

## PUBLICATION

### Off Duty Conduct

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When was the last time you Googled yourself?

Try it and see what comes up.

Social media has changed the boundaries of the theory, 'what an employee does in their personal time is their business.' Take for instance, a simple search of someone's name on Facebook, LinkedIn, Twitter or Google and the person's employer can easily be found. In most cases, there is little impact to that employer but where it becomes a problem is when an employee's personal misconduct attracts negative publicity.

When an employee's off-duty conduct 'goes viral' - high profile examples in the last few years caught on video include the CEO of a catering company repeatedly kicking a puppy in a Vancouver hotel elevator and a Calgary man on his way home from a company party directing racist verbal abuse at a cab driver - an employer may find itself caught between a PR disaster and its legal obligations to the employee.

All employees have a duty of good faith and loyalty to their employer. Those duties are even greater for senior employees who may owe fiduciary duties to the employer to protect the employer's goodwill and reputation.

When an employee conducts themselves in their personal lives in such a way that:

- it interferes with the employer's reputation or product;
- it interferes with the employer's ability to conduct its operations,
- the employee's behaviour renders the employee unable to perform their job duties satisfactorily;
- the employee's behaviour leads to refusal, reluctance, or inability of other employees to work with him/her;
- or
- the employee has been guilty of a serious *Criminal Code* offence which renders their conduct damaging to the general reputation of the employer and other employees

then the employee may be found to have breached their duties to such an extent that the employee can be disciplined or potentially dismissed for just cause. Whether or not off-duty conduct will warrant just cause for dismissal largely depends on the seriousness of the conduct in relation to the employee's job, whether the conduct was repeated or isolated, and whether there is actual damage to the employer's interests (or such damage can be presumed).

Most of the legal decisions on this issue have come from labour arbitrators, but the courts have often applied the same criteria when assessing the severity of off-duty conduct.

While every individual case will depend on its own specific facts, off-duty conduct has been upheld as supporting discipline in a number of circumstances.

For example, a fraud examiner with the Toronto Stock Exchange was dismissed for cause after he was caught cheating on a qualifying exam. The Court had no difficulty agreeing with the employer that a fraud investigator required 'the highest moral character' and the actions of the employee justified the employer's decision to dismiss the employee.

Other examples where off-duty conduct was held to justify dismissal for cause included sexual harassment of co-workers and subordinates outside of the office, posting online threats of violence against other employees and posting racist comments online.

Disciplining an employee in any circumstance, especially for off-duty conduct, is a step that should not be taken lightly. For off-duty conduct to warrant discipline there needs to be a link between the conduct and the employee's job (or ability to perform the job). Any discipline that is taken needs to be proportionate to the conduct that has occurred and should follow an appropriate investigation by the employer. The standard for off-duty conduct warranting discipline will be higher than if the same behaviour had occurred at the workplace as the employee has increased privacy interests when they are going about their personal lives.

However, the line between 'personal' and 'public' lives is blurring. Employers can be proactive in addressing potential off-duty conduct issues before they arise by taking steps like reviewing their employment contracts, updating or creating policies for social media use by employees, introducing a Code of Conduct, and ensuring that employees are aware of their obligations and employer expectations.

For more information on off duty conduct, please contact any member of our Employment & Labour Group.