Loyalty And Professional Rights

(ESSAY #6)

Introduction

The relationship between engineers and employers has come under increasing scrutiny in recent years. This essay describes some of the recent debate regarding employee rights and loyalty. Section one deals with the legal environment. Court cases dealing with employee loyalty and its limits have changed the legal aspects of employment dramatically in the last twenty years. A sketch of those changes will be made here. Section two discusses some theoretical attempts at resolving the tension between company loyalty and public responsibility. Finally, the third section describes actual policies that different corporations and government agencies have used to deal with the issue of employee rights.

Legal and Regulatory Environment

The trend in the law is toward increased recognition of employee rights. Until recently, American law has been governed by the common-law doctrine of "employment at will," where, in the absence of a contract, an employer can discharge an employee at any time and for whatever reason the employer considers relevant. This doctrine determined the Pennsylvania Supreme Court's position in a 1967 case of Geary v. United States Steel Corp1. Mr. Geary was not educated as an engineer, but he had 14 years of engineering experience with U.S. Steel. Mr. Geary became convinced that a new type of pipe that U.S. Steel was using was unsafe under high pressure. He attempted to make his concerns known to management, but was rebuffed. Finally a vice president listened, and an investigation vindicated Mr. Geary's concerns. A costly blunder was thus averted.

For his efforts Mr. Geary was fired on July 13, 1967, on grounds of insubordination. In a 4-3 decision, the Pennsylvania Supreme Court denied Mr. Geary a cause of action, reasoning as follows:

There is nothing here from which we could infer that the company fired Geary for the specific purpose of causing him harm, or coercing him to break any law or otherwise to compromise himself. According to his own statements, Geary had already won his own battle within the company. The most natural inference from the chain of events...is that Geary had made a nuisance of himself, and the company discharged him to preserve administrative order in its own house.2

This case shows that even in the relatively recent past employees had little protection from their employers even when they wanted to protect their company's or the public's welfare.

A more important landmark was the 1980 case of Pierce v. Ortho Pharmaceutical. Dr. Pierce, a physician, was involved in the development of a drug for treating diarrhea in children and the elderly. Dr. Pierce believed the drug contained an excessive amount of saccharin, and she objected to using the drug in tests on humans. Management overrode her objections, and she refused to continue working on the project. As a result, she was reprimanded and demoted. After resigning, she brought suit against Ortho, alleging that the company had pressured her to violate her ethical principles.

A trial court judge dismissed her claim, essentially invoking the doctrine of employment at will. However an appellate court found there were legal grounds for suit if her loss of employment was a violation of public policy.

She appealed this ruling to the New Jersey Supreme Court. Dr. Pierce lost her appeal, but the decision was an important one nevertheless. In its majority opinion, the New Jersey Supreme Court said:

In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of the profession...probably would not be sufficient.3

The Court went on to say that,

employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.4

The Court said that Dr. Pierce lost her case for two reasons. First, her resignation was premature. She had not actually been ordered to conduct the tests to which she objected. The tests were still in the future and would have required prior government approval. Second, her appeal to the Hippocratic oath was not an adequate support for her case. She should have appealed to the code of the American Medical Association.

The wording of the court decision provides important grounds for an asserting professional employee rights against an employer. At the same time, the assertion sets important parameters: the employee's action must be for the public interest rather than for private benefit.

In 1981, the Illinois Supreme Court's ruling in Palmateer v. International Harvester affirmed the line of development suggested in Pierce. Mr. Palmateer discovered that International Harvester employees were using company property to store stolen goods. Instead of informing his superiors, he contacted the police, who instructed him not to go to his employers, but instead to continue informing them until an arrest could be made. He did as the police requested; as a result, company executives did not know of the illegal activity on their property until the arrests were made. When the matter was made public, Mr. Palmateer was fired for insubordination.

In the ensuing suit against International Harvester, the company argued that Mr. Palmateer's action violated the Constitution's illegal search and seizure provisions. The Illinois Supreme court finally ruled against International Harvester, but did not prescribe a remedy. In granting Mr. Palmateer a cause of action, the court argued that if a corporation's actions violate public policy, the employee should be protected. But in a dissenting opinion Justice Ryan made the following comments:

By departing from the general rule that an at-will employment is terminable at the discretion of the employer, the courts are attempting to give recognition to the desire and expectation of an employee in continued employment.... In nurturing the shaping of this remedy, the courts must balance the interests of the employers with the hope of fashioning a remedy that will accommodate the legitimate expectations of both. In the process of emerging from the harshness of the former rule, we must guard against swinging the pendulum to the opposite extreme.5

Justice Ryan's plea for balancing employee rights against the employer's rights to guide "the policies and destiny of his operation" should be given careful consideration, and we shall return to it shortly.

Although there is a growing trend to judicially restrict an employer's ability to discharge an employee at will, the

trend still represents a minority position. The states of Alabama, Florida, Georgia, Louisiana, Mississippi, Missouri, North Carolina, and South Carolina have recently specifically refused to recognize any exceptions to the employer's right to terminate an employee at will.6 Most of the judicial protection of employees from arbitrary discharge by employers has been afforded by creating a remedy in tort (injury) for unjust, abusive, malicious, or wrongful discharge.

The jurisdictions that support employee rights usually agree that a cause of action may be granted when the discharge violates a clear mandate of "public policy," but this term is difficult to define precisely, and there is considerable disagreement over its application. The courts which recognize the appeal to public policy tend to agree that discharging an employee because he exercises a right guaranteed by law, or because he refuses to undertake an illegal action, violates public policy. Thus discharged workers fired because they filed worker's compensation claims, refused to commit perjury, served on a jury, or refused to participate in an illegal price fixing scheme, have been able to obtain a cause of action against their employers. Whether or not discharging an employee for whistle blowing or upholding professional standards violates public policy is much more controversial.7

The Pennsylvania case of Novosel v. Nationwide Insurance C8 considers what this public policy exemption might mean. Novosel was an employee who was asked to assist his corporation in a lobbying effort that was to the advantage of the firm. Novosel refused and even spoke out for the opposite side. He was summarily fired. Drawing on the Palmateer v. International Harvester case, the court equated violation of "clearly mandated public policy" with "striking at the heart of citizens social rights, duties and responsibilities." Not assisting the corporation in a lobbying effort, and in fact speaking out against it, was protected activity.

Yet the actions by the Pennsylvania court have come under criticism. In a dissenting opinion one of the Novosel judges said, "my concern is that the panel has announced an extremely broad public policy exception."9 He gave three reasons for his reticence. First, This ignores the difference between the public and the private employee. While a public employee may well have to consider the public within the scope of their jobs, the private employee seems to not have the public as a consideration. Second, the ruling fails to consider, "other public policy interests such as the economic interest of the public in efficient corporate performance."10 Third, the ruling does not take into account the first amendment rights of the corporation and the corporations legitimate expectation of loyalty.

We leave it to the reader to evaluate these arguments.

A further important court case is from the Supreme Court of New Jersey. Kalman v. Grand Union Co. held that a professional code of ethics may provide the foundation for a cause of action. A code of ethics might fit under the public policy exemption; however the whistleblower's motivation is important. The motivation for the actions must be mandated by professional ethics, not the individual's personal ethics.

...employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers. However, an employee should not have the right to prevent his or her employer from pursuing its business because the employee perceives that a particular business decision violates the employee's personal morals, as distinguished from the recognized code of ethics of the employee's profession.11

Mt. Heathy Board of Education v. Doyle12 dealt with an important issue in the controversy over employee and professional rights. How can one decide if an action is retaliatory in a mixed motive case where the person may

have been retaliated against for a whistle blowing act, but the employee was also punished for a non-protected act, such as insubordination, or failure to achieve goals?

The U.S. Supreme Court did not want to make it impossible for an employer to release a disgruntled or non-performing employee. If the firm were unable to release employees that do not do their job, the costs of hiring anyone would become prohibitive. On the other hand, if an employee has blown the whistle on the employer, the employer should not be able to punish the employee. In Mt. Healthy, the Supreme Court ruled that the employee must first show that she performed some type of protected activity. If she is able to do this, the burden of proof shifts to the employer. The firm must then prove that the disciplinary action was based solely on the non-protected activity; that is, once the employee has shown she was engaged in a protected activity, the firm must then prove that its act was non-retaliatory.

The attempt here was to both protect the employer from spurious retaliation charges, and also protect the mediocre employee who justifiably blows the whistle on her firm.

In addition to protection through judicial modification of the common law doctrine of employment at will, some statutory protection of dissenting employees has emerged, primarily through whistleblowers' laws. In April, 1981, Michigan became the first state in the country to pass a "Whistle Blowers Protection Act." The provisions are as follows:

Any employee in private industry fired or disciplined for reporting alleged violations of federal, state or local law to public authorities can now bring an action in state court for unjust reprisal.

If the employer cannot show that treatment of the employee was based on proper personnel standards or valid business reasons, the court can award back pay, reinstatement to the job, costs of litigation and attorney's fees. The employer can also be fined up to $500.. Every employer in Michigan must post a notice of this new law in the workplace.13

From the stand point of a strong advocate of professional employee rights, the law is weak. It protects an employee only from discharge for reporting illegal actions, not actions which are contrary to professional ethics or conscience. Furthermore the penalties to employers are minimal. What is a fine of $500 to General Motors? Nevertheless the law is significant as an indication of another departure from the "employment at will" doctrine.

Along with other states, Pennsylvania also has whistleblower protection laws on the books. While the law only protects reporting to the employer or to government agencies, the protected report includes not only legal violations, but also "a code of conduct or ethics designed to protect the interest of the public or the employer."14

The assault on management autonomy will no doubt continue. Many people believe this assault is justified and that employees, particularly professional employees, must be granted more rights in the workplace. But we have seen that there are arguments in favor of protecting management autonomy as well. We must now examine the moral issues raised by these considerations. A good place to begin is by considering the philosophical arguments made on behalf of one side or the other in this debate.

Loyalty to the Company and Responsibility to the Public

A professional's concern for public welfare may place her in opposition to her employer. Many cases illustrating this conflict come from the engineering profession, because approximately 90 percent of all engineers are

employees. However, the employee rights issue is destined to become more common in all professional ranks. More and more physicians are being employed by Health Maintenance Organizations and other corporate entities, and many lawyers work for corporations and large legal firms. In addition to certified public accountants, many of whom work for accounting firms and corporations, the accounting profession includes management accountants who are usually employees of large corporations. Architects also usually work in architectural firms.

Professionals are increasingly subject to organizational conflicts. The problem posed by the professional's rights in the work-place is complex, because employers do have legitimate rights to loyalty, confidentiality and obedience from their employees, including professional employees. What rights should professionals have against employers?

We can begin with the argument that employees--including professional employees--owe unqualified loyalty to their employers. This claim is set forth by Herbert Simon in his classic text, Administrative Behavior. A subordinate accepts his superior's authority, according to Simon, when he "holds in abeyance his own critical faculties for choosing between alternatives and uses the formal criterion of the receipt of a command or signal as the basis for choices."15 This means that professionals should accept their superior's suggestions and orders "without any critical review or consideration."16 At most, their reasoning should be aimed at anticipating commands by asking themselves how the superior would wish them to behave in given circumstances.17 Simon emphasizes that all employees have limits to what they will accept from their employers, but within these limits Simon portrays the employee as "relaxing his own critical faculties" and permitting "his behavior to be guided by the decision of his superior, without independently examining the merits of that decision."18

These claims for a virtually complete sacrifice of employee autonomy need a strong justification. A doctor who is told by her superior to watch costs (a legitimate request) is not in the same situation as a doctor requested to cut costs by not performing certain procedures. The problem is whether limits can be set for professionals, as Simon wishes.

Yet loyalty is important to the firm and should be expected of employees when they work for the firm. The Maryland court system gives this definition of loyalty:

we have read into every contract of employment an implied duty that an employee is to act solely for the benefit of his or her employer in all matters within the scope of employment.19

This definition is useful because it tries to define the scope of activities a loyal employee should fulfill, as well as emphasize that the employee should work for the benefit of the company. Thus being asked to perform illegal activities for a firm would not be to the firm's advantage.

Regardless of whether we can answer these questions adequately, there is still the question of what rights the employed engineer should have. Although Simon supplies some reasons for his position, they are more satisfactorily presented in other places.

In a well-known article, engineer Samuel Florman is concerned about the "deceptive platitude that a professional's primary obligation is to the public."20

Three problems that would develop from this platitude are: first, ties of loyalty and discipline would dissolve, and blowing the whistle on one's superiors would become the norm instead of the last resort.21 Second, any engineer who declines a commission in deference to his scruples, furthermore, will only pass it along to a colleague of less

refined sensibility.22 Third, as a class engineers have neither the ability nor the right to plan social change.23

Florman's first criticism is directed especially at safety and risk issues, where the engineer wants to introduce more safety features, and management does not.24 It is obvious that any product can be made safer by adding more features. But there is a point where the costs of adding additional safety features offset making the product at all. What has to be found is a confidence level where overt risks are dealt with, yet not all risks are.

Florman is correct in remarking that if every engineer constantly demanded more protection for the public, no product would ever get out the door. There has to be some point where management can go ahead with a product. Florman's argument suggests that bickering and conflict would occur most of the time, or at least enough to be problematic, Yet the claim that conflict would become the "norm," as Florman suggests, is not necessarily true.

Second, there is a value to a corporation in having its employees bring to the attention of management an obviously faulty product, as we saw in Geary. It is hard to see how that type of action would harm the firm.

Now let us consider Florman's second argument. The fact that a second engineer might perform an immoral act refused by the first does not legitimate the first engineer's performance of the immoral act. Immoral behavior will occur at times, but nothing can prevent that. If enough engineers stood by their professional codes and refused to act immorally, Florman's second fear would be unfounded.

Now let us consider Florman's third criticism. What is the engineers' role in public policy issues? Perhaps there are two types of public policy issues. The first issue might involve deciding on alternative strategies which will affect the public. An example might be the decision whether to build a nuclear power plant. A nuclear engineer has neither the responsibility for deciding whether his corporation will build power plants, nor the responsibility for deciding whether the government should ban them. Florman is correct -- engineers do not have responsibility for this type of decision. They can advise, but the decisions must be made by persons to whom the public has given the responsibility.

There is a second type of public policy obligation, however, one which assures the public that whatever is done will be done within professional standards. Here the engineer does have an obligation to the public. Florman agrees with this by distinguishing between "solving problems and establishing goals."25 Goals are public policy decisions, and should be set by those given power to do so. But engineers must uphold professional standards even when their employees object. The next section will discuss some attempts to protect employee rights.

Protecting Employee Rights

Firms and governmental agencies use various policies to protect employee rights. One of the simplest and most effective policies, especially suited to small firms and governmental agencies, is the "open door" policy. Managers make themselves available for hearing complaints on a regular basis and without prejudice to the complainants. This method is particularly appropriate where a single manager can correct the problem.

Another method has been introduced by the Nuclear Regulatory Commission (NRC). This government agency has instituted a procedure for handling what it calls Differing Professional Opinions (DPO's). If a professional employee has a complaint, there is a formal mechanism whereby the complaint can be registered. The employee is not limited to her area of responsibility and may raise matters dealt with by other parts of the NRC. A permanent record of all actions taken and formal comments made on a DPO are kept as the DPO travels up

through the administrative ladder.

Copies of all comments and responses to the DPO are made available for comment by the originator. Statements on each DPO and the NRC management responses to it consistent with security classification policy are placed in the NRC's public document room.

Finally the NRC also has an open-door policy to complement the DPO policy. Anonymity is allowed throughout the procedure, though this may decrease effectiveness. A panel is chosen each year to oversee and monitor the program and make recommendations on it.26

Although the DPO policy has many strong features, the provision regarding national security raises questions. Stephen Unger warns that Government agencies, including the NRC and its predecessors, have had a tendency to use "national security" to "cloak blunders or manipulate public opinion."27 Unger points out two ways security considerations could be used to subvert the DPO procedure. First, the security blanket might be used to cover up information that a complainant would need to justify her DPO. Second, the DPO might itself be a complaint that national security is being invoked to conceal information that should be made public.

One possible solution would be to permit the originator of a DPO to request a special panel to rule on the legitimacy of invoking national security considerations; the panel should be composed of people outside government as well as inside.28

A third proposal for protecting employee rights involves a corporate ombudsman. An ombudsman can often register employee complaints in a confidential and anonymous way. The ombudsman or advocate must operate totally independently of the corporate hierarchy and should have direct access to top management and the board of directors. An ombudsman might not have sufficient expertise or power within a governmental or corporate bureaucracy to directly mediate a dispute between a professional and a manager, but he or she could facilitate a mediation. While there is no assurance that every complaint will be accepted and acted upon, the employee should have confidence that he or she will be treated fairly and honestly. Obviously the ombudsman could be utilized by non-professional as well as professional employees, but his or her services seem especially appropriate for professionals, because professionals have considerable responsibilities, while often not being in positions of managerial authority.

Finally, some corporations have established a vice-president for corporate responsibility. The vice-president and his staff have as one of their duties the proper disposition of employee complaints. Any employee must have access to this office, and it must also operate confidentially and in complete freedom from middle and lower-level management.

A small business, such as a small engineering firm, could not make use of the more elaborate mechanisms proposed here. But perhaps a modified version of the NRC's DPO procedure would not be beyond their means. In any event, professional employee rights are an essential element in the proper performance of a professional's task in the workplace. As an increasing number of professionals become employees, the issue of professional employee rights will become more important.

Annotated Bibliography

Decker, Claudia E., "The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship," **Baylor Law Review**, 36:677, pp. 667-688.

Surveys recent case literature that argues that Texas ought to change its employment-at-will laws.

Dworkin, Terry M., and Janet P. Near, "Whistle blowing Statutes: Are They Working?", **American Business Law Journal**, 25:1987, pp. 241-264.

Discusses how the statutes that are "on the books" affect the employee-employer environment.

Howard, John L. "Current Developments in Whistleblower Protection," **Labor Law Journal**, Feb. 1988, pp. 67-80.

Howard surveys the recent case literature on whistle blowing.

Jensen, J. Vernon, "Ethical Tension points in Whistle blowing," **Journal of Business Ethics**, 6:1987, pp. 321-328.

Jensen discusses those areas in whistle blowing which deal with moral decisions.

Laurendeau, Norman M., "Engineering Professionalism: The Case For Corporate Ombudsmen," **Business and Professional Ethics Journal**, 2:1982, pp. 35-46.

Discusses the history, and the advantages, of using ombudsmen as means of resolving possible whistle blowing situations.

Malin, Martin H., "Legal Protection for Whistleblowers," in **Weil, Vivian, ed., Beyond Whistle blowing: Defining Engineers Responsibility**, Chicago: Illinois Institute of Technology pub., 1983, pp. 11-32.

A very brief survey of the literature.

Rongine, Nicholas, "Towards a Coherent Response to the Public Policy Dilemma Posed By Whistle blowing," **American Business Law Journal**, 23:1985, pp. 281-297.

Attempts to construct a solution to the issue of whistle blowing.