Assignment One

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1. Define the employee's duty of loyalty, the duty to act in good faith, and duty to account. Give an example of a breach of each duty.

The duty of loyalty, duty to act in good faith, and duty to account all describe the responsibilities of an employee to his or her employer. In some cases, the breach of these duties can lead to the possibility of legal action to be taken against the employee (Moran, 2013). This text will explore each of these duties in more detail, give examples of what would constitute a breach of each duty, and discuss some research surrounding these questions.

The duty of loyalty means that the employee must follow the directions of the employer. This includes direct commands, informing the employer of relevant business information, and protecting any privileged or confidential information (Moran, 2013). One example of a breach of duty of loyalty might be a woman employed as a cleaner by a cleaning company, such as Merry Maids. The employee decides to start her own cleaning business and poaches the clients from Merry Maids. In this case, the employee may be sued for breaching of contract and thus, breaching her duty of loyalty.

The duty to act in good faith simply means that the employee should carry out their assigned task or duty using good faith, or proper care and reasonable skill (Moran, 2013). As I work at a university, an example in this setting might be of a professor who incorrectly enters the final grades of a student. In this situation, the employee has not breached duty of loyalty, but has breached the duty to act in good faith because of the negligent errors that occurred.

Finally, the duty to account means that the employee must be responsible for the use of company funds, and must account for any and all money and compensation received. In addition, company funds must be kept separate from the employee's own personal funds. Our book gives the example of a securities broker who comingles company and personal funds in order to fund his

own investments. In this case, all three of the duties are breached, including the duty to accurately account of company funds. The employee may be sued in this situation (Moran, 2013).

Conflict of interest has been explored with regards to a duty of loyalty. Bower and Paine note that this issue is especially prevalent with what is called the Agency Model of ownership, in which stock holders supposedly exercise control of a company, and yet for the most part, these stockholders are not able to even step foot on the company grounds (2017). In addition, there is a question as to the fiduciary duty of loyalty and what happens when that is in disagreement with the commercial world. Cohn notes the serious questions raised, especially when a business decision with a supposed conflict of interest has been approved by a board of directors, but without shareholder approval (2019).

This author believes that these three duties are mostly straightforward. However, there may be more conflict as more and more Americans are left with no choice but to work as independent contractors in temporary or gig jobs, without benefits. The gig economy is growing by the day and so its implications will be interesting to note for these duties.

2. What is the Uniform Guidelines on Employee Selection Procedures? Why is this important to companies?

The Uniform Guidelines on Employee Selection Procedures (UGESP) were first published in 1978. The goal of this document is to assist those involved in the selection and hiring of new employees so that this is done in a manner consistent with various laws and acts of the federal government, including Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act, and the Equal Pay Act (Moran, 2013).

One of the main goals of the Civil Rights Act is first, to state that discrimination based on one's race, color, religion, sex, or national origin is illegal. Second, it seeks to identify and eliminate the use of hiring methods that have a disparate impact on members of protected groups, including women and minorities. In discussing the burden of proof with regards to disparate impact, The Civil Rights Act of 1964 states that if disparate impact arises with regards to race, color, religion, sex, or national origin, then the business must prove that the these disparate impact hiring methods are a business necessity. If this cannot be proved, and the employer refuses to modify their hiring methods to no longer have a disparate impact, then this employment practice is unlawful.

The UGESP, therefore, seek to assist the employer in creating hiring guidelines that are consistent with the law. A major focus of the UGESP is validity: does a measurement procedure actually measure what it is supposed to be measuring? There are three types of validity: content validity, criterion-related validity, and construct validity (Haimann, 2019). Schmidt notes that there is some disagreement whether content validity and cognitive measures can be linked (2012).

In addition, the UGESP rests on other principles, such as the idea of reliability. In other words, if a business is attempting to assess a psychological construct such as self-efficacy, these constructs must be measured consistently (Haimann, 2019).

This is very important to companies, as they must be well-aware of the impacts that their hiring may be having on protected groups. And if the hiring procedures do have a disparate impact, the burden shifts to the company to prove that the hiring practices represent a business necessity. The UGESP is especially important for companies that have 100 or more employees. This is because these employers must then keep records of their hiring practices, so that if the

Equal Employment Opportunity Commission investigates, the company will be able to produce this information. The employer is also required to post some kind of banner or notice advising of Title VII (Moran, 2013).

In addition, companies may be sued civilly if they do not comply with the Civil Rights Act of 1964, so if companies are familiar with the UGESP, their legal liability may be reduced. Interesting to note is that is that the Society for Industrial and Organizational Psychology (SIOP) hopes that some of these rules may be reviewed and changed. SIOP notes that as the guidelines were first published in 1978, there has been much psychological research and testing done since then. Therefore, some of the guidelines do not reflect the conclusions of current research with regard to testing, employment, and selection (Reynolds & Dunleavy, 2011).

This author believes that the UGESP are important for companies and are another tool to assist companies in being compliant with the law. However, the record keeping requirements are quite burdensome. In addition it is advised that a company consult with an industrial organizational psychologist before requiring any kind of cognitive or behavioural test. Or, if the test is utilized but then begins to show a disparate impact, it is important that the organization be ready to shoulder the burden of proof to demonstrate the business necessity of that test.

3. When can a polygraph be used? Why can they do the polygraph?

Polygraphs are a type of honesty test. Specifically, a polygraph attempts to determine if the individual is lying. However, the reliability of polygraphs has been called into question. Additionally, it is often considered an invasion of privacy. At one time, the use of polygraphs was commonplace. However, polygraphs can no longer be used in most cases. This is because of the Polygraph Protection Act of 1988. If a polygraph is used illegally against an employee, the

U.S. Secretary of Labor can take action, and the employee can also initiate a civil suit against the employer (Moran, 2013).

Polygraphs are only allowed in specific cases in which an employer has a reasonable suspicion that the employee is engaged in some kind of illicit activity, specifically related to theft. In this case, the employer must craft a statement that describes the specific parameters describing the polygraph test, including the types of questions and purpose and suspicions regarding the test. Questions concerning anything unrelated to the investigation, including questions related to certain protected statuses like religious preference are prohibited. The polygraph must be administered by a licensed polygraph examiner (Moran, 2013).

Schrage notes that while a traditional polygraph is very infrequently used these days, the idea of "virtual polygraphy" is now very common. Many employees (and individuals in general) have a large presence on the internet, across various social media platforms including LinkedIn, Facebook, Twitter, and many others. Algorithms that aggregate large amount of data from an individual's many internet presences can now determine whether or not an employee is being dishonest. The author notes that, especially after the Bernie Madoff scandal, organizations are very concerned about detecting fraud and deception among employees. Discovering dishonesty in an employee's social media may indicate a general propensity of dishonesty in the constitution of the worker (2011).

These days, it seems as if polygraphs are somewhat outdated, at least in the private sector. While the federal government may still administer polygraphs, especially for security-sensitive positions, the use of a polygraph in the private sector seems to be used much less frequently. In addition, as Schrage notes, there are many other ways to evaluate an employee's character, including through day-to-day interaction and the use of algorithms (2011).

In this author's personal experience, the use of careful and proper interviewing techniques can also reveal possible dishonesty even before hiring the individual. At the author's workplace, Yonsei University, a candidate was interviewed who had not undertaken any kind of personal development. When asked why, the candidate revealed that they were too busy with work. However, when asked later about hobbies, the candidate stated they were working on becoming a yogi (a certified yoga instructor). This revealed some inconsistencies and thus the employee was not hired. Therefore, good interviewing techniques are one tool which can be used to make polygraphs less of a necessity.

4. Explain retaliatory discharge. Is retaliatory discharge ever justifiable? Please explain in detail.

Retaliatory discharge is when an employee is retaliated against by an employer and fired for either making discrimination claim or being a witness in a discrimination case against an employer. Retaliatory discharge also includes when an employee is fired for filing a compensation claim or submitting whistleblowing complaint. This concept is markedly different from wrongful discharge, which exists when an employer is terminated because of protections under the law, including for being disabled, for their color, race, etc. (Title VII), or for their age if they are over 40, among other protected classes (Moran, 2013).

Retaliatory discharge by itself is never justifiable, but there have been some interesting cases. Our text gives an example case of an employee who observes co-workers illegally dumping chemicals into the river. This individual has a great working history, but after blowing the whistle and reporting the issue, she is given a poor work review and fired. In this case, the termination is retaliatory and illegal (Moran, 2013).

There have been other court cases involved with retaliatory discharge. Morrow & Phillips note that the courts must strike a careful balance between the concept of at-will employment and providing employees with recourse for illegal termination. In one particular case, Williams v. City of Burns, a police officer refused to alter a ticket that was given to the stepson of the chief of police. The officer complained to the mayor about what was going on. The police department later fired the officer, supposedly for a violation of chain of command. However, the court noted that this was merely a pretext for the firing, and thus ruled in favour of the officer (Phillips & Morrow, 2016).

However, in another case, Bige v. City of Etowah, a police officer refused to follow the directions of his superior to have a "quota" of tickets and was later fired. According to the state of Tennessee's law on whistle-blowers, a plaintiff should be protected if they speak out about illegal activity. However, in this case, the court ruled that the use of quotas was illegal for a police department, but not for an individual officer, and therefore ruled against the officer's claim. So in this case, while it certainly seemed to be retaliatory discharge, the court ruled differently (Phillips & Morrow, 2016).

This author believes that it may be quite difficult to actually prove a retaliatory discharge. As the case above demonstrates, there is a high bar to meet to prove this. In addition, many organizations, including this author's, have extensive employee handbooks. With performance reviews apt to find at least one issue or problem with the employee's work, it can be very easy to find a way to terminate employee that appears prima facie to be legal. Therefore, an employee who is at risk for being discharged illegally should document everything and ensure they are on firm, legal standing to make their case as strong as possible.

5. Define arbitration? Is the arbitrator award equivalent to a court's judgement? Can the arbitrator award be overturned?

When the Federal Arbitration Act was passed in 1925 (FAA), the goal was to provide a framework for recognizing arbitration. Arbitration is the settling of a dispute through a mediated process led by a professional arbitrator, rather than through a court. Both sides must agree to arbitration. The arbitrator will still listen to both sides and make a judgment. In order for an arbitration to occur, there must first be documents drawn up which are not too complicated. An employer hoping to use arbitration should have employees sign a document acknowledging the arbitration process (Moran, 2013).

An arbitration award is similar to a court's judgement, in that the arbitrator is given a lot of power, including the ability to assign legal fees, and issue awards for judgement. According to our text, an arbitrator award can only be overturned for three reasons. Reason one is that there was a blatant disregard for the law in the arbitration process. Reason two is if the arbitrator acted on their own self-interest rather than the interest of the two parties. Finally, a third reason an arbitrator's award can be overturned is if there was fraud or corruption in the process (Moran, 2013).

Our text notes that arbitration is an interesting issue, as the Seventh Amendment of the Constitution allows for a jury trial. However, many companies now employ mandatory arbitration in the case of disputes. The author notes that if there is question as to whether arbitration is fair in a particular case, the party can then go and petition the court regarding the appropriacy of the arbitration (Moran, 2013).

Rutledge notes the differences between arbitration, which largely exists in a private sphere, with the court system, which is open to the public and established by the state. It is noted

that in the second half of the twentieth century, the use of arbitration expanded greatly, including between consumers and companies. Arbitration even now exists among nation states (2012).

This author believes that arbitration is probably necessary in the United States, which is a very litigious society. It saves companies money fighting court battles while still giving the consumer or employee a fair chance to present their case. However, as our textbook points out, there have been some different court outcomes regarding arbitration and certain issues such as violations of Title VII of the Civil Rights Act (Moran, 2013). It is important that the courts are able to step in when the court cases are more complex, and a more expansive discovery is required, as is often the case with sexual harassment and other such cases. Arbitration should give the petitioner the same opportunity for justice as would going through the court system.

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