

Chapter 2

Employee Rights and Responsibilities: The Internal Constituencies of Business

Abstract The emerging consensus on the responsibilities that employers bear toward their employees is traced, through the cases and controversies that brought it into being.

Keywords Justice • Non-discrimination • Employer • Employee • Rights • Employee welfare • Employee dignity • Employee integrity • Sexual harassment • Whistle-blowing

2.1 Introduction

What are employees entitled to? A fair day's wage for a fair day's work, to begin with: they have a contract, written or implied, that indicates their wages and when they are to be paid, their benefits and what they have to do to qualify for them. The worker is worth his wages, and his employer is enjoined by law and by the Bible not to keep them back overnight.

But beyond contract, the employee has a spectrum of rights proceeding from general social and legal understandings of his position *vis a vis* an employer. We may summarize those clusters of rights under five headings or ethical imperatives: justice, privacy, workplace health and safety, dignity and integrity. Each of these headings specifies a condition worth preserving in the workplace, so that the worker may thrive and flourish as an individual and a responsible citizen. Dilemmas for the employer—and for the employee and the larger society—arise when the efficient and profitable conduct of business is made more difficult either by honoring the ethical imperatives or by providing the bureaucratic enforcement mechanism to implement them. Difficulties also arise, as we shall see, when our values for the workplace work against each other. Let us consider these rights-clusters in sequence.

2.2 Justice

2.2.1 *Non-Discrimination in Hiring and Promoting*

2.2.1.1 The Law: Equal Employment and Affirmative Action

The law is very clear: if you are an employer, you will not decide who among your applicants is to get the job, or who among your employees is to get the promotion, bonus, preferment, educational benefit, or more desirable corner office, on the basis of criteria irrelevant to the job that is to be performed. There are two categories of decision on the basis of irrelevance, both of which can be called **prejudice** (a disposition to judge before knowing the facts, a bias that works in favor of some and against others regardless of the objective features and facts of the situation). First, less troublesomely, there is the ancient prejudice *in favor of* your relatives and your friends; second, more seriously, there is the ingrained prejudice *against* certain **power minorities** (groups which, while not necessarily numerically a minority in the employment situation or region, have traditionally not held decision making power. Incidentally, that makes the ones that have dominated the field—usually but not always white males—“majorities.”) We will take these on in order.

A pattern of hiring your relatives is called **nepotism** (from the Greek word for “nephew”: presumably, your brother has put pressure on you to hire his son). Many relatives are perfectly well qualified for the job, of course, and not everyone you hire has to be a relative: but in a nepotistic system, it is well known that family members (including spouses) will always control the business and no non-family member can ever be preferred to a family member. Nepotism is very widely practiced in some societies (India, for instance) where it is accepted as a matter of course; in certain kinds of small (“family”) businesses, it is common everywhere. But in larger enterprises in modern European and American societies, nepotism is frowned upon, on two moral grounds: First, it raises serious questions of trust and competence, since it creates the presumption that the relative did not have to meet the same tests as a non-relative; and second, it destroys the hope, and often the morale, of any non-relatives who had been faithful to the company for a long term. **Cronyism** (systematic hiring and retaining and promoting friends who can be counted on for loyal support) is a variant of the same practice. Both are also contrary to the free-market criterion of efficiency, which requires that an objective decision procedure pick out the best qualified candidate for any function in the corporation; any publicly held company will be required by law to maintain fair standards in hiring, so that the shareholders will not be cheated by corporate officers doing favors for their families.

The more serious form of discrimination excludes or otherwise negatively impacts power minorities. Such discrimination is illegal: Following the Equal Protection Act of 1963 (which referred specifically to equal opportunity for women), Title VII of the Civil Rights Act of 1964 made it illegal

to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

(The amendment of the Act by the 1972 Equal Employment Opportunity Act kept this language.) The Age Discrimination in Employment Act (ADEA) of 1967 and the Americans with Disabilities Act (ADA) of 1990 extended protection to those over forty years of age and to those suffering from disabling handicaps. In some places, protected groups include those who have chosen alternative lifestyles and sexual orientation (gays and lesbians); but for the most part, non-discrimination laws cover only traits that are in no way chosen and cannot be concealed, like color and sex. Occasionally courts have ordered companies with a history of discrimination not just to abstain from discrimination from that point on, but also to take **affirmative action** to compensate for that history: that is, actively to seek out qualified candidates of the group that has been discriminated against, to hire them and to promote them; sometimes, companies have been asked to hire up to a certain **quota** or percentage of their workforce of the minority in question. **Affirmative action** by now has acquired another meaning: it encompasses any social programs, in the public or private sectors, intended to ensure that minorities enjoy all of the opportunities that any member of the power majorities might have, whether or not in compensation for past discrimination. During the late 1960s and early 1970s, all corporations contracting with the federal government were required to have such programs. The Equal Employment Opportunity Commission, established in 1972, required that all companies doing business with the United States had to issue a written equal employment policy and an affirmative action commitment, appoint a high-ranking officer in the company to implement it and to publicize it, and must keep careful track of the actual number of minority employees by department, job classification, and compensation, in order to flag any pattern of underrepresentation and discrimination. Should any such be found, specific programs with specific hiring and promoting "goals" (court decisions disagreed on whether a real "quota" could be adopted) had to be developed, implemented, monitored and audited for progress.

Certain glaring forms of discrimination can be identified and punished under this legislation. In November, 1996, for instance, Texaco, Inc., was forced to settle for \$176.1 million (the largest such settlement in history) a racial discrimination lawsuit brought by their employees, only days after a company lawyer released tape recordings of executive suite meetings; the executives had been heard to express contempt for African American customs and an intention to conceal the evidence of discrimination against black employees. But in many cases discrimination is much more difficult to detect, and fair treatment difficult to enforce. If non-discrimination is adopted as a policy in pursuit of the value of a truly diverse workforce (derived from the ideal of universal equality), serious ethical issues are raised in the attempt to balance that value with others that seem equally important. Some of these issues will be covered in the next sections.

Often the only way to judge a policy, or an industry, or a nation, is by the results. How do black and white families fare in a country dedicated to racial equality? Very unequally, it seems: according to the White House's Council of Economic Advisors, in 1996 black and Hispanic families were further behind whites than they had been twenty years ago.

The typical white family earned about \$47,000 in 1996, almost twice that of blacks. Worse, the typical black household had a net worth of only about \$4,500, a tenth of the white figure....About 95 % of black families own no stock or pension funds.

...Unemployment among black men fell last year to 8.6 %, the lowest in 23 years, but nevertheless twice the jobless rate of white men.

Since 1972 black family incomes have risen less than 10 %, at a time when white family incomes have risen almost 15 %...¹

Meanwhile, back on the distaff side, while here too there has been progress, women do not earn the salaries that men do for the same work. Diane Harris, a business writer, argues that for executive women at least, the situation is improving: "In the 28 fields for which salary information was available by gender, women typically earn 85–95 % of what men in similar jobs take home...." That is better than the Bureau of Labor Statistics average on all jobs (blue-collar and white), which has women earning 74 cents to every dollar a man takes home.²

Clearly whatever the laws say, our society keeps blacks and whites, men and women, in different jobs, somehow, and on different pay scales. Three cases demonstrate how unjust discrimination lodges in common business practices and attitudes: in setting job qualifications, in collective bargaining agreements, and as inadvertent sex stereotyping in hiring and promotion decisions.

2.2.1.2 Three Cases of Bias

Griggs Versus Duke Power Company³

Prior to 1970, Duke Power Company of North Carolina required a standardized general education (aptitude or "intelligence") test of every job applicant for any Department other than their Labor Department. The wages of the Labor Department were the lowest, and transfer out of Labor was difficult. Eventually a group of black employees sued the company, arguing that the test was unfairly keeping them out of good jobs. The case was difficult to make. No one doubted that prior to 1964, when the Civil Rights Act was passed, Duke Power had openly discriminated against black applicants, routinely consigning them to low-paying jobs. But

¹ *New York Times* editorial, Tuesday, February 17, 1998.

See also the article it is commenting on, by Richard W. Stevenson, ironically entitled "Black-White Economic Gap is Narrowing, White House Says," Tuesday, February 10, 1998, p. A16.

² Diane Harris, "How does your pay stack up?" *Working Woman* February 1996 21(2) p. 27 ff.

³ 401 U.S. 424, 91 S.Ct. 849 (1971).

since 1964, all applicants had been subjected to the same requirements, a high school diploma or passing the test for any department but Labor, all applicants were graded fairly and assigned to jobs accordingly. It just so happened that Blacks always ended up not employed or in the lowest paying jobs.

Justice Warren Burger wrote the majority opinion. The test was unjust, he argued, on two grounds: first, the new requirement did not change the status of all the whites who had previously been hired without having to take it, who had obtained their jobs simply because they were white, and

Under the Act, practices, procedures, or tests *neutral upon their face, and even neutral in terms of intent*, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.⁴

Second, the blacks who took the test were at a significant disadvantage because they came from a school system still substantially segregated, and the black schools were known to be vastly inferior to the white schools. *But unjust or not*, he argued, if Duke could show a clear correlation between what the test was about and qualifications for the job, the test would pass Constitutional muster:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving those devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance....Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that *any test used must measure the person for the job and not the person in the abstract*.⁵

The burden of proving that connection Duke could not meet; you did not need a high school diploma or the skills tested for on the aptitude test to do most of the jobs at Duke Power. On those grounds the test was ruled in violation of Title VII, and Duke Power Company was ordered to remedy the situation by hiring more blacks in all positions.

International Brotherhood of Teamsters Versus United States et al.⁶

This lawsuit was initially brought by a group of black and Hispanic truck drivers, arguing that their company and their union discriminated against them. They were largely correct; instance after instance was cited where their requests for transfer or promotion were ignored or denied, or where they were simply lied to about qualifications, application procedures, or the existence of jobs. Since the passage of the Civil Rights Act, most of that had stopped, yet few minority drivers had been hired or transferred to better positions.

⁴ Id at 430; emphasis supplied.

⁵ Id at 436.

⁶ 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

This lack of progress, the employer argued, stemmed not from discrimination but from “low turnover.” More accurately, it was a result of collective bargaining agreements that put disincentives in the way of the kinds of transfer the minority drivers wanted. Of course the disincentives now worked against white new hires and transfers as well as against minorities, but all the senior positions in a system that (by union preference) strongly favored **seniority** (years accumulated on the job, either with the company or in the present job) were already occupied by whites because of past discrimination. The situation was in many ways analogous to that in Duke Power Company, except in this case the company could claim that it was bound by the union contract. In the decision, handed down in 1977, Justice Potter Stewart stopped short of dismantling the seniority system as a method of controlling employment decisions, but made it clear that collective bargaining agreements would be subjected to the same scrutiny as employer’s policies in the Court’s efforts to end employment discrimination.

Price Waterhouse Versus Hopkins⁷

According to many of her co-workers, Ann Hopkins was one of the best partnership candidates that Price Waterhouse had seen for years. She had secured a \$25 million State Department contract, after working on it for two years, and had run it herself. No one else who went up for partner in her year had anything like her track record. She apparently had no difficulty dealing with, and pleasing, the firm’s clients; she was a competent project leader, she worked long hours and pushed herself and her staff very hard to meet deadlines, in short, she did everything her male colleagues did to make partner. So why was her candidacy put “on hold” for a year?

There was a suggestion that perhaps the partners who voted against her disliked her approach and behavior because she was a woman: not that they objected to women, and not that they objected to her behavior, her competitive drive and aggressiveness, salted occasionally with strong language—they liked those qualities in a man—but that they perceived those qualities as inappropriate *in a woman*. That kind of perception is known as **stereotyping**, in this case **sex stereotyping**: basing your judgment of a person or his or her skills on some stereotype you happen to have of persons of that type, kind, group, race or sex. When the partner delegated to explain the Policy Board’s decision to Hopkins advised her, to improve her chances next year, to “walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry,”⁸ she took the case to court, and eventually won. The point here was not that the policies by which partners were chosen was invalid, nor yet that Price Waterhouse did not have the right to demand good “interpersonal skills” (Hopkins’ weak point) of their partners, but

⁷ 490 U.S. 228, 109 S.Ct. 1775 (1989).

⁸ Id at 1782.

that it was clear that in this decision of the Board, sex stereotyping had taken place, and that made the decision discriminatory.

Job discrimination, in brief, is seriously wrong and illegal, and not only the blatant sort of job discrimination that characterized this country's history: the signs in the store windows at the start of the century reading "Irish need not apply," the Jewish quotas and exclusions of the 1930s and 1940s, the frank discouragement of blacks in all except agricultural and service categories of employment up through the 1950s. All practices that lock in the results of previous discrimination are seriously flawed, and all practices that stem from unwarranted stereotypes of power minorities are subject to review and reversal. The object of the law is to make sure that hiring and promotion (and transfer and compensation) decisions are made on objective and job-related criteria only, and the history of court decisions indicates a national intention to carry it out.

2.2.1.3 Affirmative Action and Justice

What do we do if a decision like the ones tracked above seems to create as much injustice as it ends? Let's continue the story of Duke Power, and look at one case where an allegation of "reverse discrimination" went as high as the Supreme Court.

Duke Power, Chapter Two

Employment in the construction sector of the power industry is cyclical: when times are good, plants expand and new ones are built, and the companies hire workers. When times are bad, they lay them off, keeping their names for recall when times get better; the workers are used to this. By 1974, three years after the Supreme Court decision in *Griggs v. Duke Power Co.*, Duke Power Company, with plants throughout the South, was faced with the necessity of laying off some thousands of construction workers. But there was a complication. When the Supreme Court decided that Duke Power had unfairly discriminated against black construction workers by imposing that aptitude test, it had instructed Duke Power to hire and black workers in all departments until the proportion of blacks to whites in the workforce was equal to the proportion in the general population in the regions in which they operated. Duke had complied with the order, and for several years had hired a large proportion of black workers, who were generally doing very well and beginning to be promoted to supervisory positions. All these affirmative action gains would be lost if the company laid off workers according to its usual formula, which respected seniority—that the last hired would be the first to be laid off.

The vice president who had to make the decision, Bill Lee, was faced with three demands: from management, to lay off all the worst performers and keep the best, of whatever seniority or race (*reward for merit*); from the senior workers, to lay off

in reverse order of hiring, by straight seniority (*reward for service*); and from the court decision and the newer laws, to preserve the proportion of black workers in the company (*diversity*). He could satisfy everyone to some extent: he began by laying off the worst performers, as far as the foremen could document; he went on to discharge all workers, of whatever race or competence, who had been hired during the last six months. But that didn't begin to reach the number he needed to lay off. For the rest, he would have to choose straight seniority or choose to keep the black workers.

In the end, he chose to keep the black workers, going to the worksites to explain his decision personally to the discharged white workers. His explanation appealed to justice: to the fact that those who had gone before him in the company, and the region, had indeed discriminated against blacks, and that it was their duty to try to provide some compensation for that now. The decision was accepted by the workers, and worked out better than he had anticipated: As a result of that choice, he told an interviewer 10 years later, the black workers were able to build up some seniority themselves, and the next time the company had to lay off workers, he could make up the lists on the basis of straight seniority while keeping the legal proportion of black workers.⁹

United Steelworkers Versus Weber¹⁰

Bill Lee's white employees understood his position and did not protest that their rights had been violated by a policy that essentially gave jobs to black workers that they might have expected to be theirs. When Brian Weber, a semiskilled worker at Kaiser Aluminum's plant in Gramercy, Louisiana, was denied admission to a skilled craft training program for most of the same reasons, he saw the matter differently: he sued for admission. His application had been denied in accordance with a collective bargaining agreement that Kaiser had made with United Steelworkers "to eliminate conspicuous racial imbalances" in the skilled craft positions; so although his scores on the qualifying test were higher than the scores of the senior black applicant (a friend of his named Kernell Goudia), the black applicant was accepted and he was turned down. He figured he was being cheated, so he brought his case to the law.

Five years later, Justice William Brennan delivered the opinion of the Court, upholding affirmative action plans against this kind of protest:

⁹ See Kenneth Goodpaster's account of this case (Matthews, Goodpaster and Nash, *Policies and Persons*, McGraw Hill, 2nd edition 1991 pp. 128ff.), and the video of his interview with Bill Lee in 1984 (Harvard Business School Series).

¹⁰ *United Steelworkers of America, AFL-CIO-CLC vs. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2nd 480 (1979).

We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to “open employment opportunities for Negroes in occupations which have been traditionally closed to them.”¹¹

So Weber lost his case. Brennan went on to note that the plan did not entirely shut down opportunities for whites, and was in any case a temporary measure.

Affirmative Action, Pro and Contra

When all is said and done, is “affirmative action”—a program of increasing minority representation in places where minorities are underrepresented, even if that means passing over members of the majority who would otherwise have gotten the job (raise, promotion)—really justified? The country as a whole is badly divided on the subject. The federal government has largely abandoned the strict affirmative action requirement of the 1970s. Some state legislatures adopted that federal affirmative action program, requiring all contractors to show efforts to recruit minorities; more recently (1996) California passed an anti-affirmative action initiative, Proposition 209, by a very narrow margin. It provides in part:

Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State’s system of public employment, public education or public contracting.

The Supreme Court, as noted in the decision on *Weber*, had been willing to defend some, but not all, affirmative action programs as Constitutional; in *Memphis Firefighters v. Stotts*¹² the Court faced a situation identical to the one Bill Lee faced in the Duke Power layoffs, and came down on the other side: straight seniority won, and the affirmative gains were lost. The results-oriented “disparate impact” theory articulated by the Court in *Griggs v. Duke Power* above, justifying affirmative action programs by citing the inequality of the *result* of policies, rather than their intent, was contradicted 18 years afterwards, in *Wards Cove v. Atonio*¹³ where the Court held that Title VII aimed only to remedy *intentional* discrimination.¹⁴ Meanwhile, affirmative action is one of the most hotly debated topics in politics; like the abortion issue, it has become a conservative/liberal litmus test for any candidate for public office. Among political philosophers and ethicists, the battle rages just as furiously (if less publicly): some defend it as a proper form of

¹¹ 443 U.S. 190, 218.

¹² *Memphis Firefighters v. Stotts*, 104 S. Ct. 2576 (1984).

¹³ *Wards Cove Packing Co. vs. Atonio*, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S.Ct. 2115 (1989).

¹⁴ See Robert Belton, “The Dismantling of the *Griggs* Disparate Impact Theory and the Future of Title VII; The Need for a Third Reconstruction,” 8 *Yale Law and Policy Review* 223.

compensation for centuries of wrong, and certainly no worse than the other forms of preferential treatment we accept; a smaller number attack it as unjust to those of the majority who are excluded from deserved benefits, as certain to stigmatize its beneficiaries as less than qualified in the public eye, as a source of resentment that will follow any favored by the policy through his or her career, and as improperly turning an area of law and justice into a political football.

Beyond Justice to Celebration

Possibly the best hope of agreement is to treat the whole issue of the hiring and promotion of minorities not as a matter of justice, but in a utilitarian framework, as a social and political ideal to be attained as far as possible. Homogeneity is easy; nothing is more soothing than working, playing, marrying, and dying in a group of people exactly like ourselves. But diversity—simply the presence in the workplace (at least) of many different types of people—has enough advantages to make it worth working toward:

- (a) It salts the enterprise with genuinely different points of view, many of which will not have occurred to the majority members of the group, and therefore expands the number of insights and options available to the decision makers.
- (b) It supports, by providing breadwinners for, a series of different communities, each of which can learn and contribute to its own culture, enriching the nation and preserving its pluralist heritage.
- (c) In an increasingly multinational business atmosphere, it provides links and ambassadors to many nations with which American business is cultivating economic ties.
- (d) Minority co-workers enrich and expand the minds of their majority colleagues, making them more curious, tolerant of differences, and interesting to be with.

The matter is infinitely complex, and those four reasons provide the merest beginning of a discussion of diversity beyond the scope of this work. Consider this: until recently, the U.S. was the only place in the world committed to the “melting pot” concept of nationality, where people of all ethnic backgrounds are supposed to become good Americans through assimilation into our culture. Until very recently, it has been the only nation in the world reluctantly committed to the “orchestra” (or, “mulligan stew”) concept of nationality, where people of all ethnic backgrounds retain their cultural identity while participating in the civic life of an open society. Diversity as an ideal is very new to all of us, and its consequences will work themselves out only in the next millennium.

A Final Note on Economic Justice

“Economic justice,” inevitably a contested concept, should be mentioned only because wide disparities of income surely *feel*, to a worker, like any other of the “disparate results” mentioned by the Supreme Court in some of the racial discrimination cases. A while ago, for instance, Philip Purcell, then the top executive of Morgan Stanley/Dean Witter Discover, cashed in on stock options worth \$36.4 million in the 12 months ended November 30, 1997. That was in addition to \$14.4 million in salary, bonuses and restricted stock. Graef Crystal, a “compensation expert” from San Diego, pointed out that Purcell “could have taken an additional \$43.2 million of exercisable options, but he chose not to. That would have given him \$94 million. That’s a staggering amount.”¹⁵ Yes. If workers of all races should be treated equally, should all levels of workers be treated equally? Is there some rule of proportionality that would say what relation the highest salary in the company should bear to the lowest, or what sacrifices the top ranking executives should be prepared to make before serious layoffs begin? At the outset, there is no real evidence that CEO salaries are related to shareholder wealth—recall that while corporate profits fell 4.2 % in 1989, for instance, CEO salaries went up 8 %. And when CEO bonuses are pegged to increase in the price of the stock, the result can be considerably worse for the employee: the quickest way to boost the price of the stock is to “downsize” the company, laying off labor, the highest of the cost factors, while the income still rolls in. With the ratio of income to cost radically changed, the profit soars, the quarterly report looks terrific, the stock leaps upward, and the CEO may find himself dandling a bonus in the tens of millions. (The knowledgeable investors depart at that point, it may be noted.) Surely this must be unjust? But there is nothing in that scenario that is illegal, and everything in it that increases the wealth of the shareholders—the first responsibility of the CEO. This question will remain to be addressed in the future.

2.3 Privacy and Civil Rights

2.3.1 *The Rubber Hits the Road: Testing and Monitoring*

2.3.1.1 General Purposes and Problems of Monitoring

Employees usually work within sight of many other workers, and generally do not mind being (informally) watched. This is good, because corporate employers have a legitimate interest in keeping track of what happens at the workplace, and in making sure that employees are spending their time on the company’s business and

¹⁵ Peter Truell, “Morgan Merger Creates Windfall, at Least for Boss,” *The New York Times*, Saturday, February 21, 1998, p. D1.

not (save exceptionally) on their own personal business. Further, they have a duty to keep track of the workplace to make sure that the law is obeyed, that there are no hazards to health or safety, and that all employees are being treated with respect. Monitoring is also necessary to find out if training is effective (is the employee actually doing what he or she was trained to do?), to measure efficiency and effectiveness, to make sure customers are being treated in accordance with policy, to gather the data needed for objective evaluations and, in general, to control the quality of the performance for which the employer—the customer, ultimately—is paying. “Supervision,” oversight, then, is part of any workplace that distinguishes clearly between employers and employees (universities, except for limited purposes, are not among these), and employees generally do not object to having their work overseen, directed, inspected, and occasionally rejected. That’s the boss’s job and prerogative.

But supervision of *work* respects a boundary around the *person* of the employee, a personal “space” that ought not to be entered by the boss without clear invitation, or at least permission, from the employee. The right to this space of noninterference is part of the general right of **privacy**, generally understood, in the words of Justice Louis Brandeis, to mean “the right to be left alone,” and identified as one of the most valued rights of the citizen in a free country. What kinds of monitoring might be held to violate this boundary? When does “overseeing” become “spying,” and supervision become intrusion? We will take on three current issues: Electronic monitoring; drug testing; and genetic testing (and other health inquiries).

2.3.1.2 Electronic and Video Monitoring

The technology of monitoring continues its relentless advance: we can now store the data from computerized performance monitoring to review the number of keystrokes in an employee’s day, to watch his or her computer screens, track the destination and length of telephone calls. There are computerized location badges that can tell the employer precisely where an employee is at any time, and allow precise measurement of time spent in the restrooms or at the water cooler (do they still have water coolers?) The problem with all this electronic monitoring, according to employees subject to it,¹⁶ is that it is dehumanizing to be judged by a machine, that the machine cannot measure good work as opposed to much work, and that the devices regularly permit employers to read e-mail and notes stored on the computer for personal reference only. The trouble with video monitoring (which can be conducted with miniaturized cameras beamed through pinholes) is that it spies on employees in unguarded moments—scratching, yawning, slumping, squirming—and that a composite tape could easily be made from the product of

¹⁶ Charles Pillar, “Bosses with X-Ray Eyes,” *MacWorld*, July 1993.

the videos that would reflect very unfavorably on them, even if they were doing absolutely nothing wrong.

The issue of overly intrusive monitoring is really a matter of trust, and of restraint of idle curiosity. To what extent *must* the employer watch an employee, or arrange to have the employee watched, as part of an implied contract with the shareholders and the public, to ensure that law is being respected and the company's interests are being served? To what extent beyond that minimum may an employer monitor, without sending the signal that the employees are simply not trusted? In a typically enormous corporate setting, is there any way for an employee to *earn* the employer's trust? If there is not, can we say that, in the absence of bad behavior, it is a matter of *right* for an employee to be trusted? In this context a pervasive question begins to make sense: Is there something in the human mind that really wants to know too much? From the fact that technologically, the employer *can* know his secretary's number of keystrokes, does it follow that he should want to know that, that that information is of any use to him? The answer is probably not, and further, that the secretary will probably find out about the keystroke counting, and that it will decrease his or her efficiency slightly and his or her morale significantly; the probability, however, is that the employer will have that monitoring device installed.

The issue of trust has a more general form: What may an employer ask, and how may he ask it? What kinds of questions can show up on pre-employment questionnaires? Some states prohibit questions about religion or sexual orientation; others about encounters with the police that did not end in conviction for crime; others about marital status. With employee theft estimated at \$10 billion annually, may an employer require that an employee take a lie detector test-on penalty of firing if he or she refuses? It's a reasonable way to find the thief: everyone knows that physiological changes accompany the kind of emotional stress that comes from stealing and lying about it, and the polygraph is a quick and cheap way to verify information and catch thieves. But the use of such tests raises very serious problems: first, they test for nervousness, not crime, and cannot catch calm criminals even as they incriminate nervous innocents; and second, they are humiliating and degrading, associated with a criminal element and law enforcement rather than a supportive workplace. For this reason, the legislatures of several states have passed laws restricting private use of polygraphs, joining the Federal Employee Polygraph Protection Act (1992) which prohibits private employers (except security firms and drug companies) from using polygraphs in pre-employment testing, and requires that if they are to be used when there has been a pattern of thefts from the company (for instance), the employee must have the test explained to him or her, along with the reason why the testing is being done and why this particular employee has been chosen for testing.

Perhaps the best way to approach the difficult questions of monitoring and testing is by a three-way test:

1. While normal supervision is necessary and welcome, concealed monitoring, electronic or visual, and testing (especially by mechanisms such as the

polygraph), are inherently repugnant. Are there really good job-related reasons for using them, or could the information be obtained other ways? *Always use the least intrusive methods to gather information.*

2. What kind of information is being looked for and collected? Is that information strictly job-related or does it include a fair amount of personal prying for information that just might come in handy some day? *Collect and store no information that is not directly relevant to the way the employee is doing the job for which he or she was hired.*
3. Who has access to this information? Only those on the job who need to know it to do their work of protecting the customer, the shareholder and the public, or anyone with access to the computer or to the boss? *No one should have access to employee information except those in the appropriate departments who really need to know it.*

2.3.1.3 Drugs and Drinking

Substance abuse is a national problem, a problem of any affluent society, especially when, as in the developed world in the 21st century, primary structures of family and community have been seriously eroded. The problem of substance abuse is not a problem created by business or the market. But corporations have to deal with the problem, for substance abuse creates intolerable conditions in any workplace: (1) the behavior of the abuser is often beyond his or her control, and may be injurious to co-workers, for whose safety in the workplace the employer is responsible; (2) job performance is predictably substandard, a recipe for actionable errors if the employee is manufacturing automobiles and a recipe for indefinitely extensive loss of life and property if the employee is driving one; (3) even when the employee is not operating machinery, or responsible for public health and safety, the substandard performance drags down the productivity, and morale, of the abuser's co-workers, who have to carry the abuser's job as well as their own. It should be noted that substance abuse damages job performance in any position requiring judgment; the oil tanker captain on alcohol and the subway operator on marijuana may get more publicity, but bond traders on cocaine can do just as much damage to the financial position of their clients as oil spills can do to Alaskan fisheries.

For all these reasons, corporations (and public services like police, firefighters, and transit operators) have adopted a variety of policies to test for drug use in the workplace. These are not simple policies to draft or enforce. It is worth looking at some of the difficulties:

The usual method is to test some body part or substance, usually urine, for the presence of the breakdown products of known controlled substances. But this method (1) does not distinguish between **workplace use** and weekend recreational use of drugs. To be sure, the unauthorized use of controlled substances is illegal

any time; but is it the employer's responsibility to crack down on weekend use of drugs, even though all behavioral effects will have worn off by the time the worker arrives in the workplace? (2) The method is not always **valid**—that is, it does not always accurately signal the presence of drugs. If the test yields a **false negative**, the employee continues unidentified and dangerous; if the test yields a **false positive**, the employee is unfairly plunged into very bad trouble. Of course the test can be repeated, however repeating the chance of the false positive. Suppose there were only one false positive in a hundred tests. 99 % accuracy is excellent, better, in fact, than we can actually achieve. In a workforce of 20,000, that's 200 false positives. A repeat test, also 99 % accurate, will still yield two false positives, and that's two totally innocent employees accused, tried, convicted, fired and probably unable to find another job. The actual statistics for the validity of the tests are much worse. Is this kind of error tolerable for the sake of the safety of the whole? (3) The method by which the urine must be obtained is notoriously **intrusive**: the employee must urinate into a cup *under the direct observation* of a supervisor; if a female employee is allowed to use a stall in the restroom, the door must remain open. Nowhere else in business practice, or indeed in the practice of any other institution, is the taboo against non-voluntary observation, overt or covert, of a person eliminating bodily wastes, violated for any person of sound mind and good health past the age of four. The fact that drug testing by this method is accepted anywhere is some indication of the importance that has been attached to the problem of substance abuse.

Monitoring for alcohol abuse raises many of the same dilemmas as monitoring for drug abuse, but at a lower level. The reasons why alcohol abuse cannot be tolerated in the workplace are the same, but the tests are far less intrusive: most able foremen can spot containers of alcohol when vials of drugs would be invisible, and can identify drinking on the job much more quickly than drug abuse; if testing has to be done, a much less intrusive (and more surely accurate) breath analysis can be performed; and alcohol is, very simply, a much more familiar problem to all concerned. Alcohol abuse becomes problematic for corporations when all supervisors are absolutely certain that an employee is abusing alcohol, and someone has to decide what to do about it. Before the passage of the Americans with Disabilities Act, an alcoholic employee would be given a chance to reform, and if that did not work, the employee was out. But alcoholism is now classified as a disabling disease, and no employee can be separated from the company until a series of efforts have been made to rehabilitate him. The employee may not be fired just because of a history of alcohol abuse: that is the effect of the ADA. There must be careful documentation of failure of performance on the job. If ultimately the employee cannot perform the job for which he or she has been hired, separation is possible; but the documentation of that performance has to be very, very good, as well as documentation of the efforts at rehabilitation.

In the new legal climate, most large corporations have found it advisable to institute Employee Assistance Programs. Based in the Human Resources Division, these Programs assign skilled counselors to help employees with a variety of problems, personal, emotional, and sometimes practical (housing and personal

finance, for instance), that are interfering with work. The workplace supervisor may send the employee to the Program, and in most jurisdictions may require the employee to keep the appointment; thereafter, the advice to the employee is confidential, and unless the employee consents to more extensive sharing of information, the supervisor may only know whether or not the employee has kept the appointment and whether or not the advice (whatever it was) is being followed. If either of those is negative, given a clear record of substandard performance, a procedure may be set in motion to dismiss the employee (usually including a set of steps, like suspension without pay, short of firing). An alcoholic employee may be fired; but it is no longer a simple matter to do so.

2.3.1.4 Testing and Monitoring of Health and Genes

In light of the intrusiveness of the standard drug test, alternatives to body fluid testing have been suggested.¹⁷ One obvious alternative is hair sampling. It costs an employee nothing to pluck a single hair and give it to a supervisor (it will grow back!), observation to make sure it is the employee's own hair can be accomplished without direct viewing of the private parts or their functions, and traces of drugs can be detected in hair strands for up to 90 days after the employee has used them. Yet in 1996, two employees of Global Access Telecommunications in Boston, who had cheerfully submitted to urine tests, were dismissed for refusing to give hair samples. They argued that hair could be used to determine not only drug use but also a wide range of genetic data, including predispositions to disease or disabling conditions.¹⁸ Identification of these predispositions—ranging from BRCA1, the gene for breast cancer, with a small but significant ability to predict onset of the disease, to the Huntington's Disease gene, which is 100 % predictive of Huntington's Disease—could lead to refusal of insurance benefits in the future. (Possession of the gene would allow the company to call the disease, should it materialize, a "pre-existing condition," treatment for which may still be non-reimbursable.)

In an era when health insurance is becoming increasingly cost-conscious, employee fears about employer awareness of health conditions are justified. An employee in New Jersey was fired from her small company because at her age (52), and with her history of arthritis, the company's health insurance would be higher than it could afford as long as she was on the payroll. Without her working there, the insurers were willing to offer a much lower price to cover the other employees, whose average age was 32. When she protested that her work record was excellent and that she was, in effect, being dismissed because of age and because of non-work related disability, both of which are illegal, she was informed

¹⁷ "Alternatives to Body Fluid Testing," *HR Magazine* April 1992, p. 42.

¹⁸ David Adams and Edward W. Maine, *Business Ethics for the 21st Century*, Mountain View CA: Mayfield Publishing Co. 1998. p. 169.

that it was not the employer discriminating, but the insurance company—and that it is perfectly legal for insurers to charge more for older people with established medical conditions. She had to find another job.

To be sure, such practices seem to contradict the original purpose of insurance, which was to spread the risk over a large pool of the older, younger, sicker and healthier employees, so that all could afford to be covered in case of catastrophic health emergency. But it occurred to the insurance companies long ago that they could earn higher profits in their health insurance business if they covered only those persons who would not get sick; at the least, they could improve profits relative to their competition if they made sure that their client pool was healthier than the competition's. If they could pay out significantly less in reimbursements to the insured, they would be favored with an agreeable choice: to increase the return to shareholders, to keep back a portion of profits to increase investments, or to increase market share by underselling the competition. Since this line of reasoning struck every player in the insurance market at once, the result was a strong effort at **creaming**: discovering, through careful research, which groups of potential customers enjoyed the best health, and arranging to insure all and only those. Barriers to insurance were immediately raised before the poorer workers, inner city residents, older workers, and any with a history of or predisposition to disease. And any information that the company can legally obtain can be used in the calculations.

Occasionally legislation is required to counter the determined quest for information on health and other conditions. It is now illegal to require a person to undergo a test for the presence of the **HIV** virus (the Human Immunodeficiency Virus) that leads to **AIDS** (Acquired Immunodeficiency Disease Syndrome, a serious collapse of the immune system that is often ultimately fatal), for two reasons: first, because the victims of the disease tended to be male homosexuals (who acquired the virus from unprotected intercourse) or intravenous drug users (who got it from sharing contaminated needles), both groups subjects of fear and contempt from the larger population; second, because for a long time the disease was inevitably lethal, the means of transmission were known only in part, and co-workers were terrified of infection. In the light of the inevitable stigmatization of an identified HIV carrier (in which the immediate loss of his or her health insurance would be only one of many worries), even before he or she became ill with AIDS, many states have ruled that no test for HIV may be required unless someone other than the suspected HIV carrier is at risk. (Also material to that decision was the fact that no treatment was effective in curing the disease, so it could not be argued that its detection was of benefit to the individual or society in the procuring of timely treatment.) As with other disabilities, any job decision for the affected employee must depend on work performance and nothing else; until the HIV positive employee is simply unable to do the job, the employer may not dismiss him.

With genetic research progressing rapidly—the current flap about “cloning” is only a symptom of a much wider sophistication of technique and genetic theory—the problem with health insurance is only going to worsen. With full genetic

information available, soon any insurance examiner will be able to predict which of the proposed insured will develop expensive chronic diseases, since asthma, arthritis, sickle cell disease, cancer, lupus, multiple sclerosis, Alzheimer's Disease, ALS (Lou Gehrig's Disease), and most disabling heart, lung and back disease have genetic components. The ultimate invasion of privacy—determination of precisely that molecular code that determines our individuality—is even now within the capability of those most likely to abuse it for their own profit. This may be one of the areas that market solutions only make worse; we may have to rely on very complex regulation and legislation to retain privacy in these matters.

2.3.2 Employment at Will?

Adam Smith's model makes every employment agreement a free and voluntary contract between worker and employer. From this model it follows that, absent contractual restrictions, the employee can leave at any time and the employer can separate the employee at any time. It all sounds very fair, and of course, it is not. The employer does not need any individual employee anywhere near as much as the employee needs the job. The only way to create a modicum of fairness in the workplace is to protect the worker in his or her employment, at least from arbitrary and discriminatory firing. That, fundamentally, is what this chapter is about. Workers may not be fired (or kept in positions beneath their ability) on grounds of disfavored minority status; workers may not be deprived of rights of privacy obtaining elsewhere in the society save as absolutely necessary to protect the workplace—and that “absolutely necessary” is under continuing negotiation.

But that, of course, is only half the story. We have laws in place now, for instance, that protect minorities in the workplace from the discrimination that history leads them (and us) to expect; citizens with disabilities are appropriately included in this protection. Yet one part of the result of that protection is that employers have a long, difficult, and expensive battle in front of them if they try to dismiss an alcoholic or emotionally disturbed employee who not only is not doing his or her job, but is making it impossible for co-workers to do theirs. What is the employer to do? Probably, seek some other form of legal protection—new judicial rulings, new legislation—that will protect the workplace from the intolerably disruptive employee. At the end, we settle for the knowledge that there is a pendulum swinging in employer/employee relations; the beauty of a free system is that it swings freely, and that common justice can always correct whatever imbalances common justice has created.

2.4 Protection of Health and Safety

2.4.1 *Hazards in the Workplace*

2.4.1.1 Where We're Coming From

For most of the human experience, we have accepted the fact that injuries occur in the course of making a living. In many of our older industries, whole regional cultures grew around the shared risks of the dominant occupation: the “Widow’s Walk” and community support for the families of seagoing merchantman crews and fishermen who were lost at sea; the coal-mining towns where a man’s status as seasoned miner was set by the tone of his black-lung cough, the cattle and logging towns where every family had lost at least one man to accident on the range or in the woods; and of course, the military installations around the world, where one of the oldest occupations led most predictably to death. Tracking the growth of health and safety provisions in the United States is, essentially, tracking the decreasing social tolerance for physical risk of any kind, just as we shall see in the next chapter’s discussion of consumer risk and manufactured products.

The first century of modern industrialization, from about 1830 to 1930, saw manmade workplaces as dangerous as the seas, mines, plains and forests of our early industries. Exposed machinery amputated fingers and hands, massive steam explosions were common, and all the hatters in Danbury, Connecticut, ended their careers insane, with lethal brain damage from the fumes of the mercury used to process the felt for the hats—hence, “mad as a hatter.” Contributing to a high accident rate and widespread health problems was the brutal pace expected of factory workers: 16 h days were the rule, Saturday work was often expected, and workers could be counted on to show up for overtime opportunities because wages were so low—the factory owners, if no one else, read David Ricardo. Early in this century several states passed wages-and-hours laws limiting the hours that women, at least, could work during a given day, and specifying a minimum wage. After several bouts with a Supreme Court that seemed determined to protect Adam Smith and Freedom of Contract in the face of impossibility, these laws were declared Constitutional and were followed by federal legislation on minimum wage and working conditions. By the 1930s further progress had been made: workers’ (“workman’s”) compensation laws, awarding insurance payments to workers injured on the job (thereby incidentally preventing them from suing their employers for damages), at least provided support for the families of workers hurt on the job; meanwhile, labor unions had taken over the job of negotiating wages and working conditions, with the federal government setting only the barest minimums. By the late 1960s, however, it was clear that leaving the matter of protection of health and safety in the workplace to the private parties to work out and to insurance to pay for would provide insufficient protection; not enough workers were unionized, compensation schemes required waivers of legal rights and did nothing to make the workplace safer, while public tolerance for workplace

risk had fallen below the point where unions could be permitted, for instance, to bargain protection away in return for higher wages. So the Federal Government stepped into create its own superagency to monitor the protections, and OSHA was born.

2.4.1.2 OSHA

The **Occupational Safety and Health Act (OSHA)**, passed in 1970, assigns the primary responsibility for protecting worker health and safety to the federal government, rather than to the states or private parties; its intention is to ensure “so far as possible every working man and woman in the nation safe and healthful working conditions,” and it creates the **Occupational Safety and Health Administration** (also **OSHA**) to implement it. Every workplace must be kept free of recognized hazards that are likely to cause serious injury or death: the implications of that general purpose are spelled out in specific provisions for each industry. Machinery must be designed to shield fingers and hands from sharp surfaces or moving parts; where deleterious toxins are known or suspected, frequent inspection (sampling of the air) must take place to ensure that the amount is not high enough to cause harm, and so forth.

Changes in the law have not prevented industrial accidents, especially in industries working with substances whose lethal potential is not entirely known, and OSHA does not always protect the employee. The chemicals that are used in the manufacture of computer chips, for example, are known to be toxic, and often a safe level of such contaminants is difficult to determine; the composite plastics used in the skin of the Stealth bomber sickened some of the workers involved in its manufacture in the late 1980s and 1990s; while a worker whose job was stirring tanks of chemicals at a Film Recovery Services plant in Illinois suddenly became dizzy from the toxic fumes, went into convulsions and died. Was this a freak accident or a case of company negligence? OSHA and the local courts disagreed; OSHA fined the plant a few thousand dollars, while the state attorney general for Cook County sought, and obtained, convictions of three of the company’s officers for murder and reckless conduct. Fires and explosions continue to claim lives in industrial accidents; are these all preventable? Is it OSHA’s job to prevent them?

Reviews of OSHA’s work are mixed. On the one hand, its critics assert that its regulations multiply like rabbits and significantly raise the cost of doing business by rapidly changing rules on trivialities—the size of toilet seats, for instance. Further, OSHA regulations can conflict with those of other agencies, as they did for awhile in meat packing plants: OSHA wanted the often bloody floors corrugated so workers would be less likely to fall, while the Food and Drug Administration (FDA) wanted them smooth so that they could be hosed clean to prevent infection. Overzealous enforcement of OSHA provisions has been blamed for the closure of small companies that could not afford compliance. (Of course, when the political shoe changes feet, the opposite criticism can be heard: during the administrations of industry-friendly presidents, enforcement funds and personnel

are slashed, and the agency is accused of neglect and ineffectiveness.) On the other hand, there is no doubt that the agency's existence, and the ever-present threat of unannounced inspections, have helped to keep the workplaces safer. And OSHA guarantees workers' rights that were unenforceable or "waived" under previous law: the right to know what hazards await them in the workplace, the right to refuse to accept risky assignments, the right to know the extent of their exposure to toxins, the right to petition for higher safety standards, the right to file complaints against their employers and request federal inspections of the workplace—and backing up all of these, immunity from discharge or other retaliation for exercising these rights.

OSHA shares the drawback of most attempts to manage business enterprises by federal legislation: it is behind the times, working only on the information that has survived the political process, and cannot weigh its own values against competing values in any particular situation. We can illustrate these drawbacks with three typical workplace-injury situations: lung damage from the inhalation of asbestos fibers, reproductive anomalies from exposure to lead and other chemicals, and "repetitive stress injuries."

2.4.2 Representative Dilemmas in Workplace Health and Safety

2.4.2.1 Asbestos: "Outrageous Misconduct" or War Effort?

Asbestos was thought to be a miracle fiber when it was discovered: a mineral that could be spun like cloth, light, durable, and absolutely fireproof, it rapidly became the standard of safety where protection from fire was concerned. As early as the 1930s, doubts about possible harm from breathing asbestos fibers had begun to surface, and a condition of "asbestosis," mild lung scarring from asbestos fibers, had been identified; but at industry request, these doubts were set aside in the interests of keeping the work moving and the people employed. The country's major exposure to asbestos occurred during the Second World War, when the U.S. Navy needed ships built quickly to replace those lost at Pearl Harbor. All the ships had to be insulated by asbestos, which was sprayed on inside the confined spaces of holds and compartments in the ship. Because of the warnings from the early studies of asbestos, the workers were usually issued masks to protect them from inhaling the fibers; but the workers found them uncomfortable and inconvenient, no one required them to wear them (especially when they cut into productivity), and they were generally ignored. Speed of production was essential.

About 30 years later, physicians noted the first cases of mesothelioma, a cancer of the lining of the chest attributable almost entirely to fibrosis—the scarring of the lungs by some durable fibers. After the first round of cases, it was clear that mesothelioma was significantly associated with former employment in one of

several industries, especially defense industries, that had used asbestos. It was clear to the lawyers contacted by some of the first victims that these sick individuals merited some sort of compensation for being put at risk for this deadly and painful disease. But who should pay? The workers could not sue the federal government, which had ordered those ships, because there had been no law protecting them from asbestos exposure (and therefore no negligence on the part of the government for not enforcing it), because the government cannot be sued without its consent, and most importantly because they were not working for the federal government—they were working for private contractors who had agreed to do the work to prepare the ships. Many of these were by this time out of business, and besides, any injury suffered on the job had to be compensated through workers' compensation laws, and no further suits against the employer could be brought. Whom to sue? The lawyers rapidly came up with an answer: the manufacturers of the asbestos, who knew or should have known that the stuff was dangerous and who did not sufficiently warn their customers to make sure that the workers applying it should be protected from inhaling it. The theory was wildly successful, and some excellent accounts of the ensuing asbestos battles supply the details.¹⁹ But the bankrupting of Johns Manville, the major asbestos contractor, and the subsequent class action suits and settlements, do not address the ethical dimensions of the asbestos incident.

The reason most frequently offered, and widely accepted, for holding someone liable for putting someone else at risk, is that the risk was unknown to the victim and therefore not accepted *voluntarily* by the victim. Had the victim known about the risk ahead of time, the victim would never have consented to the exposure. But, first, can we take seriously the worker claims that “had they been informed about the hazards of asbestos, they would not have continued to work in those settings”? For if they cannot say that, a claim that the exposure was involuntary is not true. Second, to what extent is the industry “concealment” of the data, that showed asbestos to be dangerous, relevant or material to any judgment of praise or blame? Didn't the workers already know that you shouldn't breathe that stuff? Some testimony suggests they did. Third, the danger of mesothelioma and other forms of lung cancer turn out to be strongly correlated, in these workers, with the habit of smoking tobacco. We know that smoking causes lung disease and predisposes for many different kinds of cancer, asbestos or no asbestos. Should all asbestos workers who smoked be excluded from awards on grounds that we cannot tell if their disease is from asbestos or smoking, or have the awards docked proportionately to their smoking on some ground of contributory negligence? And fourth and most importantly, what kind of risk was involuntarily assumed by those workers—in comparison with the risk assumed by others in their positions? The United States right after Pearl Harbor was a military camp on a war footing; every

¹⁹ See especially Paul Brodeur, *Outrageous Misconduct*, New York: Pantheon Books, 1984. Also Samuel S. Epstein, “The Asbestos ‘Pentagon Papers’”, in Mark Green and Robert Massie, Jr., Eds, *The Big Business Reader: Essays on Corporate America*, New York: Pilgrim Press, 1980. As the cases still wind through the courts, the issue continues.

young man who was not paralyzed, in another military service, or working in a war industry was drafted into the Army. So the alternative for the asbestos workers was military service, with a moderate risk of violent death within the next two or three years, against an asbestos risk, a mild risk of death by sickness 25 years into the future. Which risk would it have made more sense to assume? And just as the soldiers killed in the war did not have their rights violated, so, it could be argued, there was no violation of right in assigning these workers to spray asbestos. Of course risks could have been minimized, had the workers worn their masks; again, it can be argued that the workers contributed some negligence to the situation and to their ultimate disease. Asbestos, of course, continued to be used long after the war was over. But the proportionate risks and the problem of contributory negligence remain, even after the military draft was ended. The debate continues, in and out of court.

2.4.2.2 Women of Childbearing Years in Chemical Factories

For this issue, some knowledge of **ontogeny** (the developmental course of a fetus from fertilized egg to baby) is presupposed. If a woman is fertile, i.e. at that point in her monthly cycle when she is able to conceive a child, then there is a chance that some 24 h after intercourse, a sperm will meet up with a fertile egg and conception will take place. If either sperm or eggs are **mutated**, genetically changed by some process, there is a chance that a deformed child will be conceived; mutation might have taken place in response to a **mutagen**, a substance that causes mutations, somehow absorbed from the environment. The fertilized egg implants itself into the womb and starts to grow. Within the first month, before the embryo is visible to the naked eye and usually before the mother knows for sure that she is pregnant, all the body's systems start to form; organs, limbs, nervous system. Rapid formation of new systems goes on for the next month or so; after that, the course of growth is set, and the baby just finishes the job and gains weight for the next seven months. During those first two months the embryo is very vulnerable to interference with development by foreign substances that interrupt one or more of the terribly delicate processes of growth and formation; substances that harm the embryo by interfering with such growth are called **teratogens**, literally, "monster-makers." For if the embryo is exposed to those substances, the result may be major malformations of limbs (the teratogen in the drug thalidomide, for instance, kept arms and legs from growing normally), loss of kidneys, heart damage, or mild to severe nerve and brain damage; such children used to be called "monsters," and the name stuck.

Clearly it is a good thing to keep all adults who may sire or bear children from exposure to mutagens, and all embryos from exposure to teratogens. How does this task become part of the corporation's responsibility? Recall the workplace hazards cited above: among them were (more specifically) fumes of cyanide compounds, chlorine compounds, arsenic compounds and ambient lead, byproducts of the manufacture of plastics, film, paint, pesticides, airplanes and even computer chips.

Some of these substances are deadly, and they are carefully controlled with masks, suits, and special rooms; some are harmful, and they are regulated; some don't seem to do any harm at all, at sufficiently low concentrations. But the concentration that will seep into the germ cells and turn out to be mutagens—producing no harm to the adult but creating genetic chaos for the children—is not known; above all, the concentration that will hurt an embryo, should the mother be exposed to the substance and should the substance cross the placenta, is not known. One of the major controversies that arose in the conduct of business in the 1980s was, whether a corporation was justified in banning all women, but not men, from a workplace where some low concentration of a harmful substance was in the air. On the one hand, no one wanted a badly damaged baby born—a baby the corporation would probably have to pay for the rest of its life, after a jury heard the tearful mother blame the company and its teratogens for the damage done to her child. On the other hand, women have the same right to work as men; what if the mother objected to being forced to leave her job, or prevented from taking one, because of ambient chemicals?

Corporations argued vigorously about this issue, trying several means to reconcile the claims of justice with the safety of the child. Some corporations asked women to pledge that they would not have a baby while working there; when some of them got pregnant, the women claimed that the pledge forced them to seek abortions. That horrified the press, and the practice was dropped. Some plants barred all *fertile* women, women of childbearing age who had not received surgical sterilizations, from entering areas with chemical contaminants in the ambient air; younger women protested that they were being compelled to undergo sterilization on pain of losing their jobs. That did not sit well with the courts. Others required women in such jobs to sign a waiver saying that they understood the risks and would not sue. When a child with birth defects was born of one of those employees, she did not sue, but the child's grandmother did, on behalf of the child, arguing that it was the child who was affected and that the child had not signed anything at all. A woman may waive her rights, but not someone else's. Some reformers argued that any teratogen could also be a mutagen, and just as damaging to men as to women. Finally the Supreme Court decided the matter, in favor of absolute equality of men and women: anywhere a man may work, so may a woman. The effect was to restore peace and end experiments with discrimination; it also, occasionally, resulted in the closing of plants whose ambient air the management could not sufficiently clear of chemicals.

2.4.2.3 Repetitive Stress Injuries

Like the teratogens, “repetitive stress injury (RSI)” is a contemporary hazard, not known before the 20th century. It arises from work activities which might seem totally free from stress of any kind (apart the psychological stress of a boss demanding faster and faster work), like operating a word processor or checking out groceries at the supermarket. Automatic letter sorting machines, cash registers,

modern day assembly lines, switchboards, keyboards, all of which require the same motion, swiftly performed, all day, are to blame for any number of very physical ailments: tendonitis in any joint in the arm, wrist, or fingers, carpal tunnel syndrome, inflammations like arthritis, and a wide assortment of complaints about swelling, numbness, and much, much pain.

This type of injury raises dilemmas of honesty, of remedy, and of compensability. Unlike the industrial injuries of the past—mangled limbs, bashed heads—these injuries are hard for an employer to understand and impossible to verify. A secretary's complaint of "shooting pains up my hand and arm" may be the first step in a case that will cost the employer a fortune: the employee may need surgery, which may or may not work; there may be long-term disability and vocational rehabilitation to pay for, as the employee rests and prepares for another job. And there is no limit to these cases. According to a 1995 report from the U.S. Bureau of Labor Statistics, RSI accounted for 60 % of all workplace illness and even then, had cost more than \$20 billion in worker's compensation. By that time, IBM was the defendant in 350 RSI lawsuits.²⁰ Given the uncertainties of the cure, should it even be tried? Given the uncertainties of the injury, the wide distribution of the complaints, and the likelihood of more in future, should insurance companies be especially stringent about compensating these cases? How much is real, how much sheer boredom from spending all day cooped up by a machine?

Meanwhile, office supply designers are doing their best to lower the incidence of these complaints, by redesigning computer keyboards, chairs, desks, every other aspect of the workplace to be more human-body-friendly. Only time will tell if the ergonomic designs now being tried will make the workplace genuinely less stressful for those in it.

2.4.3 *Safety and Health as Cultural Problems*

Ultimately, health and safety have more to do with the attitude and lifestyle of the employee than they have to do with the stresses of the modern workplace. Some companies have made a fetish of safety consciousness, drilling safety and health protection rules into the employees (*Never* reach out to brace yourself on a working machine. *Never* lift with your back, always with your legs. *Always* wear your safety equipment. Etc.), rewarding units that are accident-free and low in absences, posting records of health and safety to encourage employees to remember the rules, and on occasion, even shutting down units found in violation of safety regulations until the violation is fixed—to make sure that the unit is operating in compliance with regulations, but also to send a clear message to all units that minor deviations from rule will not be tolerated.

²⁰ Adams and Maine, *Business Ethics for the 21st Century*, Mountain View CA: Mayfield Publishing, 1998, p. 417, citing *National Law Journal* 2/20/95.

Beyond adherence to good rules on the job, the quest for employee health and safety can expand into a variety of “wellness” programs in the workplace: exercise rooms available to executives between tasks or meetings, with an exercise plan to go with them and a company physician to recommend individualized programs; diet and nutrition programs offered by the company cafeteria; rewards (in the form of better benefits, perhaps) for employees who agree to stay smoke-free or fat-free. Why might a company undertake these programs, which have nothing obviously to do with the company business or the bottom line? The answer lies in the cost to train and prepare new high-level executives for the corporation. It takes a very long time to bring a really good corporate officer on line, with up to date expert knowledge in the field, relevant people skills, and a deep understanding of the company’s history and culture. If fitness and “wellness” initiatives can keep an executive active 15 more years than he would have been active otherwise, they pay for themselves. A wellness center, then, including fitness programs, may be one of the best investments a company can make.

2.4.4 Mommy Tracks

Since the first stirring of the women’s suffrage movement, women have been working for equality with men in the public space and in the workplace. We have wanted to be hired, compensated and promoted, just as a man would be with our work skills. Women with children have asked no more than to be treated as men with children, and that was not an easy task. Expectations were different: A man who had a child was expected to become a better worker (“He’ll settle down now that he’s got the future to work for,”) while women were expected to become worse (“with all those responsibilities at home she won’t be able to handle responsibility at work,”) so the father was favored for promotion or challenging assignments while mothers were passed over. It was a major accomplishment when women managed to persuade managers, usually with the help of the EEOC and a friendly judge, that considerations of family status were not relevant to job qualifications and must be ignored in job-related decisions. Like questions about minority status, religion, and sexual preference, questions about family status, e.g. how the prospective employee is going to handle the knotty problem of day care, are now barred by law from the entrance interviews.

We seem to have succeeded. Yet now that we have achieved equality, or are very close to achieving it, in all but very small pockets of resistance in American business, new questions seem to arise—specifically those questions we worked so hard to get rid of. Now, it has been argued, it is time for employers to take into account the special needs of women—for pregnancy leave, for maternal leave, for sick children at home. It has been suggested that women be able to opt for a “Mommy Track” at work, that will give them shorter hours (compatible with her children’s school schedule), access to childbearing leave when they want it, and generally the freedom to tailor work demands to the home demands. Employers, it

is argued, not only may, but must, be aware of the needs women have to care for children and home, and must adjust work demands accordingly.

Proponents of the “Mommy Track” in business argue that women have been forced to set aside their real nature in order to compete with men in a man’s world—a macho, sacrifice-all-for-the-company, family-doesn’t-count world which tears working mothers apart. To be sure, such a world is as wrong for men as it is for women. But men will stick with it indefinitely, until they can be shown that another, more balanced, approach is possible—and the only way to show them that is by living it. So put in the Mommy Track, in every company possible: let women at least live balanced lives where, as one of my colleagues puts it, priorities come first, right now, and when women have shown that balancing family and work demands is no hindrance to reaching the top posts in the company, maybe men will begin to join them, and the whole corporation will become more humane.

Opponents of Mommy Tracking argue that it is inappropriate in a free market system to have the company responsible to non-company interests of the employee, whether it be to make childbearing easier or to support an employee’s outside consulting business; that it is unfair to male employees to give women benefits of shorter hours and unscheduled leaves if there are no career penalties attached, and unfair to female employees if there are; and that bringing the image of female employee as mother and helpmate to her husband to the fore in dealing with human resources concerns is a sure route to the return of job discrimination against females. Now that equality is won, why not live it, continue on to CEO, and find a good child care center along the way? It is unlikely, very unlikely, that a Mommy Tracker will ever reach a high post in any company; she lacks the reliability, the dedication, and the willingness to take on unusual challenges that are expected of the employees who will contend for the highest positions.

In sum: Women have always worked. As partners in the family farms of agrarian societies, as the craftsman of nomadic herding societies, as the farmers of hunting societies, women have borne an equal share of the economic production. In the eighteenth and nineteenth centuries, women and children worked alongside the men, as they always had. Only as the factories became more brutal, the hours longer, and, most importantly, their success more evident, did the wives of the bourgeoisie find it possible to retire to a life of lacemaking and chocolates, and a movement arise to exempt first children, then women, from the hardest work of the factory itself. By the turn of the century, an atypical, and probably unrealistic, ideal of “womanhood” held sway, in which the woman was solely the custodian of the Heart, the hearth and the home (a haven in a heartless world), while men had the work of the Head, braved the competitive wars and backbreaking work of the industrial age and the workplace in general. (That ideal never applied to the poor—the Irish and the blacks who supplied servants to the rich. Their women *always* worked.) The ideal of stay-at-home women was revived at maximum volume after the Second World War, when it became necessary to send women “home” from the factories that had supplied the war, in which they had been spectacularly successful, so that returning veterans could have jobs. The ideal prevailed through the 1950s, but by the end of the 1960s it was dead, and the older model prevailed:

women shall work beside men in whatever work the society does. Of course that leaves the home in some disarray, as previous, non-factory, work economies did not. What shall we do about that? As is probably evident from the foregoing, the role of the woman in the modern workplace is not yet settled.

2.5 Dignity, and Protection from Harassment

As a general principle, the workplace shall nurture **dignity**, and shall not tolerate assaults upon it. What is dignity? For our purposes, two meanings will suffice: first, empirically, dignity is an understanding of one's own self-worth resting on no external criterion but generated within oneself. Normatively, dignity is a characteristic possessed of every human being according to which he or she deserves respect from others. Putting the two together, we arrive at what we may call a social understanding of dignity: a presence in all persons of a recognition of self-worth, accompanied by an expectation that it will be recognized by others, fostered by respectful treatment by the entire society, individually and institutionally. For people to *have* dignity, others must (in general) *acknowledge* dignity; it is a social creation.

How does this apply to business? The workplace is a space in which the dignity of every employee must be recognized by every other employee, by every supervisor at every level, and by the institutional policies and structures built into the conduct of business. In practice, this means that while at work, no employee will be subjected to ridicule, annoyance, embarrassment or humiliation, in connection with the job or otherwise. (This proviso excludes any "embarrassment" felt by an employee in the course of normal instruction or correction of job performance: but it requires that any such instruction or correction be administered in a way minimally embarrassing.) This requirement is particularly difficult to implement or enforce in the normal conduct of business because, while the **formal structures** (rules and policies) of the company may insist on correct and respectful behavior at all times from all employees, the **informal structures** (customs and practices of the employees) may be sufficiently offensive to support legal action against the company, should any victimized employee choose to complain. The company's officers are generally held to be responsible for monitoring the "corporate culture," the informal, non-mandated, conduct of the employees toward each other, just to make sure that assaults on dignity are not taking place.

2.5.1 *Sexual Harassment*

What, in a corporate setting, might count as an assault on dignity? Certain easy examples come to mind: fraternity-type hazing of new employees by old ones, and the habitual use of racial or ethnic slurs, stereotypes, or derogatory names

(“Mick,” “Polack,” and the unprintable word for African-American, for instance) in the course of the daily routine. The corporate culture is also manifested in logo, publicity, community relations and advertising copy, all of which should be free of stereotype and derogation. Probably the best example of workplace affronts to dignity is **sexual harassment**: the systematic humiliation or degradation, through stereotyping, of women, exemplified in unwanted sexual attentions bestowed as though they could not be refused, the conditioning (by a superior) of promotion or job on response to these attentions, or the creation of a workplace so sexist, so contemptuous of the talents of the women, as to render the workplace absolutely hostile to the women and their work. [As the Equal Employment Opportunity Commission (EEOC) pointed out in 1990, harasser and harassed do not need to be of different sexes. It is possible for men or women to be harassed in the same way by homosexual supervisors, and for men to have sexual favors demanded of them by a female supervisor. These cases are much less common.]

Sexual harassment has been held to fall into two major categories, as above: the first we call *quid pro quo* and arises when a woman is given to understand that the likelihood that she will advance in the company or in her career is conditional upon a favorable response to sex-laden suggestions by her superiors. Classically, the suggestions have been that the woman must engage in sexual intercourse, otherwise undesired on her part, with her superior, or see her job dead-end or disappear. But as we saw in *Price Waterhouse versus Hopkins* (above), it is just as insulting, and illegal, to condition promotion upon a woman’s closer adherence to a “feminine” stereotype in dress, makeup, language and behavior.

Title VII of the Civil Rights Act of 1964 forbids discrimination on grounds of gender. In *Meritor Savings Bank v. Vinson*,²¹ (1986) the Supreme Court found that the creation of a “hostile environment” through sexual harassment was a violation of Title VII; it was discriminatory even though there were no identifiable employment decisions conditioned on the woman’s response to sexual advances. The EEOC went on to define sexual harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to or rejection of this conduct explicitly or implicitly affects an individual’s employment [*quid pro quo*]; (2) unreasonably interferes with an individual’s work performance; or (3) creates an intimidating, hostile, or offensive work environment.

Who is to judge whether a workplace is “intimidating, hostile, or offensive”? That question was decided in 1993, in Sandra Day O’Connor’s opinion in *Harris versus Forklift Systems*: It is hostile if a reasonable person would see it to be hostile, and if the victim perceives it to be so. It is not necessary to show that severe psychological damage has been inflicted on the victim; she is not required to stay on the job until she has a nervous breakdown in order to be compensated

²¹ 477 U. S. 57 (1986).

for damages.²² Concededly, the criterion is subjective and difficult to interpret; but it accomplished its object, which was to put all businesses on notice that the way their employees treat each other at the office is to be taken very seriously.²³

2.5.2 Fostering Dignity: Respect and Participation

In general, dignity can best be protected by respecting and honoring differences in the workplace. Just as the best non-discrimination rule for racial, ethnic and religious differences is the celebration of diversity, so the best rule for the prevention of harassment is a positive appreciation of different kinds of lives and lifestyles, lives with different priorities and perspectives. Women would certainly gain from such appreciation. So would gay and lesbian employees, whose legal protection against discrimination is sporadic at best, and varies from state to state. A corporate culture that incorporates such an attitude of appreciation of differences might also provide protection against very different sorts of harassment—the tendencies to retaliate against employees who manifest their differences publicly by participation in political and social associations outside the workplace, in feminist or gay activism. Political activity on the part of the employee is protected by law, of course, but there are few effective formal safeguards against informal sanctions against an employee perceived as “different” in a setting where “different” is a pejorative term.

It could be argued that the most effective way to show respect for employees is to invite their participation in workplace decision making. Including workers in workplace decisions on a democratic basis can be justified, John McCall argues, in five ways: (1) that the legitimate interests of all in the company are better protected by worker participation than by protective legislation; (2) that only an extensive system of democratic participation recognizes the dignity of persons as moral agents and rational decision makers; (3) that the worker’s perception of his or her ability to influence corporate policy will result in higher productivity and a much higher level of responsibility and accountability, and (4) a much lower level of alienation and disaffection; and (5) that workplace democratic participation and

²² 114 S.Ct. 367 (1993) For an editorial underscoring this point, see “A Victory on Workplace Harassment,” *New York Times* 11 November 1993.

²³ On June 26, 1998, the U.S. Supreme Court handed down a decision making the definition of “sexual harassment” much more precise and specifying the steps a corporation may take to limit its liability. Linda Greenhouse, “Court Spells Out Rules for Finding Sex Harassment: Makes Suits Easier to Win While Giving Employers a Defense,” *The New York Times* Saturday, June 27, 1998, A1, A10 (excerpts from decision on p. A11).

responsibility is an essential training ground and reinforcement for civic participation and responsibility, good citizenship in the larger society.²⁴

There have been some experiments along the lines of workplace democracy. One of the most famous was the “Bolivar Project,” started in 1972 by Sidney Harman, then owner and CEO of Harman International Industries, and Irving Bluestone of the United Automobile Workers union. A far-reaching experiment in worker empowerment, it began by encouraging (and rewarding) workers to invent their own workspace and processes, and to join in creating new opportunities for workers: classes, day-care centers, gospel groups. Morale soared, productivity increased, and absenteeism declined. But by the early 1980s, the company began to get into trouble. One major cause of the trouble was human nature, specifically, laziness: the company had been letting workers decide their own incentive system, and eventually the workers in areas where work could be accelerated were asking to leave work early if they finished their work. That created tensions across the company with workers whose jobs could not be so tailored, lured workers who only wanted to go home early into the company, and tempted workers to cut corners to appear to have their work done. Firm management would have nipped this trend in the bud, but by that time firm management was no longer part of the corporate culture. The second major cause was the rapid change in the market for their major product, rear-view mirrors; new product materials and directions should have been adopted, but were not, leaving the company by the wayside. (Underlying both factors, speculated Harman and Bluestone—both out of the project by 1976—was the fact that neither the new owners of the company nor the old managers *really* bought the concept of worker democracy, and they were not sad to see the project fail.) But the experiment was not entirely a failure. By the time Harman Automotive went out of business on March 1, 1998, it had taught a whole generation of industry how to bring workers into management decisions, saving the GM Tarrytown plant for about 26 years, and making workplace empowerment one of the criteria by which companies can be judged.²⁵

2.6 Integrity, and Respect for Moral Choices

We begin with a general principle and a general duty. The general *principle* is that, as above, employees are presumed to be rational moral agents; and the employee does not leave his critical intelligence in the parking lot. It should be respected. More to the point: the employee *cannot*, consistently with his dignity as a moral agent, avoid taking responsibility for situations that, morally, call for action when

²⁴ John J. McCall, “Participation in Employment,” from Joseph R. DesJardins and John J. McCall, eds *Contemporary Issues in Business Ethics*, 3rd Edition. Belmont, CA: Wadsworth, 1996.

²⁵ Barnaby Feder, “The Little Project That Couldn’t” *The New York Times* Saturday, February 21, 1998, p. D1.

the employee is the only one in a position to act. If he sees some wrongdoing, and fails to do something to stop it, he incurs guilt, the “guilt of silence” that has accompanied so many of the historic atrocities of the twentieth century.

The general *duty* for the corporation, then, is to provide channels through which employees may question and criticize company decisions, policies, and the conduct of company operations in general and on specifics in the areas that they have observed. Failure to provide such channels essentially disregards the critical intelligence and the moral agency of the employee, treating him as just another machine, or piece of office furniture. Confronted with a serious moral problem in the workplace—a practice that threatens some serious harm to someone, identifiable or not—in a setting that does not allow his concerns to be voiced, taken into account, or acted upon by the company, what is the employee to do? If there is no way to act responsibly through company channels, the only responsible course open to the worker is to tell others about it, to try to end the practice by publicity, even if it means bringing the whole corporate enterprise to a screeching halt. This effort to stop the game, to make everyone pay attention to what is going on, is called “blowing the whistle.”

2.6.1 Blowing the Whistle: Definition and Justification

Employees and former employees of corporations often complain that the company is involved in wrongdoing—failing to inform the public about defective products, failing to inform the Nuclear Regulatory Commission about safety problems in nuclear plants, failing to inform the Environmental Protection Agency about environmental problems caused by the corporation’s operations.²⁶ The corporations inevitably reply that the complainer, the “whistle blower,” is exaggerating, wrong, misleading, out for his own glory only, and, in the case of former employees, disgruntled. Two questions are raised by such claims and counter-claims: First, how should an employee of a company involved in dubious practices decide whether to bring his concerns to some outside agency? and second, how may we determine whether or not such an employee’s complaint is valid?

In his 1982 edition of *Business Ethics*, Norman Bowie presents the classic definition and set of criteria for the moral justification of blowing the whistle:

²⁶ See Alan F. Westin, *Whistle Blowing: Loyalty and Dissent in the Corporation*, New York: McGraw-Hill, 1981. Classic “whistle-blowing” cases include the accounts of engineer Roger Boisjoly and the explosion of the space shuttle Challenger, of Kermit Vandivier and Goodrich Brakes (Vandivier, “The Aircraft Brake Scandal,” in Robert Heilbroner, *In the Name of Profit*, Doubleday, 1972, reprinted in *Ethical Issues in Business: A Philosophical Approach*, ed. Thomas Donaldson and Patricia H. Werhane, Prentice Hall 1979), and of Frank DeCamp and the Pinto. Incidentally, in all these cases, the engineers’ objections did not come to public attention until after the events of which they warned.

A whistle blower is an employee or officer of any institution, profit or nonprofit, private or public, who believes either that he/she has been ordered to perform some act or he/she has obtained knowledge that the institution is engaged in activities which (a) are believed to cause unnecessary harm to third parties, (b) are in violation of human rights, or (c) run counter to the defined purpose of the institution, and who informs the public of this fact.²⁷

Note that it doesn't count as blowing the whistle as long as the complaint stays inside the company or within a small circle of peers in the industry or profession; the public must be involved, so the stakes are high. The presumption of this topic is that a certain amount of harm is going to be done when the whistle blows: the company gets a black eye in the press, the employees involved in the practice on which the whistle is blown are defamed and hurt, no one likes the whistle blower and his or her job is promptly in danger. Against that harm, the justifiability of blowing the whistle requires an argument, must bear the burden of proof. Bowie considers that the burden is met when:

- (a) The whistle is blown from the appropriate moral motive—to save the innocent third parties from harm, to expose wrongdoing so that it can be dealt with by the proper authorities, or to restore the agency or firm to its proper course. A desire for attention is not a proper motive, which is why our response to whistle blowing changes so profoundly when we find that a book contract has already been inked. To be sure, the public can profit from knowledge of wrongdoing no matter what the motive of the informant, but given the ambiguity of findings of wrongdoing, as general policy, the public will be much better off with a predisposition to ignore tell-all publicity seekers no matter what stories they have to tell.
- (b) Unless the whistle blower knows for sure that he will be fired, discredited, and barred from further information if he so much as hints of his concerns to his supervisors—or that some major explosion or other danger is imminent—all internal channels for expressing dissent must be exhausted before the whistle blower goes public. The officials of the company may honestly not know what is going on; even a minimum of loyalty to the firm requires that they be given a chance to right the situation before the irreversible damage of unfavorable publicity has occurred.
- (c) The wrongdoing must be carefully documented, the evidence certain.
- (d) The employee must give the matter careful thought, and be sure that the danger is real, the harm imminent, there is specific misconduct to cite, and there are no alternatives to blowing the whistle that will bring the matter to light and get it remedied.
- (e) The employee has some chance of success. If the whole matter is doomed to failure, the employee is not obligated to destroy his career by blowing the whistle.

²⁷ Norman Bowie, *Business Ethics*, Englewood Cliffs, NJ: Prentice Hall, 1982. Pp. 142 ff.

Of course, there is no way that we could say an employee is obligated, in response to wrongdoing in the workplace, to destroy his career—putting himself and his family at risk, distressing his friends, infuriating his erstwhile co-workers, entertaining the press and generally turning his life into a media circus for the short attention span of a scandal-hungry society. Unless it is clear that there is little danger to the whistle blower (and that is rarely the case) there cannot be a strong obligation to blow the whistle. That is why this topic turns on the notion of **integrity**, the singleness of life, character, and person that informs us at our best, that requires us always to act in accord with our moral principles, and thereby permits us to undertake courses of action that would scare us to death if we thought about them for a minute. Without integrity, an employee will not blow the whistle. Of course, without integrity, there's no telling what else he will or won't do.

The important point to remember is that some ready and relatively painless means of upward communication must be found. The employee must know how he can access the highest officers in the company to share his concerns; he must know that they are listening, and that they will act on his concerns one way or another. (By all means try a suggestion box, someone said, but make sure that the employee knows that the suggestions are being read.)

2.6.2 The Corporation and the Whistle

There are several reasons why a corporation might want to institute practices that make it unnecessary for employees to blow whistles. Any quick consequential analysis will yield the undesirable results of whistle blowing: the company's operations suffer short-term disruption because of the investigations triggered by the whistle and by the need to devote resources to the confrontation with an angry public and press; the company may be in trouble with the law and face fines or criminal or civil proceedings; employee morale plummets as the employees take sides with or against (usually against) the whistle blower; other stakeholders (shareholders, vendors, customers) may decide to make other business arrangements and hurt the company's long term interests. But there are worse consequences.

First, there are the undesirable results of the corporate governance practices that made whistle blowing seem the only recourse for the employee. If the corporation does not respect the employee's contribution to the ongoing dialogue of company operations, it not only places itself at risk for whistle blowing, but it loses the value of that contribution; the policies and practices that discouraged the whistle blower's communication will have discouraged all the other employees from joining the dialogue, and a good portion of their creativity, experience, cultural slants and ideas will have been lost to the company. A second consequence is the loss of employee enthusiasm, or "ownership," regarding the company mission and work, duplicating the morale problems incurred by any exclusion of the employees from the decision making process.

But the worst consequence of the whistle blowing scenario is the damage to the employees who confront the corporate evil, whether or not one of them blows the whistle, whatever they decide in fact to do. Consider the case of the *Challenger*, for instance. The story is well known: On January 28, 1986, the space shuttle *Challenger* lifted off from the launch pad at Cape Kennedy in Florida, flew seven nautical miles down range, and exploded, killing its seven astronauts, including a popular New Hampshire schoolteacher, Christa McAuliffe, chosen from all the nation for the honor of space flight. As it shortly became known, most of the Morton Thiokol engineers responsible for the spacecraft had advised against the flight, on grounds that in the unusually cold morning air (it had gone well below freezing during the night, and there was still ice on the launch pad), the O-rings (loops of rubber-like material between the segments of the booster rocket) might be too stiff to seal the joints in the rocket; if that happened, hot gases might blow by the rings and ignite with explosive force, destroying spacecraft, crew, and the entire launching apparatus. (The engineers had assumed that the explosion, if it came, would be at the liftoff.) They were listened to, but eventually overruled by senior management at Morton Thiokol, who in company with the agency that ran the space program, the National Aeronautics and Space Agency (NASA) felt that they could tolerate no more embarrassing delays. After the explosion, Congress wanted to know what had gone wrong; against the advice and pleas of his colleagues, engineer Roger Boisjoly, the first to notice the erosion of the O-rings in previous flights, and responsible for the task force working to solve the problem, told the Rogers Commission exactly what had gone wrong, and that he and others had tried to stop the flight but had been overruled.

As a result, Boisjoly was isolated and shunned in his workplace, sent away from the centers of decision, removed from projects in which his expertise would count, deprived of his functions; soon enough, he had to resign. He lost his job, income, security, career, and very nearly his sanity. The fate of the employees who stayed may be worse: now they know not only that their failure of courage (or, in the case of the managers, failure of wisdom) caused the death of the astronauts, but having done nothing about it since, and having done nothing while the one person who did try to do something was persecuted by the company, they must carry that guilt, compounded by their silence with regard to Boisjoly, with them forever.

Boisjoly's action, even though taken after the fact of the explosion, still constitutes external whistle blowing: "a disclosure by organizational members of illegal, immoral, or illegitimate organizational acts or omissions to parties who can take action to correct the wrongdoing."²⁸ There was no correcting the wrongdoing for Christa McAuliffe and her shipmates, but there was much that could be done to make sure that it did not happen again: in future, NASA could worry less about media embarrassment and more about safety checks, the engineers and the managers could spend more time learning to understand each other's preoccupations,

²⁸ Marcia Miceli, Janet P. Near, and Charles R. Schwenk, "Who Blows the Whistle and Why?" *Industrial and Labor Relations Review* 45:113 (October, 1991).

and the hierarchically-organized company could figure out some way to empower employees to pursue ethical concerns to the end, instead of being asked to bottle them in the name of corporate (and agency) convenience. A good company will make sure that its employees can follow their consciences, no matter how much delay and disruption those consciences threaten to spawn. Ultimately, when management realizes the inevitability of confronting employee consciences in tight situations, management will learn to have the confrontation much earlier in the decision process, when things are easier to change, and next time the disaster may be avoided.

2.7 Conclusion

What, then, does the corporation owe its employees? The general duty may be summed up as **mutual responsibility**—the corporation must exercise responsibility over the areas which it controls (the physical conditions of the workspace, the monitoring devices and policies in place), while the employees must take responsibility for that portion of the work that is in their control. Each of the imperatives of this chapter is really a mutual imperative, binding not only (as is traditional in business ethics) on management and Boards of Directors, but also on the employees individually and, to a lesser extent, collectively.

For **justice** to obtain in the corporation, not only must hiring and promoting practices reflect non-discrimination and, where appropriate, affirmative action, but the employees must work informally to create an accepting and empowering working situation. For **privacy** and other individual rights to be honored in the workplace, management must learn to trust the employees, but *a fortiori* the employees must be trustworthy, not taking advantage of the hands-off (or eyes-off) policy for behavior that would hurt the company's interests. For **health and safety** to be protected, management can only make a start at keeping the workplace safe; workers must learn safety consciousness and create a work atmosphere where protection is taken very seriously. **Dignity** also is preserved as much by co-workers as by front office policy; the climate of dignity is created not by rules but by thousands of acts of respect among employees of all levels. **Integrity** must not only be permitted but encouraged; in a world that seems to have forgotten the notion, employees cannot always be expected to know how to live with integrity when they enter employment. In a company that depends on employee integrity to survive, as most companies do, it is imperative to include some lessons on integrity near the beginning of employment.

What would a lesson plan look like, for these integrity lessons? On the assumption that they would be for top managers and every level beneath them, they cannot include the specifics of anyone's job, and they certainly cannot contain how-to material for handling, supervising, outwitting, intimidating, or spying on each other. That's one of the advantages of a course designed for the whole

company. Experience suggests a three-item curriculum, elaborated in any way that may seem useful to the company:

1. Primarily through the discussion of cases (supplemented by some limited instruction on the terminology of ethics), help each employee acquire the **wisdom** to see ethical problems when they arise—to discern injustice and insult as they happen, to foresee problems from unsafe practices, to know when rights and welfare are being violated.
2. Through empowering policies and direct encouragement (accompanied by some very specific instructions to the first-level managers), help each employee acquire the **courage** to speak out about problems when they are first noticed, and to follow up to make sure something is done about them.
3. That said, and done, continue the lesson, primarily through the relation of stories that trace signal events over time to show both short and long-term consequences, to help each employee acquire the **patience** (or temperance, for traditionalists) to recognize that in the best of circumstances, while minor changes that avert disaster may certainly be hoped for (let's put off the flight for a few days and maybe it will get warmer), radical changes in corporate structure and practice are not going to happen quickly. Action that continues a controversy beyond reason and beyond effect can only harm the company and therefore everyone who has a stake in it.

Employees must know, in short, how to take responsibility, how to recognize a problem, how to act effectively to solve it, and how to lay it to rest to minimize harm to others. The corporation is, after all, a world unto itself; it absorbs the best part of the lives of those who work in it, commanding their obedience, their social support and their individual creativity. Their lives are lived as part of it, and if they are to be truly human lives—lives of choice and responsibility—the corporation must be an arena of responsibility for all its human participants.

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