbitrators are reluctant to sustain discharges based on off-duty conduct of employees unless a direct relationship between off-duty conduct and employment is proved. Discretion must be exercised lest Employers become censors of community morals. However, where socially reprehensible conduct and employment duties and risks are substantially related, conviction for certain types of crimes may justify discharge.535

Arbitrator Duff, in sustaining the discharge, noted that the misconduct could not be kept separate from the activities of the workplace because so many families were involved. As the arbitrator stated, "[a] business enterprise by its nature requires collaboration, accord and reasonable harmony among

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531. 64-2 Lab. Arb. Awards (CCH) 7848 (1964) (Duff, Arb).
532. Id. at para. 8749.
533. Id.
employees. The technical and administrative sides of an enterprise cannot function correctly if the human side of the business is disrupted with conflict.\textsuperscript{536} Arbitrator Duff reasoned that families do not want their sons to seek or retain employment in a company where they would be subjected to the possible influence of a convicted sodomist. It is of note that the arbitrator made this finding notwithstanding the fact that employees signed a statement that they had no objection to working with the grievant.\textsuperscript{537}

In \textit{Lone Star Gas Co.},\textsuperscript{538} an employee of a public utility was indicted and later found guilty of incest.\textsuperscript{539} The arbitrator found it was impossible to reinstate the employee when there was testimony by the grievant's fellow workers that they were reluctant to continue working with him.\textsuperscript{540}

The same reasoning in \textit{Robertshaw Controls Co.}, however, was not controlling in \textit{Kentile Floors, Inc.},\textsuperscript{541} where an employee was convicted of possession of narcotics (amphetamines).\textsuperscript{542} Even though the company had a rule stating that employees convicted of crimes were subject to discharge, the arbitrator held that the discharge was inappropriate because the conviction had no discernible effect upon the employee's relationship with fellow workers.\textsuperscript{543} It is of special note that Arbitrator Howard Block reasoned that the employer's rule was overbroad since it failed to take into account the relationship between the crime and the employment situation. The discharge was thus seen as arbitrary and capricious.\textsuperscript{544} Similarly, in \textit{International Paper Co.},\textsuperscript{545} discharge was reversed for an employee convicted of an off-duty assault and battery against his foreman. (The employee, in an apparent argument over a woman in a tavern, had slashed his foreman with a knife.) Though the arbitrator viewed the knifing as a serious act of misconduct, he believed that it would not disrupt plant operations by creating fear among fellow employees.\textsuperscript{546}

In another case,\textsuperscript{547} an employee was offered $20 by co-workers to "streak" in front of a baggage terminal at the airport where he worked.\textsuperscript{548}

\begin{flushleft}
\textsuperscript{536} Id. \\
\textsuperscript{537} Id. \\
\textsuperscript{538} 56 Lab. Arb. Rep. (BNA) 1221 (1971) (Johannes, Arb.). \\
\textsuperscript{539} Id. at 1222. \\
\textsuperscript{540} Id. at 1223-24. \\
\textsuperscript{541} 57 Lab. Arb. Rep. (BNA) 919 (1971) (Black, Arb.). \\
\textsuperscript{542} Id. at 920. \\
\textsuperscript{543} Id. at 921. \\
\textsuperscript{544} Id. at 923. \\
\textsuperscript{545} 52 Lab. Arb. Rep. (BNA) 1266 (1969) (Jenkins, Arb.). \\
\textsuperscript{546} Id. at 1266-67. \\
\textsuperscript{548} Id. at 351.
\end{flushleft}
The employee accepted the offer and later, wearing nothing but a ski mask, tee shirt, and cowboy boots, streaked in front of the terminal.\textsuperscript{549} When news of the incident reached management, the employee was discharged for irresponsibility.\textsuperscript{550} In overturning the discharge, the arbitrator reasoned, in part, that the misconduct was not viewed negatively by co-workers. In fact, because some had even encouraged it, they had little, if any, reluctance to work with the grievant.\textsuperscript{551}

When it is believed that the off-duty misconduct poses a threat to the safety of fellow workers, however, arbitrators are not reluctant to sustain discharge. In one case, an employee’s conviction for aggravated assault for attacking an elderly man prompted the company to terminate his employment. The company successfully argued that the employee was dangerous and continued employment would endanger the safety of his fellow workers. Similarly, in \textit{Central Packing Co.},\textsuperscript{552} an employee convicted for attacking his wife and mother-in-law with a knife was subsequently discharged. At work, the employee had easy access to knives, cleavers, and other instruments. Even though the employee’s numerous arrests and convictions were all unrelated to work, the board of arbitration upheld discharge for the protection of other employees.

Even when the off-duty conduct does not involve acts of violence, discharges have been sustained where a showing has been made that the safety or health of workers would be threatened by reinstating the grievant. In \textit{Martin-Marietta Aerospace, Baltimore Division},\textsuperscript{553} Arbitrator Louis Aronin, in sustaining a discharge upon the employer’s discovery that an employee had been convicted of selling cocaine to an undercover agent, found that this conduct had an impact on the employer’s product, reputation, employee safety, plant security, production, and discipline.\textsuperscript{554} The company established that the grievant had a history of drug abuse and, at times, was even under the influence of cocaine while at work.\textsuperscript{555} The arbitrator, concluding that the employee was a "pusher," found that the evidence established more than mere "social use" of drugs by the grievant and determined that the employer could conclude that the grievant might attempt to sell drugs to other employees.\textsuperscript{556}

\textsuperscript{549} \textit{Id.} at 351-52.
\textsuperscript{550} \textit{Id.} at 354.
\textsuperscript{551} \textit{Id.}
\textsuperscript{552} 24 Lab. Arb. Rep. (BNA) 603 (1955) (Granoff, Arb.).
\textsuperscript{554} \textit{Id.} at 696.
\textsuperscript{555} \textit{Id.} at 696-98.
In general, where co-employee concerns are at issue arbitrators will uphold discharge if management demonstrates that the safety of other workers is endangered by reinstatement. A clear showing that co-employees have refused to work with the grievant will generally be sufficient to sustain a discharge, although there are exceptions. Evidence that employees will not work with the grievant if reinstated has also been credited by arbitrators, although the better rule is that just cause should not be determined on a popularity vote.

B. Application to Public Sector

In the public sector, discharge for off-duty lifestyle infirmities may be restricted by contractual, statutory, or even constitutional mandates. In general, just cause precedents and standards established by private-sector labor arbitrators have also been applied in the public sector, although in off-duty cases there appears to be a greater sensitivity to the criteria of the reputation and mission of the government agency on the part of both

(Turkus, Arb.) (discharge sustained when stewardess while at airport and in uniform sold marijuana to co-employees); Chicago Pneumatic Tool Co., 38 Lab. Arb. Rep. (BNA) 891 (1961) (Duff, Arb.) ("Degeneration of the addict could at any time reach a point where it would seriously endanger the health and safety of fellow employees.").

557. Advocates have routinely conducted opinion polls in support of their clients. For example, in an unpublished case reported by Arbitrator Benjamin Aaron, discussed supra at note 477, the grievant submitted the following question to a random sample of flight attendants: "Would you be willing to work with a male flight attendant who had solicited for money an undercover police officer for sex and had been arrested, charged with the offense and paid a $72.00 fine?"

558. 5 U.S.C. § 7513(a) (1988) of the Civil Service Reform Act of 1978 permits removal of an employee "only for such cause as will promote the efficiency of the service." To dismiss a federal employee for off-duty conduct the government must make at least two separate determinations: (1) did the employee commit the act(s) allegedly responsible for his removal; and (2) is there a nexus between the employee's misconduct and the efficiency of the service. Cooper v. United States, 639 F.2d 727, 729 (Cl. Ct. 1980). The Merit Systems Protection Board (MSPB) has, at times, interpreted § 7513(a) to mean that, where the misconduct is egregious, a nexus is presumed. Abrams v. Department of the Navy, 714 F.2d 1219, 1221 (3d Cir. 1983) ("employee may rebut this presumption by showing an absence of adverse effect upon the efficiency of the service, thereby shifting the burden of going forward with evidence to the agency to establish, by a preponderance of the evidence, a nexus between the off-duty misconduct and the efficiency of the service"); Borsari v. FAA, 699 F.2d 106 (2d Cir. 1983), cert denied, 464 U.S. 833 (1983); Masino v. United States, 589 F.2d 1048 (Cl. Ct. 1978). Note, however, that not all courts have embraced the MSPB's application of a "presumption of a nexus."

559. See supra notes 342-46 and accompanying text.
arbitrators and courts. It may accordingly be easier for the public employer to sustain a dismissal.

As in the private sector, the overriding principle in the public sector is that discipline for off-duty conduct is appropriate only when such conduct has a demonstrable adverse effect upon the employer's business or the overall employment relationship. Illustrative is United States Internal Revenue Service,560 in which two male employees were suspended for "mooning" a woman in a parking garage. While discharge was not involved, the reasoning and analysis articulated by Arbitrator Samuel Edes are consistent with holdings of arbitrators in private-sector discharge cases.

[The] applicable standard to be applied in judging the conduct of employees in public service takes into realistic account the fallible nature of the human condition which results, with substantial frequency, in conduct which is less than exemplary by commandment of both moral and legal codes. It recognizes, quite properly, that, however much an employer may be wont to enforce such codes and condemn their transgression, [the employer] is entitled to do so only to the degree that there is a direct and demonstrable relationship between the illicit conduct and the performance of the employee's job or the job of others.561

Arbitrator Edes further noted that because one employee's off-duty actions may be subject to disciplinary penalty and another's may not, determination of the propriety of disciplinary penalty can only be made on a case-by-case basis.562 Furthermore, an employer's power to discipline is restricted even where misconduct results in substantial embarrassment to the employer. In discussing this aspect, he commented that "[I]t is not unworthy of an employer to hope that all of his employees conduct themselves in a manner which . . . is above suspicion. . . [management] can only exercise his authority in respect to conduct which affects the work of his employees and, accordingly, the efficiency of his enterprise."563

The declarations by Arbitrator Edes highlight a principle used by many arbitrators in regard to off-duty misconduct. Again, arbitrators generally look for a nexus between the conduct of the employee and the employment setting. Absent a nexus, the discipline is overturned.

A paradigm case in the public sector is United States Customs Service,564 in which Arbitrator Joseph Rocha considered the discharge of a customs inspector for homosexual behavior. In holding that the agency did not

561. Id. at 21-22.
562. Id. at 23.
563. Id. at 22.
have just cause to effect the termination, the arbitrator focused on the
grievant's off-duty private conduct and the grievant's on-the-job activities:

If any fact has been firmly established by the evidence, it is that the
grievant separated his homosexual practices from his activities as a Customs
Inspector. He succeeded so well in this respect that no one associated with
his employment knew of his homosexuality until he was discharged. Also
critical is the fact that no traveler ever complained about [grievant] for any
valid reason. Certainly, [grievant's] homosexual behavior did not manifest
itself in any way that resulted in notoriety or public censure which would
reflect unfavorably on Customs... 565

Customs relied for precedent on a 1970 "sanitized" case arising in
Buffalo in which a Customs Inspector was discharged because he had been
arrested and convicted for engaging in homosexual conduct in a public
Toilet. 566 That case is easily distinguished from the instant case. In the 1970
case, the homosexual activity occurred in a public place; the arrest and
conviction became a matter of public record. As a consequence, Customs was
identified with notoriety and public censure and was exposed to an erosion of
public confidence. These elements are absent from the present proceeding. 567

This nexus requirement was again applied in Social Security Administra-
tion, 568 where an arbitrator was forced to determine if a nexus existed
between an employee's conviction for sexual offenses against a minor, for
which he served a six-month sentence, and his employment with satisfactory
performance as a clerk-typist. 569 The arbitrator was particularly concerned
with possible adverse public reaction, for which the employer offered no
supporting evidence. In overturning the discharge, the arbitrator held that,
absent any demonstrable loss of public confidence in the employer, there
could be no impairment in the efficiency of the agency. 570 His reasoning is
cited at length:

Under 5 U.S.C. § 7701(c)(1)(B) [of the Civil Service Reform Act],
Management has the burden of proof under the preponderance of evidence
test. In this respect, the Agency has a two-fold burden. It must first prove
that a wrongful act has occurred and then that the discharge for the
wrongful act would promote the Agency's efficiency. Since the Grievant's
removal, as stated aforesaid, was based upon two actions, the sexual offense

565. Id. at 1114-15.
566. Id. at 1116-17.
567. Id. at 1117 (footnote omitted).
569. Id. at 726.
570. Id. at 726-27.
and impeding the operations of the SSA, they will be discussed separately. The sexual offense will be considered first.

Although H’s denied in his testimony that he committed the sexual offense as charged, a copy of his conviction was entered into the record. Copies of court records are acceptable evidence and may be received by an arbitrator as such. Maroon v. Immigration and Naturalization Service, 364 F.2d 982 (8th Cir. 1966), U.S. v. Verlinsky, 459 F.2d 1085 (5th Cir. 1972). Thus Management has met its burden in proving the commission of a wrongful act by the Grievant.

It next must be determined whether, due to the Grievant’s wrongful act, his removal from employment will promote efficiency of the SSA. This must be accomplished by proving a logical connection (nexus) between H’s off-duty misconduct and his employment with SSA. As stated in Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1977),

"[T]here must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee’s ability to accomplish his or her duties satisfactorily or some other legitimate government interest promoting the efficiency of the service."

Although, in the case of "certain egregious circumstances a presumption of nexus may arise from the nature and gravity of the misconduct." Merritt v. Department of Justice, MSPB Docket No. PH075209058 (1981) The Agency specifically states that it does not intend to rely upon any such presumption. Thus the SSA must directly prove by a preponderance of evidence the nexus between the Grievant’s off-duty sexual activities and [their effect] upon the efficiency of the service.

The testimony by various supervisors of H upon which the Agency relies for this purpose, involved the concern for disabled employees, as well as student aides, working around the Grievant, the effect of disclosure and possible contact work with the public and the possibility that H could become a physical threat. All of this is speculative. In order to engage in public contact work the Grievant would have to be transferred to a field office which under the circumstances appears highly unlikely. The fact that H has made sexual advances to minors does not necessarily imply that he would while on duty attempt to engage in similar activities with disabled employees or student aides, especially since nothing even slightly similar to this has occurred over the past eight years. There was also no evidence that the public was even aware of H’s conviction. Thus the foregoing evidence is not sufficient to prove the necessary nexus. 571

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571. Id. (citations omitted) (quoting Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1977)) (quoting Merritt v. Department of Justice, MSPB Docket No. PH075209058 (1981)).
Referring further to federal law, the arbitrator concluded:

As reprehensible as H____'s misconduct is to this Arbitrator, I must hold that the recent decision of the Court of Appeals in Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981) is controlling in this matter. The employee in that case appealed from a decision of the Merit Systems Protection Board affirming his discharge from his job with the Post Office for alleged grossly immoral and indecent off-duty conduct with a child. As stated therein:

"The Agency cannot satisfy the statutory requirement that an employee's removal promote the efficiency of the service by use of unsupported, general assertions that such action is necessary to maintain the public confidence. To permit otherwise would be to render nugatory the protections afforded the federal employee by the imposition of a standard for removal which requires a connection between employee misconduct (especially when off-duty and non-work related) and the job. The agency must demonstrate, therefore, a relationship between this employee's misconduct and the specter that public confidence will be undermined." (emphasis added)

...  

Despite our reflective revulsion for the type of off-duty misconduct in question, whether resulting from a now-cured mental disability or not, the 1978 (Civil Service Reform) Act does not permit this court nor an employing agency to characterize off-duty conduct as so obnoxious as to show, per se, a nexus between it and the efficiency of the service. The 1978 Act prohibits the discharge of a federal employee for conduct that does not adversely affect the performance of that employee or his co-employees . . . ."

Although the Agency attempts to differentiate Bonet on the grounds that the employee in that matter was not actually convicted of a crime as here and that the employer therein relied solely upon the grossly immoral nature of the off-duty conduct as establishing a nexus per se, this argument is specious to say the least. The Bonet decision appears to be on all fours with the facts in the present matter and just because the criminal indictment against the employee therein was dismissed due to the unwillingness of the mother of the child to prosecute, this should not control the reliance thereon. Other than proof of the commission of the subject sexual act, the Agency here has failed to prove any relationship between that act and the undermining of public confidence.572

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572. Id. at 728-29 (footnotes omitted) (citing & quoting Bonet v. United States Postal Serv., 661 F.2d 1071 (5th Cir. 1981) (alteration in original)).
Similarly, the arbitrator in *City of Wilkes-Barre*, 573 refused to allow discharge of a blue-collar employee who pleaded guilty to possession of drugs. 574 In so ruling, the arbitrator examined the employee’s job performance, possible injury to the city’s image and reputation, and the existence of a drug problem among other city employees. 575 In all three instances, the arbitrator concluded there was no evidence that indicated any injury to the employer. 576

However, in *Commonwealth of Pennsylvania*, 577 discharge was sustained for a state liquor store employee for "conduct unbecoming a State employee." 578 In that case, the employee fatally injured a 71-year-old woman who asked him to stop beating his wife. 579 News of the incident was widely reported in the media, which prompted his termination. 580 In recognizing that an employer may take appropriate disciplinary action when off-duty misconduct affects or is likely to affect the employment relationship, the arbitrator concluded that the publicity would cause fellow workers to fear the grievant and make customers hesitant to deal with him. 581

Discharge was also justified for a police officer in *City of Taylor*. 582 The officer gave drugs to a female citizen who was also an informant for the city. 583 The arbitrator determined that the incident would negatively reflect

574. Id. at 34.
575. Id. at 34-36.
578. Id. at 281.
579. Id. at 282.
580. Id. at 282-83.
583. Id. at 148.
upon the police force and would further give rise to the distinct possibility of adverse publicity against the city and lowered police force morale.\textsuperscript{584}

In a decision with far-reaching implications for individuals with tax problems, Arbitrator Peter Feuille, in Lawrenceville Unit School District No. 20 and William McCullogh, an unpublished (November 3, 1987) decision, sustained the dismissal of a tenured teacher who had been indicted, arrested, and incarcerated for three misdemeanor counts of income tax evasion. In sustaining the dismissal, the arbitrator reasoned that the teacher attempted the functional equivalent of renouncing his citizenship by claiming that the federal and state government had no authority over him. He also noted that the teacher was also hospitalized for psychological evaluation and treatment and that "most of the events were widely publicized in the community." Indeed, "there was considerable awareness of the Teacher's behaviors among students, teachers, administrators, Board members, and parents . . . . Further, the Teacher offered no persuasive evidence to show that the media reporting of his conduct was noticeably inaccurate." The emphasis of the arbitrator was that the teacher could not be an effective role model for students "because he can no longer credibly teach or demonstrate such virtues as honesty and patriotism."\textsuperscript{585}

C. Summary

In general, arbitrators are reluctant to sustain discipline or discharge based on off-duty misconduct (i.e., conduct that occurs off the premises during non-working time) absent some relationship or "nexus" to the job. Where off-duty misconduct results in the physical inability of an employee to properly perform work duties (jail, for example), arbitrators examine whether such conduct violates a specific provision of the agreement. If it does, discipline or discharge will normally be upheld, especially where the company can also demonstrate some injury to its operations. When it is argued that an employee's off-duty misconduct renders the employee unsuitable for employment, arbitrators in sustaining dismissals have focused on considerations of honesty and the overall character of the grievant as these traits relate to a specific job. Other considerations being equal, it will be difficult for an

\footnotesize{584. Id. at 149-50.  
employer to sustain a discharge based merely upon the fact of a criminal conviction or that management finds the employee's lifestyle distasteful. In the "inability" and "unsuitability" cases, however, arbitrators may properly take into consideration mitigating circumstances such as the employee's prior work record and whether in similar situations progressive discipline had been applied.

Is there a synthesis or theory to principles established by arbitrators? Marvin Hill and Mark Kahn, in an address before the National Academy of Arbitrators, have summarized most of the criteria arbitrators apply in off-duty cases as follows:

The characteristics of the employer may be critical. If it is claimed that the off-duty misconduct had adversely affected or will harm the company's reputation or sales, or both, this may be of greater concern for firms that operate in highly competitive, consumer-oriented markets (e.g., airlines, retail stores, private schools, health clubs, day-care centers) than for oligopolistic firms with produced-oriented markets.

The location of the employer may be a factor. A prominent employer in a small isolated town may be legitimately more sensitive to scandal based on off-duty misconduct than an anonymous employer in a large metropolitan area.

The nature of the misconduct: Violent, destructive, or perverted actions may reinforce the nexus more than crimes of the so-called white-collar variety (e.g. tax evasion). A misdemeanor (e.g., marijuana possession) is much less likely to be considered just cause for discharge than a felony (e.g., marijuana sales).

The occupation of the offender. Many decisions [in the off-duty area] have hinged on a link between the employee's job duties and obligations and the content of the misconduct. It is not hard to demonstrate a nexus when a police officer commits a felony off-duty, when a teacher molests a child off-duty, when a sales clerk is convicted of shoplifting (from someone else's store), or when a bank teller has embezzled funds from his church's treasury. The extent and nature of the grievant's customer contacts are important, especially if they relate to the type of misconduct. Committers of sex crimes or property thefts will probably not be retained in jobs that entail entering customers' homes.

Finally, there is the extent and kind of publicity. When the public's attention has focused on the misconduct and the miscreant has been clearly identified with the employer, the nexus is reinforced. Often, of course, it is the publicity that caused the employer to become aware of the off-duty misconduct.586

Hill and Kahn conclude by noting that, in this context, it is easy to see why so many of the cases have arisen in connection with government units that are concerned about their reputation for economic or political reasons, or both.

VI. CONCLUSION AND POLICY ANALYSIS: IN SUPPORT OF A NEXUS REQUIREMENT

What should be the rule when employers attempt to exercise jurisdiction over an employee because management does not like that employee's lifestyle? Management has an interest in regulating the private lifestyles of its employees to the extent, and only to the extent, that a nexus exists between the employee's job and the off-duty conduct, or alternatively, between the employer's product or reputation and the conduct at issue. Absent a clear showing that the private, off-duty, personal activities of the type that would otherwise be protected by the constitutional guarantee of privacy, speech, or association have a nexus or relationship to an employee's job performance or the employer's product or reputation, the decision should be in favor of the employee. The better rule was stated by Arbitrator Richard Bloch in an unpublished (February 17, 1981) decision. In reinstating a 13-year flight attendant who removed a picture from its frame in a motel room while on layover, Arbitrator Bloch stated the rule this way:

The Company may properly be concerned when the private actions of employees inevitably involve it in an unflattering light. At the same time, the Employer is neither the guardian nor the monitor of its employees' off-duty actions. Basic precepts of privacy require that, unless a demonstrable link may be established between the off-duty activities and the employment relationship, the employee's private life, for better or for worse, remains his or her own.

Saying a nexus exists will not make it so, although as the job in question becomes more public or customer oriented the employer's burden in sustaining a discharge is easier than when the job does not involve dealing with the public. Indeed, in some public services (police, fire, and to a lesser extent, elementary and secondary education and the postal service) the test and corresponding burden sometimes has been little more than a mere declaration that the employee's activity is disgusting to management and any reasonable citizen. The more unconventional the activity (a sixth-grade teacher

587. A case illustrating how balances get resolved in favor of management because of an unconventional lifestyle of an employee is In re Grossman, 316 A.2d

ACADEMY OF ARBITRATORS 121-54, 153-54 (1986).
dressing and undressing a mannequin in his backyard, for example), the easier it becomes for management to sustain a dismissal, although we believe that courts and arbitrators should proceed with caution before concluding that public or private hostility to the individual’s conduct alone justifies actions against the individual.\footnote{39 (N.J. Super. Ct. App. Div. 1974), where a 55-year-old music teacher, otherwise found mentally and physically fit to teach, was nevertheless terminated as "incapacitated" after undergoing sex-reassignment surgery that changed his external anatomy to that of a female.} Constitutional rights, as well as the right to be free from an arbitrary or capricious dismissal under a collective bargaining agreement, should not be determined by polling the public or the immediate workforce. The views of co-workers and the public may be relevant, but rarely, if ever, should such considerations be dispositive of dismissal in any forum.

Public management will and should have a more difficult time regulating an employee's weight, dress, sexual preferences, and other "addictions" in non military-type organizations. However, para-military organizations, like police and fire, may be more free to do as they please when the employee does something unconventional, but not always. In the private sector, where constitutional restraints are absent, management is accorded significant discretion and power to affect employees' lifestyles, although Title VII, the Rehabilitation and Americans with Disabilities Acts, and state statutes (where they exist) provide some restraint. To the extent the employer is organized and the union has negotiated a grievance arbitration provision in a collective bargaining agreement, arbitrators may provide greater protection to employees than the courts applying a mere rational basis test. Most arbitrators apply more than a rational basis test, especially in discharge cases that involve off-duty conduct issues. They may not announce they are doing this, but a fair reading of the cases supports this proposition. Whether arbitrators in general apply what would amount to a strict scrutiny test when fundamental rights are at issue is open to question. We believe that numerous arbitrators have taken the high road in favor of employees when lifestyle issues are litigated before them.

Furthermore, because arbitrators often look to the law for guidance,\footnote{588. Cf. Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that private biases and the possible injury they may inflict could not be considered in deciding whether a child should be taken from white mother living with black man); Egger v. Phillips, 710 F.2d 292, 317 (7th Cir. 1983) ("[T]he unpopularity of the issue surely does not mean that a voice crying out in the wilderness is entitled to less protection than a voice with a large, receptive audience.").}
they may tend to accord more discretion to private sector companies in regulating lifestyles where constitutional restraints are not operative, but this practice is questionable and there is no policy basis for the rule. Public and private-sector management should adopt an objective nexus rule between the "misconduct" engendered by the employee's lifestyle and job performance. One court, rejecting the traditional approach of unquestioned deference to management, and applying a balancing approach to the problem, stated the better test this way:


Scheinholtz and Miscimarra argue that is it not instructive to ask whether arbitrators should or shouldn't consider statutory issues. Rather, if arbitration is to be preserved as a practical, expeditious, and final method of dispute resolution under the parties' labor agreement, the more helpful query is "whether and under what circumstances is the consideration of statutory issues appropriate." Leonard L. Scheinholtz & Philip Miscimarra, The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration, 40 ARB. J. 55 (June 1985). Noting that it is impossible to formulate a single answer to the question of whether statutory issues should be considered by an arbitrator, the authors maintain that four "guiding principles" should be considered when determining whether an arbitrator should consider external law: (1) the authority of the arbitrator (whether the parties explicitly indicate in their labor agreement that an arbitrator cannot consider issues of external law); (2) arbitral expertise (is the arbitrator competent to resolve the statutory issue?); (3) arbitration hearing procedures (will the parties' procedure enable a fair resolution of the issue?); and (4) the finality or "nonredundancy" of the procedure (does an arbitrator ever perform a service by handing down an award from its inception is predestined not to be enforced?). Id. Consideration of statutory issues will vary depending on a balancing of these factors.
[N]o longer is there the unquestioned deference to the interests of the employer and the almost invariable dismissal of the contentions of the employee... this court [is] no longer willing to decide these questions without examining the underlying interests involved, both of the employer's and the employee's as well as the public interest, and to the extent to which our deference to one or the other serve[s] or disserve[s] the needs of society as presently understood.\footnote{590}{Woolley v. Hoffmann-LaRouche, Inc., 491 A.2d 1257, 1260-61 (N.J. 1985).}

Hard evidence that an employee's lifestyle—be it heterosexual or homosexual affairs, sexual practices, dress, weight, religion, or other addictions—affects job performance should be the rule, not the exception, before an employee's discharge is effected.

The most difficult cases are those where the employer asserts that the employee may be mentally and physically capable of performing his job with the same degree of competency as before the "infirmity" came to light, but that the actions of the employee have harmed the employer's reputation and, if allowed to continue with the company, will significantly affect the company's business or even subject the employer to civil liability. How does management demonstrate that its reputation has been harmed, or is in danger of being harmed if the employee is allowed to continue working? How can the City of Detroit, for example, ever demonstrate that its reputation has been damaged by an employee's lifestyle if the determining criterion is loss of business revenue? The same question can be asked of any provider of services in an oligopolistic market. At a minimum, management should be allowed to submit evidence that the conduct was the subject of notoriety in the media or, alternatively, that the conduct was so outrageous (sexual relations with a retarded child, for example)\footnote{591}{Gulf Oil Co., Port Arthur Refinery, 85-1 Lab. Arb. Awards (CCH) para. 8234 (1984) (Stephens, Arb.) (sustaining discharge for having sex with retarded 12-year-old girl).} that no employer operating in its relevant labor market could argue that it is concerned with its reputation if it permitted the employee to continue working. Under this test, an off-duty drug offense may be found to have no effect on the company's reputation if the offense received little media coverage and the individual does nothing but takes care of the grounds. A different result may be reached if the drug offense is reported in the media and the employee services customer accounts or repairs commercial airplanes.

An individual who engages in a lifestyle privately, unobtrusively, and without publicity should not be subject to dismissal simply because of his lifestyle. The decision makers within the system—employers, courts, agencies, and arbitrators—should presume that there are areas of an employee's private life that are beyond the scope of management's inquiry and

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regulation. The problem in the lifestyle area is that consensus as to what constitutes appropriate employer concern diminishes when one moves from the abstract to the specific. At one end of the spectrum we have a hard time believing that the Georgia Attorney General really has a legitimate interest in the sleeping partners of the lawyers in his office\(^5\) or that the Mad River School Board should be concerned that a high school guidance counselor, who never proselytized bisexuality, announces to her officious secretary one morning while in "a good mood" that "she was in love with a woman."\(^6\) At the other end, a different result can be supported when the Assemblies of God, a sectarian employer, discovers that its popular evangelist is again having sexual relations with prostitutes (not an uncommon occurrence these days for teleministers),\(^7\) or when a local school board learns that a secondary teacher is regularly having sex with her students in the faculty lounge,\(^8\) or when middle-school teachers in North Kingstown, Rhode Island, start marrying their students.\(^9\)

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Any priest or chaplain will have a difficult time convincing a court that it should intervene in an employer's decision to terminate his services. See O'Connor Hosp. v. Superior Court, 240 Cal. Rptr. 766 (Cal. Ct. App. 1987) (opinion withdrawn); Miller v. Catholic Diocese of Great Falls, 728 P.2d 794 (Mont. 1986).

595. See, e.g., Chicago Bd. of Educ. vs. Shuey, No. 81-102-6 (November 5, 1981) (Dunham, Arb.) (unpublished) (upholding the dismissal of a tenured teacher for having sexual intercourse with a 17-year-old student "over five and under thirty times").

596. Michelle Green, Outraging the Town He Taught in, a Rhode Island Teacher Marries His Former Sixth-Grade Student, PEOPLE, October 3, 1988, at 23.

After being dismissed from the teaching position at Wickford Middle School for marrying Kimberly Ryan, 17 (a little more than six years after they met at school when Ryan was 11), Frederick Hone, then 46, served a three-month sentence for violating a court order that he stay away from Ms. Ryan. Hone is reported to have commented, "Since when do I need the permission of the Superintendent or the school committee before I marry?" Id. Responding to the allegation that he violated the trust placed in him as a teacher, Hone stated "I didn't violate any ethics. What do they think? That I'm going to marry all of their daughters or something?" Id.

The Hones are now in divorce proceedings with Mr. Hone facing felony charges of threatening the judge who jailed him. Teacher Who Married Pupil Now Regrets It, UPI Tuesday, November 14, 1989.
Somewhere in the middle of the spectrum are the hard cases that are said to make bad law.\textsuperscript{597} There may be something to the argument that management does have an interest in the health of its employees who elect to smoke or maintain morbid obesity, especially if they are covered under an employer-paid insurance policy. While a common law court is likely to side with management on both issues, based on the response of arbitrators in grievances involving unilaterally imposed smoking regulations on the job\textsuperscript{598} and their rulings in weight cases,\textsuperscript{599} we believe that arbitrators would rule the other way. There may likewise be validity to the argument that a public-sector employer has an interest in whether its police and fire fighters are following the "straight and narrow" and not associating with organized crime figures or drug dealers, or if its elementary teachers appear in Screw Magazine. In both cases management is likely to prevail when interests are subjected to a balancing test, although decisions the other way are likely.

More difficult are the cases where management concerns itself with the off-duty criminal activities of its employees (drug offenses, shoplifting, and domestic violence or sex offenses). Once an employee places management on notice of instances of physical violence, should a company be compelled by a court or arbitrator to take a chance on that employee knowing that repeat behavior may result in tort liability for negligent retention? What crimes, by their very nature, imply an impairment in the employee's judgment, stability, reliability, or social capabilities in performing his job, notwithstanding mitigating factors? Child abuse? Armed robbery? Marijuana use? Marijuana dealing (at the wholesale level)? Must management resort to expert testimony to demonstrate to a trier of fact that an employee's off-duty conduct will affect its customers, or can triers take judicial-type notice that some misconduct, by

\textsuperscript{597} Northern Securities Co. v. United States, 193 U.S. 197 (1904) (Holmes, J.) ("hard cases make bad law . . .").


its very nature, impacts the organization? Is it possible that some crimes will
make an employee better suited to perform his job, such as a high-school
guidance counselor who is convicted of off-duty vehicular homicide while
alcohol impaired?\textsuperscript{600} In the words of one court, "the teacher who committed
an indiscretion, paid the penalty, and now seeks to discourage his students
from committing similar acts may well be a more effective supporter of legal
and moral standards than the one who has never been found to violate those
standards."\textsuperscript{601}

Cases involving speech are particularly troublesome (except to academic
communities) such as when a private university, attempting to diversify its
student body, disciplines a professor for writing and expressing views outside
of any classroom that "on average, blacks are significantly less intelligent than
whites."\textsuperscript{602} A local school board, with a large minority student body, may
likewise become apprehensive when its faculty, even though unidentified,
starts wearing white robes with peaked hoods while attending political rallies
in Louisiana.\textsuperscript{603} Should management be compelled to take a wait and see
posture to determine if religious and racial hatred and intolerance (un-
deniability the message of the Klan) will spill over to the classroom? Must
management wait for actual complaints by its student body or declining
enrollments or headlines in the Chicago Tribune before any discipline can be
imposed? Are the rules different in New Orleans, Louisiana than in Nowhere,
Iowa? There are, of course, always more questions than answers in the lifestyle and privacy area (its a maze),\textsuperscript{604} especially when management’s

(Hill, Arb.) (sustaining discharge of guidance counselor/coach for off-duty vehicular
homicide conviction while testing positive for cocaine and alcohol).

\textsuperscript{601} Board of Educ. of Long Beach Unified Sch. Dist. of Los Angeles City. v.
Jack M., 566 P.2d 602, 606 n.4 (Cal. 1977) (citations omitted) (holding 16-year
teacher, arrested for homosexual solicitation, not per se unfit to teach).

\textsuperscript{602} White Professor Wins Court Ruling, N.Y. TIMES, Sept. 5, 1991, at A20.

\textsuperscript{603} Klan Challenges Law Against Hoods, N.Y. TIMES, Apr. 15, 1990 at 12.

\textsuperscript{604} Cf. It’s a maze, this garden, it’s a maze of ways
Any man can spend his day
It’s a maze, this garden, it’s a maze of paths
But a soul can find the way.
* * *
Miss a step, trip and fall
Miss the path, meet the wall
Miss the way, miss a turn.
Gettin’ lost’s how you learn.

It’s a maze, this garden, it’s a maze of paths
Meant to lead a man astray
regulations impact what, in the public sector, otherwise would be First Amendment rights. The solution, as suggested by Arthur Ross, is not found by comparing the intrinsic culpability of different employees or even the nature of the offense, although both present a good starting point for an analysis of the problem by employers, courts, and arbitrators. Whatever the perspective of the decision-maker, the better rule remains: Absent an objective evidentiary nexus between the off-duty conduct and on-the-job performance, any inquiry or regulation impacting lifestyles should be prohibited.

Take a left, and then, turning left again's
How a soul can find the way.
LUCY SIMON & MARSHA NORMAN, It's a Maze in THE SECRET GARDEN (Columbia Records 1991).
