

Off Duty Misconduct and Social Media



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Presentation Overview



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Off-Duty Misconduct

Generally speaking, an employee cannot be disciplined for off-duty misconduct unless:

1. the misconduct has a *real and material connection* to the workplace; and
2. the employer can prove that the misconduct has seriously prejudiced or injured its reputation or legitimate business interests.

The *Millhaven Fibres* test:

To discipline an employee for misconduct away from the workplace, there is an onus on the employer to show that the misconduct:

1. harms the employer's reputation or product;
2. renders the employee unable to perform his/her duties satisfactorily;
3. leads to refusal, reluctance, or inability of the other employees to work with him/her;
4. amounts to a serious breach of the Criminal Code and therefore results in injury to the general reputation of the employer and its employees; OR
5. places difficulty in the way of the employer properly carrying out its function of efficiently managing its works and efficiently directing its working forces.

To discipline an employee for off-duty misconduct, the misconduct must either:

1. negatively impact the employer's reputation;
2. cause the employee to be unable to discharge employment obligations properly;
3. cause other employees to refuse to work with the individual; OR
4. adversely affect the employer's ability to direct or efficiently manage the production process.

- The test is objective - what would a reasonable and fair-minded person think if apprised of all of the relevant facts?
- Would the continued employment of the employee damage the reputation of the employer to the extent that continued employment is impossible or untenable? (*Toronto District School Board v. Canadian Union of Public Employees, Local 4400*)

The context, including the nature of the employee's position and the employer's operation, is important in assessing impact to the employer's business interests.

- Does the employee work unsupervised?
- Is the employee in a significant position of trust?
- Is the employee permitted unsupervised access to clients or client property?
- Is the employee a professional? Could their behavior be in breach of their code of professional conduct?

If, after applying the test, it is determined that the off-duty misconduct is disciplinable, the misconduct is dealt with the same way on-duty misconduct is dealt with.

- The level of discipline must be proportionate to the harm.
- The threshold for just cause termination is the same as any other misconduct; the conduct must be wholly incompatible with the continuation of the employment relationship to warrant termination for just cause.

TWO PATHS TO JUST CAUSE

Very Serious Misconduct:

- Theft
- Assault
- Serious Dishonesty

Lesser Forms of Misconduct
typically require:

- Progressive written disciplinary warnings, and
- Culminating incident

The Canadian Charter of Rights and Freedoms – Freedom of Expression – does not shield an employee from being disciplined or terminated for inappropriate off-duty social media activity.

Common scenarios:

1. Creation of a Poisonous Work Environment
2. Breach of the Duty of Loyalty
3. Breach of Privacy and/or Confidentiality

Important factors to consider:

- Damage to business (direct or indirect)
- Damage to workplace
- Threatening nature
- Frequency and duration
- Refusal to remove
- Dishonesty
- Lack of remorse
- Lack of provocation

- Creation of poisonous environment and breach of duty of loyalty
- 2 unionized employees employed by an automotive dealership
- Employees made degrading and sexually explicit Facebook posts about their supervisors
- Employees lied about authoring the posts
- Employer's decision to terminate the employees for just cause upheld
- No expectation of privacy when posting on social media

- If somebody mentally attacks you, and you stab him in the face 14 or 16 times....that constitutes self defence doesn't it????
- Completely Exploded & SNAPPED on the Fixed Ops/Head **Prick** at work todayHe sent me Home (With Pay) and wrote me up (Strike 1).... although the F**N gloves are off now ,,I gotta control my temper. One strike in 4 years aint bad, I guess.
- ... According to this reprimand at work My outburst yesterday was threatening and didn't allow The WestCoastAutoGroup to conduct regular business.... well????All I Gotta say is they p***** off the WRONG GUYbig time
- Seems my **Boss**, whos owned the business 25 yrs & is fixed operations director of 2 dealerships as well...**HE'S A COMPLETE JACK-*** ... not just Half-a Tard**
- Is wondering if his 2 **supervisors** at work, **go to the bathroom together?? And who holds who's p***s while p***ing??**
- I heard that Marco and [F.Y.] [two supervisors] were seen **fondling each others n*t s**k in the shop bathroom??** Any truth to that? That shop **ripped off** a bunch ppl I know
- ...none of the stereo s**t I bought there works, at all...Deck only plays store bought discs and subs are blown and amp is fried, again. ..
- west coast detail and accessory is a **f**** joke**....dont spend your money there as they are **f**** crooks** and are out to **hose you**... there a bunch of **greedy c***** low life scumbags**...

- Breach of privacy and/or confidentiality
- Unionized employee employed by a hospital
- Employee was tasked with cleaning up a scene where a patient had sadly jumped to his death from the hospital's parking garage
- Employee took 2 photos of the scene with his cell phone and posted them on his Facebook page along with captions/commentary, and 1 day later he deleted the photos
- Employee admitted to taking 1 photo, but he initially lied about taking 2 photos and posting the photos on Facebook
- Employer's decision to terminate the employees for just cause upheld

Practical Considerations and Tips



4. Remember that the test for termination for cause is the same and the threshold is high. A properly drafted termination clause in your employment agreement that permits without cause terminations on Employment Standards minimums helps you part ways with employees at less cost.
5. If a situation like this arises, seek experienced legal advice as appropriate action will vary based on specific facts and context.



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Thanks!

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