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Off-Duty Conduct – Is Your Job at Risk?

Employers can fault employees for inappropriate conduct away from work.

It is well known and even expected that an employee will be held responsible for inappropriate conduct in the workplace. In most instances, an errant employee will be disciplined by their employer for the improper conduct and the discipline imposed may range from a written warning up to termination for cause. However, what happens when an employee engages in improper, or even criminal, behaviour while off-duty? What remedies, if any, are available to the employer?

The Courts have held that criminal activity by an employee while off-duty does not necessarily trigger the employer's right to terminate that employee for cause. Several factors must be analysed in determining whether off-duty conduct will justify workplace discipline, including the nature of the conduct, the degree of dishonesty involved, whether the conduct is related to the employee's job, whether there is a link between the conduct and the workplace, whether the employer's reputation is damaged by the employee's conduct and the level of responsibility held by the employee.

Certain types of off-duty conduct are more likely to warrant workplace discipline. Theft, fraud, crimes of "moral turpitude", such as possession of child pornography, and crimes of dishonesty often cause a breakdown

in the employment relationship and destroy the employer's ability to trust the employee, thus justifying termination for cause. The degree of dishonesty may also affect the employer's perception of the employee's character and whether that character is compatible with the employee's duties. Crimes unrelated to dishonesty, such as possession of marijuana, are less likely to justify termination for cause.

The relationship between the off-duty conduct and the employee's job as well as the link between the conduct and the workplace are key factors in determining whether an employer is justified in disciplining an employee for their off-duty conduct. For example, an employer may be justified in terminating for cause an employee who is convicted of impaired driving if driving is integral to the employee's duties. However, an employee who is able to continue performing their duties and whose off-duty conduct is not directly linked to the workplace would likely not be subjected to workplace discipline. The employee's level of responsibility in the workplace is also considered. Employees with greater responsibility are more likely to be disciplined for off-duty conduct.

Workplace discipline has been upheld by the Courts in situations where the employer has successfully

demonstrated a risk to its' legitimate business interests due to the employee's off-duty conduct. Prejudice to the employer arising from the employee's conduct, including a loss of reputation and goodwill in the community, will justify the employee's termination for cause. However, if the employer is unable to establish that the employee's off-duty conduct affected the employer's business and reputation, even if there was publicity surrounding the employee's conduct, dismissal will likely not be justified.

Thus, employers are limited in their ability to impose workplace discipline on employees for off-duty conduct as the Courts will likely only permit this in situations where the employee's conduct has caused damages to the employer's reputation. An employee who engages in criminal activity outside of work that is unrelated to the workplace or the employer's business may face a conviction, but cannot likely be terminated for cause. **ME**

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