Chapter Two

Ethics and the Law

**A Manager’s Dilemma: Putting It into Practice**

**Quantifying the Value of Life**

***Issue Presented:*  What factors should the CEO of a corporation consider in offering to pay victims damages prior to the end of a trial?**

This question is based on the dilemma faced by Swissair after one of its planes crashed off the coast of Canada in 1998. *See* Margaret A. Jacobs, *Swissair Crash Tests Relations with Insurers*, Wall St. J., Feb. 15, 2000, at B1. Despite the concerns of its insurers, Swissair offered families advance payments of $154,000 without forcing survivors to wait years for an out-of-court settlement or court order. It also reimbursed extensive travel and funeral expenses. An association of surviving family members applauded Swissair’s “exemplary conduct” and “humanitarian attitude.” Swissair executions characterized its actions as “good public relations, as well as the right thing to do.” *Id*. Even so, the *Wall Street Journal* predicted that Swissair’s generosity was unlikely to reduce Swissair’s liability or the number of lawsuits against it.

On the advice of counsel for the insurers, Swissair initially offered less to non-U.S. victims. After a sharp public outcry, Swissair agreed to offer everyone the “American rate.” Although a major component of damages in a wrongful death case is often lost earnings, which are usually lower outside the United States, paying less to non-Americans created the appearance that a non-American life was worth less than an American one.

**Questions and Case Problems**

**Question 1**

***Issue Presented:* How should a female employee respond to her male boss’s insinuation that he is inviting her to a client meeting for her sex appeal rather than her intelligence and knowledge? Does this constitute illegal sex discrimination? How should the head of human resources respond?**

Allen Scot, Christine Bancroft’s boss, is clearly acting unethically by telling Christine that he wants her to attend a client meeting for her sex appeal rather than her intelligence and knowledge of advertising. His behavior, while disrespectful, probably is not sufficiently severe or pervasive to constitute actionable hostile environment sexual discrimination, however. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and the discussion of other hostile environment cases in Chapter 13. If, however, Scot persists in treating Christine as “eye candy,” then that may be illegal sexual stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In that case, Ann Hopkins was denied partnership in Price Waterhouse and was told that she needed to dress more femininely, have her hair styled, and wear more jewelry. The U.S. Supreme Court ruled that sexual stereotyping violated Title VII.

This situation puts Christine Bancroft in the unfortunate position of having to decide how to react to her boss’s behavior. If her boss knew how badly she wanted to work with clients, maybe he was giving her the opportunity she seemed to want at any cost. There is no doubt that this would be a good, first opportunity for her to interact with a client. She might be inclined to go to the meeting and use the opportunity to advance her career and learn from her bosses. However, Christine cannot help but feel uncomfortable about being treated as “eye candy” for a client. Nonetheless, she risks jeopardizing her position at the company or losing her boss’s favor if she complains.

Christine must, however, consider the long-term ramifications of condoning such unethical behavior. If she knows her boss will behave like that to her, then he most certainly will act the same way toward other female employees. If she can prevent other female employees from experiencing such offensive behavior, she should probably report his behavior to HR. Furthermore, there is a slippery slope argument here: if Christine shows her boss that she is willing to accept this small, disrespectful situation is she inadvertently giving him the okay to make further improper suggestions? He is not asking for sexual favors in return for a promotion this time, but if he gets away with this behavior, will he be more likely to use female employees in even more degrading ways in the future?

Christine has worked too hard to get her Northwestern MBA degree and her position at Scot Wayne More to be degraded and used for her looks. If Christine does not stand up for herself this time, it is likely that her boss will never respect her for her intelligence and knowledge about advertising.

If Christine feels comfortable talking to her boss about this matter, she could go to him directly and tell him how she feels. She can tell him that she is not comfortable going to a business-meeting if her good looks are the only attribute she brings to the table. She can offer to do whatever preparation might be required so she can be a valuable part of the meeting. She can ask her boss to treat her with more respect in the future and let him know that she will report any similar suggestions to HR. Unfortunately, there is a risk that she could lose her boss’s favor if she complains. To help protect against this, she might seek out the manager who interviewed her for the position and ask him or her how to handle it. This may give her “air cover” in the event her boss starts complaining about the quality of her work.

Alternatively, Christine could report the incident to HR, and perhaps ask to remain anonymous if that will ease her mind about reporting her boss. HR can advise her on the best course of action, encourage her to report future problems, and talk to her boss in her place. If Christine’s boss makes any more comments like this one, she will have established a pattern of behavior on the record by reporting this incident. HR should certainly speak with her boss and remind him that this behavior is inappropriate and that it is illegal to retaliate against Christine for complaining. (This is discussed further in Chapter 13.) If it has not already been done, HR should rewrite the company’s compliance manual to prohibit these types of remarks about an employee’s clothing or looks. If this is already part of company policy, then Scot’s conduct is all the more reprehensible.

As a beautiful woman, Christine should also recognize her obligation to act responsibly and professionally as well. If she does not want to be treated this way, and wants to be respected by her co-workers, she should be certain to dress and act professionally. It would be unethical on her part to flirt with male employees or wear enticing clothing to benefit herself at work. She may want to reconsider wearing overly sexy little black dresses to any company-sponsored functions, knowing that this type of situation could result.

This hypothetical is adapted from an example provided in Joseph L. Badaracco, *Defining Moments: When Managers Must Choose Between Right and Right* (1997), that involved race, rather than gender. A young African American investment banker named Lewis was invited to a client meeting simply because of his skin color, and felt awkward about the situation. Lewis was so conflicted that he made a list of pros and cons about whether or not to attend the meeting. For example “opportunity” was a major pro, but “phony” was on the list of cons. An excerpt from his thinking on the matter: “Now his firm was singling him out solely for his skin color, not for his talent. Lewis believed companies and clients should base decisions on performance, competence, and character, not on games of mix and match based on race, gender, and religion. Was including him as a token black really all that different from excluding him because he was black?” *Id*. at 12-13. Professor Badaracco further points out that this is not simply a case of deciding the right thing to do: “The challenge is deciding *which right thing to do.* Lewis has to choose between right and right, on a complex issue of personal integrity. His question was not *whether* to be ethical, it was *how* to be ethical.” *Id*. at 13-14. Lewis resolved his dilemma by asking to be part of the presentation to the clients, and therefore enabling himself to feel that he was at the meeting for a reason related to his talent and not just his skin color.

**Question 2**

***Issue Presented:* What are the ethical and economic factors that play into raising prices in times of disaster?**

Raising prices during a disaster is not always unethical – sometimes higher prices provide an incentive for others to rush to send resources to disaster-stricken areas, and sometimes higher prices give citizens an incentive to avoid overusing scarce resources. Arguably, neither of these rationales apply to the hotel price-gouging seen in the wake of Hurricane Irene.

The flip-side of the hotel price-gouging story is the general *lack* of price-gouging by hardware stores before, during, and after Hurricane Irene. Many stores sold out of certain goods, such as generators and batteries, in the days leading up to the storm. The fact that the stores sold out indicates that some customers went away disappointed. And it is entirely possible that some of the disappointed needed the generators a lot more than the people who actually got them. Should the stores have found some way of asking customers how badly they needed the generators and batteries, or should they have raised the price a bit to make sure people who bought them *really* needed them?

When a store raises prices for certain goods before a storm, the store is essentially predicting the need for disaster relief and profiting from the destruction a storm brings. Although the practice may be frowned upon, is it necessarily wrong? Don’t insurance companies operate the same way?

**Question 3**

***Issue Presented:* Is it ever ethical for an employee of a company to accept gifts from and individual or firm that does business or wishes to do business with that company? If so, under what circumstances?**

Zandra Quartney should decline the tickets to the Super Bowl offered to her by the makers of Brand One. Quartney is ethically obliged to decline any gift if her business judgment might be affected by such a gift, or if there would even be the appearance that her judgment might be affected. Even small gestures, such as dinner, should be accepted only if there are no strings attached. Given that Quartney is an ardent football fan, it is clear that she would greatly value tickets to the Super Bowl. In addition, there is a strong likelihood that her favorite team, the Steelers, will be there. Given the fact that Quartney must decide whether to cut Brand One’s boots or one of Brand One’s competitors from her retail chain’s line of shoes, accepting such a valued gift might in fact cloud her judgment. It would most definitely create a suspicion of unfairness. This is particularly true given that the brands are equally profitable and there is no easy way to decide which brand to cut. Even if Quartney were to accept the tickets and then decide to cut Brand One simply so that no one could accuse her of favoritism, this would be unethical. Quartney must make the decision purely on the grounds of what is best for her company. As a responsible manager, Quartney’s first instinct should be to decline the tickets as politely as possible.

There is sometimes a fine line between business gifts and bribes. A bribe implies a clear-cut intention to win someone’s favor. To decide whether the tickets are an out-and-out bribe, we would have to know more about the specific motivations of and information possessed by Brand One. If Brand One often showers significant gifts upon individuals who can make decisions favorable to the company, then it may be fair to say that Brand One in fact uses gifts to get favors. Such a policy would constitute a form of bribery.

It should not make any difference whether the person who offered the tickets to Quartney is a family member or a close friend. Quartney is ethically obligated to decline the tickets, given her position of power with respect to Brand One. In fact, if the representative of Brand One is a relative or friend, Quartney may have an even greater obligation to decline the tickets. Friendship and family ties should be kept separate from business relations and business decisions. Quartney’s company has an ethical obligation to treat its suppliers fairly, and require them to compete on genuine competitive issues, not on having personal connections with the company’s buyer, or showering the buyer with gifts.

**Question 4**

***Issue Presented:* Is it ethical for an employee of a company to accept a gift from a firm whose brand she plans to cut from her company’s line of products?**

Under no circumstances should Quartney accept the tickets to the Super Bowl. Even if Brand One is clearly the line that she should cut, it is simply bad business and bad ethics to accept highly valued gifts from a business relation. The more Quartney values the tickets, the stronger the obligation to decline them. Quartney should not pay face value for the tickets. Why risk any perception of favoritism or even just the general perception that the company’s buyer is offered valued gifts by her suppliers? Note that Quartney has an easy solution in this particular case—there is always an active, legal Super Bowl tickets market for those willing to pay the going price. Quartney should simply buy her own tickets at face value.

Quartney’s actions should be the same even if she were sure no one would find out about the gift. Just because an action is secret does not mean it is ethical.

**Question 5**

***Issue Presented:* Is it ethical for a consultant to gather information from a company without revealing her association with its direct competitor?**

Portoff clearly cannot lie about her employer when gathering data; to do so would be fraud. She also should not solicit trade secrets or encourage others to violate any nondisclosure agreements; otherwise, she might violate the Uniform Trade Secrets Act or be liable for intentional interference with a contract.

Talking with low-level employees would be legal if done in accordance with these strictures. Its ethical character is a closer call. On the one hand, competitors should train their employees not to disclose sensitive data. On the other, taking advantage of a low-level employees’ ignorance seems questionable. Ideally, she would figure out a way to get permission from the higher level managers, perhaps by offering to share some of the results of the study. In any event, if she personally views the calls as unethical, she should not make them. Instead, she should talk with other consultants and managers in the firm and try to persuade them that she is right or let them persuade her that they are. She might also promote an industry code of conduct as Chartered Financial Analysts have done.

**Question 6**

***Issues Presented:* May an employee accept an expensive prize as a result of participation in a company-sponsored event?**

Although Wu was clearly meant to be the recipient of the prize under the terms of the contest, she has an ethical obligation to inform her supervisor about the prize and offer it to her employer. The gift is extremely valuable, and she went to the event as a company representative, not as an individual. The company may or may not allow her to keep the television. Wu should also consider how her supervisor and others would react to hearing about the television gift if she does not tell them herself. Wu should avoid the appearance of impropriety. In grey matters like this one, it is always best to err on the side of caution and act as ethically as possible. The television really belongs to the company, since the company sent Wu and could have chosen to send someone else just as easily. If Wu were a manager receiving the television (or a similar benefit) as a result of her affiliation with the company, she would have a fiduciary duty, and not just an ethical obligation, to inform the company.

The company should provide in the code of conduct or in the employment contract that gifts or prizes over a certain value received as a result of company affiliation must be reported to the appropriate authorities and offered to the company. This type of policy would have the additional value of discouraging employees from accepting gifts or bribes in general.

If Wu’s manager finds out about the prize from a source other than Wu, she should confront Wu. She should explain to Wu that because she received the gift as a result of a company-sponsored event, she should have informed the company and offered the television to it.

**Question 7**

***Issues Presented*: (a) Would it be ethical (or legal) to send a “friend” or “follow” request to a subordinate employee for the sole purpose of getting access to that person’s “private” page? (b) Would it be ethical (or legal) to ask applicants to open their pages during a job interview? (c) If a manger finds information on a social networking site that may warrant disciplinary action, such as abusive comments about fellow employees or threats against the safety of the workplace, should the manager act on it in his or her managerial capacity?**

(**a**) An employer or manager certainly has the right to “friend” employees. Accepting an employer’s “friend” request, may have some unintended consequences, however.

The Genetic Information Nondiscrimination Act of 2008 (GINA) protects job applicants and employees against discrimination based on their genetic information. However, GINA includes an inadvertent acquisition exception to the general prohibition when a “manager, supervisor, union representative, or employment agency representative inadvertently learns genetic information from a social media platform which he or she was given permission to access by the creator of the profile at issue.” Therefore if the employer is a “friend” or a contact of the candidate or employee, the employer may legally acquire genetic information on a social networking site as long as the employer did not make the friend request for the purpose of obtaining genetic information.

Becoming a friend just to “spy” on one’s employees may be legal, but it raises ethics issues. Consider, for example, that an attorney may not “friend” somebody just to learn more about that particular person. Both the New York State Bar Association Committee on Professional Ethics and the Philadelphia Bar Association’s Professional Guidance Committee recently issued opinions stating that such conduct would constitute deception. *See* Marie-Andree Weiss, *The Use of Social Media Sites Data by Business Organizations in Their Relationship with Employees,* 15(2) J. Internet L. 16 (2011).

(**b**) Asking an applicant to open a personal social network page strikes many as a violation of privacy. Although certain states protect private employees from privacy violations, the U.S. Constitution only protects against violations by state actors, such as a government employer. Even if asking applicants to open their social network pages does not violate constitutional guarantees of privacy, it may cause ill will. For example,

The Montana city of Bozeman acquired some fame in 2009 when a local television station reported that it required individuals wishing to work for the city to “list any and all, current personal or business Web sites, Web pages, or memberships on any Internet-based chat rooms, social clubs or forums, to include, but not limited to: Facebook, Google, Yahoo, YouTube.com, MySpace, etc.” More recently, the Maryland Department of Corrections had a policy to ask corrections officers and job applicants for their social media passwords as part of the employment certification process. The American Civil Liberties Union of Maryland sent a letter in January 2011 to Maryland Public Safety Secretary Gary Maynard calling for the rescission of this policy. In February 2011, Secretary Maynard announced a 45-day suspension of the policy, noting that as “this is a newly emerging area of the law . . . [he] agree[s] that we must be convinced of the practice’s utility as well as be mindful of the path we are taking.” *Id*. A Maryland bill, S.B. 991, introduced in March 2011, would prohibit an employer from requiring an employee or a candidate to provide his or her online user names or passwords. *See* Marie-Andree Weiss, *The Use of Social Media Sites Data by Business Organizations in Their Relationship with Employees,* 15(2) J. Internet L. 16 (2011).

(**c**) Under these circumstances, *not* firing an abusive employee may place the employer at risk of being found that she negligently retained an employee. In *Blakey v. Continental Airlines*, 164 N.J. 38 (2000), the New Jersey Supreme Court found that an employer has the duty to remedy a pattern of retaliatory harassment directed at an employee using a work-related forum, if the employer has notice of it. In *Blakey*, an employee had filed a charge of sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act, alleging that co-workers posted defamatory messages accessible to employees on an online bulletin board, which pilots and crew had to use to learn their flight schedules. Employees were charged a monthly fee by the ISP for Internet access to the board, and part of this fee was paid back to the employer. Plaintiff alleged she gave notice to the employer by forwarding copies of the messages, but the court found that the record was inadequate to determine if the bulletin board was indeed connected with the workplace. It could therefore be difficult for an employee to prove that a social media site is a “work-related” forum, unless the employer creates a group, uses the site as a corporate tool, and actively participates in it himself.

**Question 8**

***Issue Presented:* What ethical and business issues should a corporation, its CEO, and directors consider when setting the salaries for the different types of workers it employs?**

This question raises the issue of what ethical obligation a company has to pay a livable wage. In an article entitled “Silicon Valley’s Dirty Side” in the April 18, 2000 issue of *The Standard* (self-described “Intelligence for the Internet Economy”), author Gary Rivlin noted that in 1999 Cisco Systems CEO John Chambers was compensated at a rate (including options he exercised) that was 7,176 times what was paid to janitor Guadalupe Herrera (who earned less than $17,000 a year).

Clearly, nothing above the minimum wage is legally required. But, unless a company is in extremis (clearly not the case here), it would seem only right for a company to pay everyone who contributes to its success a livable wage. Failure to do so can result in consumer backlash (as happened with Nike) or in the adoption of local regulations requiring at least government contractors to pay a livable wage.

CEOs in the United States averaged annual compensation of $10.5 million in 2007, 344 times the pay of typical American workers. It is much lower in Japan. The average executive’s pay increased 36 percent from 1997 to 2000 while the average factory employee’s salary increased only 2.7 percent. The board of directors (which sets executive and other compensation) should strive to create a pay structure that permits the firm to attract top talent while ensuring that those at the bottom can make ends meet (per Rawles’s veil of ignorance). In addition, even if the board looks just at the bottom line, research by Harvard Business School Professor Jay Lorsch demonstrates that large gaps in pay disrupt firm productivity. *See* Jay W. Lorsch, *CEO Pay: How Much Is Enough?*, Harv. Bus. Rev., July-Aug. 1992, at 136.