THE RIGHT TO PRIVACY FROM A BUSINESS ETHICS POINT OF VIEW

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ABSTRACT

In this paper I analyze four arguments used by some authors to show that employee's right to privacy is subject to severe limitations. The first of them is based on company's property right. I tried to show that this right does not remove necessarily any employee's legitimate claim of privacy. The second argument tries to show that a company is justified to affect the employees' right to privacy anytime when this increases their productivity. I tried to show that this argument is not correct. The third argument concerns the cases in which the company has to monitor the employment contract compliance. This can legitimate an infringement on employees' right to privacy. The fourth argument shows that a company can infringe employees' right to privacy in order to avoid legal sanctions. The last two arguments are correct.

KEYWORDS: *right to privacy, employee surveillance, drug testing, employment contract, employee e-mail monitoring*

This paper will deal with one of the most debated employee rights, the right to privacy. The issue will be tackled from the normative point of view that is specific to business ethics. Thus, the descriptive discussions concerning the current regulations in a country in a certain period of time will be only of a secondary concern for this paper. At the same time, I shall not discuss the relation between how this right is/is not respected and the way a company performs, though this relation certainly exists. My current aim will be limited to analysis of the general arguments concerning the employee's right to privacy. As I will show in the following, the sphere of right to privacy presupposes a series of very different issues, and for this reason the following arguments are not relevant for all the cases referring to this right. I will not attempt to circumscribe precisely the limits of this right and I will not follow into details any of the issues of this field. The discussion here is relevant both to moral and legal spheres, so long as the right to privacy can be used in both areas, but it will be more focused on legal arguments.

The general theme of the right to privacy can be divided in four distinct issues. These are the employee searches; employee surveillance; drug testing at workplace, by which the company tries to maintain a certain level of employee performance; prohibition, even in the free time, of some acts that can affect employee performance in the workplace. These problems generate, in turn, other secondary problems. Thus, one cannot talk about a single problem concerning the right to privacy, but rather about different interconnected problems. Accordingly, even if the vast majority of legal frameworks accept employee's right to privacy, they differ significantly on its limits.

The following analysis ignores the cases when the employee gives, by signing the employment contract, the express consent to waive some of the rights that fall under the general area of the right to privacy. In this case, the right to contract gives, at least *prima facie*, a sufficient justification for the company.

When we speak about thee employee's right to privacy, it is necessary to begin with a general characterization of the right to privacy. In 1859, in *On Liberty*, John Stuart

Mill spoke about a private sphere of the individual, where neither government nor society can interfere. According to Mill, the actions which belong to this sphere are those that affect only indirectly the others. In 1890, in an pioneering article, Samuel Warren and Louis Brandeis showed that that here is something like a right to privacy and that can be characterized as the right to keep confidential some information concerning the private life of a person. The authors refer by this to the right to keep away from the others some intimate details, or, in other words, "the right to be let alone".[1]

How can we see the problem of the employee's right to privacy, given this general characterization? First, the general right of privacy usually refers to the relation between government and citizen, while the employee's right concerns the relation between an individual and a private entity. This detail proves important, for example, in the American jurisprudence, where the protection of the private sphere of an individual is stipulated in a constitutional amendment (the Fourth), while the relations between the employee and the employer are governed by law (Kopp, 1998, pp. 865-86). In private companies, employees cannot avail themselves to the Fourth Amendment, so they have fewer chances than public employees to win in court privacy cases.

Secondly, the general right to privacy can be defended using the right to property. For example, infringing the right to privacy can imply using a compromising photo owned by someone or a piece of information in a personal diary. This kind of justifications can be doubted at the workplace, when the employee works on the computer's company or places his/her belongings in the company's locker.

Thirdly, at workplace, "the right to be let alone" cannot be defended invoking the fact that the employer is not directly involved. In most cases, the interferences in the employee's right to privacy are related with the company's profit. This happens in two ways, as I will show below, and these ways should be clearly seen as separate. On one side, there are interferences with the employees' right to privacy by which the company try to increase their productivity and, by this, company's profit. On the other side, a company can try to avoid being liable in court in several cases, because this may generate loses. I will offer some examples at due time.

The last two paragraphs may lead to two arguments against the employee's right to privacy or at least in favor of some drastic limitation of it. The main idea of these two arguments is that even if the right to privacy should be respected, when we are talking about employer-employee relation this will be put under doubt by the legitimate claims of the employer. I will try to reject these arguments.

The first argument of the anti-privacy camp has as starting point the company's right to property. Often this right conflicts with the employee's right to privacy. But the right to property is a fundamental right, more clearly defined, which has priority over the right to privacy, with its vague and subjective nature. If, for example, the employee e-mails are stored on the company's computer, the company's right to property will prevail upon the employee's right to privacy. Given the first right, the employer will have the right to access any document used by the employee. The installation of video surveillance equipment can be justified in the same manner. The body searches should be forbidden, because they infringe the employees' right to property. But, in any other case, the company's right to property will make difficult for employee to avail himself of right to privacy.

Indeed, there are many situations when there is a conflict between the employee's right to privacy and the company's right to property. I disagree that there is any general solution at the problem concerning which right should prevail. Respecting the employee's right to privacy doesn't significantly affect the company's right to property. The company may revoke the employee's right to use the computer or to access the e-mail account, or

[1] This phrase belongs to the Judge Thomas Cooley (Warren and Brandeis, 1890, p. 195).

may ask for compensation for supposed computer damages. The only right affected is the one regarding the use of the employee's private data. Additionally, there are authors who regard the right to privacy as a kind of property right, one in someone's own actions and the data about himself. (Thomson, 1975; Samuelson, 2000, esp. pp. 1126-1128). If we see things in this way, the conflict will oppose two property rights, the company's property right in the computer and the employee's property right in his personal data.

However, the company's right to property is important from another point of view. This can prove relevant for defining the situations when it is reasonable for the employee to expect privacy. The concept of reasonable expectations of privacy[1] has a very important role in privacy cases actions in American jurisprudence (Cohen and Cohen, 2007, p. 240). Generally, the employee can reasonably expect his privacy to be respected when the company's property is not by any means involved. Of course, the employee can have a reasonable expectation of privacy in this own bag and, in a smaller degree, in the unlocked locker owned by company. However, the property right is not sufficient to establish the reasonableness of expectations of privacy. In this regard, there are other relevant details, as the existence of a password (or a lock in the case of a locker). The employees can reasonably expect privacy of their private e-mail accounts, protected their own passwords.[2] Thus, the concept of reasonable expectations is far more complex and cannot be reduced to that of the right to property.

The second argument of those who consider justifiable a severe limitation of the right to privacy is the following. The employee signs a contract with a company by which, in exchange for a salary, he agree to use at his best the time spent at work, in the company's benefit. The company has thus the right to monitor by any means it considers appropriate the compliance of the contract. These means may include practices that can be seen as interfering with the employee's right to privacy. For instance, the company may install video surveillance equipment or may engage in employee drug testing.[3]

The employer has the right to find out any kind of information about something that might interfere with the compliance of the employment contract. This right is an implicit feature of the contract mentioned and do not need any further procedure for acceptance from the employee. The employee agrees to use to the maximum extent his/her capacities in the benefit of the company and the drug consumption diminishes these capacities and thus is against the terms of the contract. The drug consumption brings often important losses, which the company has the right to try to avoid.[4] This makes legitimate the company's wish to gather information regarding the drug consumption. The argument in favor of monitoring the activities at the workplace will work in the same way.

I will try to show that this argument is not correct. Firstly, the mere fact that a company would benefit form the testing the employees or by placing some surveillance cameras at the workplace is not sufficient. Legally and, perhaps, morally, the rights functions as arguments against the utility-based arguments. As Dworkin has showed, the rights are a sort of "trumps", which prevail upon any utility-based argument. However, the argument above can still work if a company can invoke another right. According to the

[1] In general, the concept of reasonable expectations is essential to many areas of American jurisprudence.

[2] This is one of the most debatable cases in American jurisprudence. In a well known case, Smyth v. Pillsbury, employee's claims were rejected (see Dixon, 1997, for a critical view on the Court's argumentation in this case), but some similar enough cases were ruled in favor of the employee.

[3] This is, for instance, the argument from Cranford, 1998. He says: "Employers are entitled to know about employee drug abuse on the grounds that such knowledge is relevant to assessing an employee's capability to perform according to the terms of the agreement" (p. 1807).

[4] Ira A. Lipman. "Drug Testing is Vital in the Workplace", *U.S.A. Today Magazine* 123 (January 1995), 81, apud Cranford, 1998, p. 1805.

argument above, the right of the company to control the employees' private lives springs from the employment contract.

The above argument implies that the employee agrees by this contract to use his/her capacities at maximum extent. Only in this case, the drug consumption is a sufficient proof of breaking the employment contract. The contracts which specifically stipulate a certain output to be accomplished by the employee set him free to any additional obligation. In cases when the contract stipulates precisely the accomplishment of a certain result, the control sphere of the company stops at this point. The employer will check whether the contract was respected and whether there is any sanction to be applied, without any further justifiable claim.

However, even in the more likely case when the contract does no stipulate expressly a result that the employee should accomplish, the argument of the anti-privacy authors looks inappropriate. The employment contracts often stipulates, implicitly or explicitly, that the employee will work as much is required by its position, not that he will work as much as he/she is capable of.[1] If this is true, then the drug testing of employees and their surveillance are not relevant. Even the employee is under the effect of some drugs, he/she can work in a satisfactory manner, given its position in the company, although it is true that he/she will not achieve the level of performance possible if he/she had not made use of some drugs.

Additionally, the argument of the anti-privacy authors is dangerous, given its potential for abuse. Using the same pattern of argument, the company acquires the right to monitor the employee without any restrictions. For example, the company can forbid the employee to smoke, even in his/her free time, invoking the idea that smoking can affect his/her performance at work.[2] A number of interdictions can thus be justified, and the company can gain control over the entire life of the employee, outside the workplace, by invoking the influence upon his/her productivity at work.

So far I have rejected two arguments formulated by the anti-privacy camp. But this does not mean that, in certain cases, this camp cannot offer other arguments. Below, I will try to formulate two arguments that can be considered relevant in some cases. For many jobs in a company, the performance of the work that the employee is bound to accomplish cannot be controlled without monitoring his/her activity. In these cases, the final result of the employee's activity is not sufficient to check the tasks specified in the employment contract. For example, the fact that an operator in a call-center is indeed performing his/her tasks cannot be verified by only looking at the final results. For example, the number of complaints filled by clients against that operator can be a relevant measure of employee's performance, but not a sufficient one. For that reason, monitoring the discussion between the operators and the clients can be seen as a legitimate infringement of the right to privacy.[3] In most of the cases, to install some surveillance cameras can be justified in the same manner. Not the least, the company-provided e-mail account, for purposes related to employee's work, can be monitored, based on the same argument. There is no significant difference between monitoring the phone calls between a call-center operator and clients and monitoring the e-mail exchange between an employee and a client. It should be noticed that it is not the property rights of a company that are invoked, but the implicit purpose of the employer's discussion.

[1] Joseph DesJardins and Ronald Duska. „Drug Testing in Employment", *Business aand Professional Ethics Journal* nr. 6**,** 1987, pp. 3–4, apud Cranford, 1998, p. 1810.

[2] This forbiddance was implemented by Weyco Inc., a company in Okemos, Michigan. The Borgato Hotel and Casino, from Las Vegas, establishes a rule of weight control, which, obviously, influence also the employee's life outside the workplace (Cohen and Cohen, 2007, pp. 235-236).

[3] Moreover, it can be argued that the right to privacy does not refer to the case when the employee accomplishes his job tasks.

The second argument concerns the cases when the company is liable to legal sanctions. In this case, certain practices of companies can be justified by the "no liability without control" principle. This principle implies that the company has the right to avoid its employees' actions that can lead to legal sanctions against it. For instance, a company that can be liable for damage done by its employees may avoid legal sanctions by implementing practices that can affect employees' privacy. The drug testing of employees that can endanger lives of properties of the others is permitted. At the same time, the companies can be liable for creating a climate that facilitates harassment (Hoffman et al, 1997, pp. 269-270). In this case, companies are justified to apply an office romance policy that affects the employees' private lives.

In this paper, I tried to evaluate some arguments concerning employee's right to privacy. I concluded that a company can invoke in its defense two types of argument. The first one refers to cases when monitoring is necessary for checking the employees' accomplishment of job tasks. The second one refers to cases when the company tries to avoid legal sanctions.

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