

Lifestyle Discrimination: Employee Rights Versus Employer Interests

Helene L. Caudill
helenec@stedwards.edu
St. Edward's University
Austin, Texas

There are numerous forms of discrimination worldwide. These forms generally focus on two broad categories: (1) traditional or protected categories including race, national origin, gender, age, and disabilities, and (2) lifestyle activities including sexual orientation, smoking, obesity and other health related concerns, political and civic activities, leisure activities, daily living activities, and illegal activities. In general, the traditional category includes characteristics that are not under the control of the individual or are, in some way, beneficial to having a diverse workforce. In contrast, the lifestyle category includes characteristics that may be perceived as controllable by the individual and are not particularly beneficial to a diverse workforce. So herein lies the controversy over the increased objection of employers imposing their control over their employees' off-duty lives. Indeed, how can employers protect their interests while at the same time ignore employees' lifestyle choices that may affect the company's image and profits? On the other hand, should employees be forced to succumb to every mandate imposed by employers, even those that dictate behaviors and activities that take place after hours?

Lifestyle discrimination, also known as invasive discrimination, can take on many forms. The two most common are related to smoking and obesity. Numerous companies and non-profit organizations have imposed not only "no smoking" policies (including no smoking in the parking lot), but "no smoking at all" policies, including off-site or at home. These companies can then impose random nicotine tests and fire those who fail. Employees have objected, just as they originally did when illegal drug testing was first implemented, but nicotine testing is perfectly legal in all but 19 states. These 19 states have passed statues that have made it unlawful for employers to discriminate on the basis of using a legal substance, such as tobacco. But Weyco, Inc., an employee benefits firm in Michigan, stopped hiring smokers in 2003, started firing current employees who chose to continue smoking two years later, and more recently began imposing a monthly fine on employees whose spouses smoke. Another example is Scotts, the lawn care company, who imposed their "no smoking at all" policy in 2005 and is now facing a lawsuit from a former employee who was fired. The employee's attorney questions whether Scotts will just stop at smoking or will they fire employees if they "don't get enough exercise."

An even more controversial category of lifestyle discrimination centers on overweight or obese employees. While there are conflicting reports claiming that obese employees cost employers more in health related costs and absenteeism in comparison to those being of normal weight, the perception remains that many employers view obese employees as a detriment. In fact, the results of surveys published in 2008 by the *International Journal of Obesity* note that weight discrimination occurs almost as often as racial discrimination. In the first of its kind, the state of Alabama has approved a plan to begin in 2010 to charge their employees \$25 per month if they have a body mass index that exceeds a certain norm.

While smoking and obesity are the two most frequently cited forms of lifestyle discrimination, it is likely that others are simply not so openly discussed. For example, discrimination based on sexual orientation may be illegal in some cities, like Austin and San Francisco, it is not a traditionally covered category and thus, is frequently cited as a concern. Also of concern is membership in political parties and civic organizations that may oppose the views and values of an organization, such as being a supporter of Planned Parenthood while being employed by a Catholic organization.

Employers may also deem certain leisure activities like riding a motorcycle or snow skiing as inherently risky which could lead to injury and absenteeism and thus, increased expenses for the organization. Daily living activities could include piercings, tattoos, and even visits to adult book stores. Employers may discriminate based on these activities on the grounds that they are morally unacceptable and would have a negative impact on its image. And while violent crime is often seen as a permissible reason to discriminate against a current or potential employee, nonviolent crimes like driving under the influence, drug use, and prostitution are also often viewed in a negative manner because they reflect the individual's poor judgment.

While employer concerns about lifestyle behaviors and employee concerns about their rights on this issue may seem to be more evident now, it is interesting to note that over 100 years ago Henry Ford created a "Sociological Department" that included a team of investigators who actually visited employees' homes and asked them about their personal lives. If these employees did not meet Ford's standards they were disciplined and could eventually be fired.

Companies today may not go to these extremes but most are savvy enough to include a "Personal Behavior" policy in their handbooks, such as the following:

Occasionally an employee's personal behavior could or actually does negatively affect the best interests of the Company. So the Company has a business-related interest in asking employees to refrain from personal behavior that could also harm the reputation and business interests of the Company.

Therefore, employees must not engage in personal behavior on the job or away from the job in a manner that could or does negatively impact the reputation of the Company or that could or does negatively impact the business interests of the Company. In addition, employees must not engage in personal behavior on the job or away from the job in ways that negatively affect the employees' job performance or the job performance of coworkers.

If the Company determines an employee's personal behavior or actions negatively affect the Company's reputation or business interests or negatively affects the employee's job performance or performance of a coworker, the Company may discipline the employee up to and including termination.

In general, it is important for companies to protect their interests and reputations while at the same time not be too intrusive into the personal lives of their employees. But how intrusive a company actually is may often be a matter of perception and this perception has changed as the line between employees' work and home lives continues to blur.