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FOREWORD

POLICING THE WORKPLACE–HOME SPACE BOUNDARY: NEW ISSUES FOR EMPLOYMENT REGULATION

*Katherine V.W. Stone**

One important feature of contemporary employment is that the boundary between the workplace and the worker's private life has changed. An increasing number of employees work at home via telecommuting for at least some of their work tasks.[1] In addition, as part of their work tasks, more employees are spending time outside the physical premises of the firm at the premises of customers, suppliers, or other venues.

Because the place of work is no longer confined to the employers' premises, many employees straddle the fuzzy line between employee and independent contractor or the fuzzy line between regular employee and temporary worker. Many workers designated independent contractors are unclear whether they work for a particular firm even when they are "at work."[2] Just as the place of work has moved outside the traditional workplace, the time that work is performed often occurs outside the confines of a regular eight hour day. The internet, email, teleconferencing, cell phones, and other technologies enable some employees to perform their work at irregular hours. Many firms have adopted flexible hour system to facilitate work outside normal business hours. Changes in compensation systems away from simple time-based payments to results-based compensation systems are used to reward these kinds of off-hours efforts. As a result of the expanding boundary of contemporary employment, employers are increasingly interested in controlling the off-duty conduct of employees.

Moreover, there is another reason why employers are paying more attention to employee off-duty conduct. Best contemporary management practices today involve encouraging employees to interact with a firm's

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1. *See* Katherine V.W. Stone, *Legal Protections for Workers in Atypical Employment Relationships*, 27 BERKELEY J. EMP. & LAB. L. 251 (2006).

2. *See* Katherine V.W. Stone, *Rethinking Labor Law: Employment Protection for Boundaryless Workers*, *in* Guy Davidov & Brian Languille, BOUNDARIES AND BORDERS: DEFINING THE SCOPE OF LABOR LAW (2006).

customers, suppliers, and other constituents of the firm. No longer is work organized in a way that keeps employees in narrowly defined, task-specific silos.[3] Because employees are part of the firm's team, firms want to police their employees' off-duty conduct to ensure that they represent the firm properly. Employers believe that illegal or immoral behavior could tarnish the firm's reputation and hence hurt business. Thus, employers are more actively trying to police off-duty conduct, and given today's technologies, companies have more means at their disposal to do so. For example, firms can monitor employees' email and can often obtain information about employees' off duty conduct, beliefs, political contributions, club memberships and leisure activities on the internet.

In addition, firms are increasingly interested in obtaining data about employees that is not immediately germane to job performance. Sometimes employers want confidential medical information, or an individual's genetic information, in order to predict future medical costs or screen out disease-prone individuals at the hiring stage. Here too, the employee's privacy for personal information is at risk of violation.

The spilling over of work from the workplace to the outside world poses new problems for employment law. How can the privacy of workers be protected against intrusive surveillance and monitoring by the employer? When can employees exercise their autonomy and speak their minds? When are they on their own time, and when are they subject to the employer's directives and constraints?

Two articles in this Symposium are directly relevant to the question of how and when employers can cross the boundary between the workplace and the employee's outside life.

In his article, *Workplace Electronic Privacy Protections Abroad: The Whole Wide World is Watching*, William A. Herbert explores the various protections that attach to electronic communications in different countries. As he states, in comparison to other countries, the United States' protection of the right to privacy in the workplace is scant. Protections in other countries attempt to balance the employee's rights to privacy and the employer's right to obtain valuable information from previous employers. The article details the European Union and its Member States' substantive and procedural treatment of individual and personal data privacy rights as a fundamental component of human dignity as opposed to a mere personal property right. To have an effective comparison, Mr. Herbert compares the protections afforded by the United Kingdom, France, and Canada to the limited protections offered by the United States. In concluding, Mr. Herbert is hopeful that the United States will develop similar protections

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3. *See* Katherine V.W. Stone, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).

for electronic workplace privacy by using those protections offered abroad as guidelines.

Similarly, in a more domestic focus, Joseph O. Oluwole analyzes speech protections in the public sector. These First Amendment protections are rooted in the Supreme Court's recognition that public employees do not shed their constitutional rights once they become employed. In his article, *Public Employment-Free Speech Jurisprudence: A New Constitutional Test for Disciplined Whistleblowers*, Professor Oluwole examines how well the Supreme Court has done in protecting the rights of a public employee to express personal thoughts on political topics, educational policies, academic standards, treatment of students, and other matters of personal conscience. In finding that the Supreme Court's protection of these rights has been lacking, Professor Oluwole proposes a new constitutional framework under which to evaluate the government's intrusion upon the speech rights of public employees. The proposed constitutional framework is based on the three-tier framework used in Equal Protection jurisprudence, and Professor Oluwole hopes the courts will use the framework to afford greater protections to public employees.

The third piece in this Symposium addresses not what types of rights employees should have, but how employment rights can be protected. In their essay, *Mandatory Pre-Employment Arbitration Agreements: The Scattering, Smothering, and Covering of Employee Rights*, Robert J. Landry, III and Benjamin Hardy call attention to mandatory arbitration provisions in employment contracts. They argue that such provisions often amount to eradications of the employee's workplace rights, and they decry the federal courts' acceptance of mandatory arbitration provisions in employment agreements. The authors show that courts have routinely upheld mandatory arbitration provisions often to the detriment of many statutorily protected rights. In concluding, Professor Landry and Professor Hardy note that the proposed Arbitration Fairness Act currently pending in Congress would potentially eliminate predispute mandatory arbitrations in employment, and they urge the legislature to enact the new law.

Lastly, this Symposium ends with two very well written student works: a note and a comment. The note, *Mortgage Reform and Anti-Predatory Lending Act of 2007: A Suboptimal Response to a Subprime Problem*, written by John Black, discusses the mortgage crisis that has swept across our nation and evaluates the successes and shortcomings of the Mortgage Reform and Anti-Predatory Lending Act of 2007, and the comment, *Constitutional Law: How Fast is Too Fast? The Court's Race to Find Reasonableness in High-Speed Chases*, written by Katie Coxe, discusses the inherent danger to high-speed chases and the appropriate response from law enforcement during such chases.