

Can You Fire Employees for Off-Duty Conduct?



Yes, when the misconduct does or has the potential to harm the organization's reputation.

There's a widespread myth that what employers do when they're away from work is their own business and that all employers can do is regulate how they behave **in the workplace**. The truth is that there does come a point when employee off-duty conduct ceases to be a purely private matter and becomes legitimate grounds for discipline. The challenge that HR directors face is recognizing when that line is crossed.

The Law of Termination for Off-Duty Conduct

The fundamental rule is that to terminate for conduct outside the workplace, employers must prove that there's a "nexus" between the conduct and the employee's employment. The leading court case on this subject is a 1967 Ontario ruling called *Re Millhaven Fibres Ltd. & Oil, Chemical and Atomic Workers I.U. Loc. 9-670*, [1967] O.L.A.A. No. 4] which holds that the required nexus exists where the off-duty conduct:

- Hurts the company's reputation;
- Undermines the employee's ability to do the job effectively;
- Makes co-workers unwilling, unable or reluctant to work with the employee;
- Constitutes a serious breach of the *Criminal Code*; or
- Makes it hard for the company to properly carry out "its function of efficiently managing its works and efficiently directing its working forces."

Proving Harm to Reputation

While any one of the 5 *Millhaven* factors is enough to justify termination, employers most commonly rely on the harm to reputation factor. **The Rule:** The employer doesn't have to prove that the employee's off-duty conduct did actual harm to the organization's reputation, just that it had **the potential** to do so. Potential harm to reputation is easiest to prove when the employee who engages in the off-duty conduct is in a position of public trust like a police officer, teacher, clergy person or charitable or social services worker. However, it can still be a considerable challenge. Consider the following cases, involving somewhat similar situations but totally different outcomes.

Employer Has Just Cause to Terminate

What Happened: Ms. S drove to school to pick up her 13-year-old daughter from school. Finding the girl in tears, apparently as a result of a confrontation with EM, an older classmate, Ms. S lost her cool and hurled a torrent of cusses, insults and threats at EM and demanding that she apologize to the daughter. It just so happened that Ms. S worked for the school district; and it also just so happened that a spectator caught the whole incident, including Ms. S' threatening to use her school district position to dig up dirt on EM and her parents, on video and posted it on YouTube. Criminal charges would follow, although they were later withdrawn. After initially suspending her, the school district decided to terminate Ms. S for her off-duty conduct.

Ruling: The Ontario Labour Relations Board dismissed the union's grievance and upheld the termination.

Explanation: There was a clear nexus between Ms. S' misconduct and her employment. Equally clear was the potential damage to the school district's reputation, said the OLRB noting that Ms. S:

- Identified herself as a school district employee;
- Was on school district property;
- Targeted her venom at a school district student; and
- Used her position as a school district employee to threaten the student.

Coupled with Ms. S' attempts to cover up what happened and minimize the seriousness of her actions, the school district had just cause to terminate for off-duty conduct [*Toronto District School Board and CUPE, Local 4400 (Hatzantonis), Re,* 2015 CarswellOnt 6561 (Ont. Arb.)].

Employer Has No Just Cause to Terminate

What Happened: After an ugly breakup, a Toronto Police Services parking officer returned to the apartment she once shared with her domestic partner to retrieve her "stuff." Unfortunately, the ex was home and after screaming in the hallways, the confrontation turned violent and the officer was charged with assault. Although the charges were later dropped, the TPS did its own internal investigation and determined that the officer engaged in "discreditable conduct" and acted "in a disorderly manner or a manner prejudicial or likely to bring discredit upon the reputation of the police force." To make matters worse, the incident occurred not too long after the officer had returned to work after a 10-day suspension for an impaired driving conviction.

Ruling: The Ontario Superior Court upheld the arbitrator's ruling to reinstate the officer.

Explanation: TPS contended that the arbitrator based her decision solely on the absence of actual harm to its reputation and not the potential for such harm. But the court disagreed, noting that the arbitrator did consider but found no evidence of potential harm to reputation. The arbitrator specifically noted that there was no conviction or "other evidence that the incident came to the public's attention." Like Ms. H in the *Hatzantonis* case above, the officer got into a verbal altercation in the hallway. But unlike in that case, there was no evidence that anybody actually heard the altercation or would've known that the officer worked for TPS if they had. And even if somebody did know where the officer worked, the arbitrator said she "wasn't persuaded that a fair-minded well-informed person would think less of the TPS for

continuing to employ a parking enforcement officer who was yelling at her partner to give her back her ‘stuff’ during an obvious domestic dispute.

[[Toronto Police Services Board v. Toronto Police Association et al.](#), 2020 ONSC 6923 (CanLII), November 13, 2020]

Takeaway

Not every incident of off-duty misconduct poses the potential of harm to reputation, even if the incident occurs in public and involves an employee of a police department, school or other particularly reputation-sensitive organization. The table below provides examples of misconduct that were found to have crossed the line. However, keep in mind that the nature of misconduct isn’t enough and that organizations need to have [written policies](#) establishing clear guidelines for off-duty conduct.

Cases Upholding Termination for Off-Duty Conduct for Harm to Reputation

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Managerial report on the performance of the company in the first half of the year. The report covers the period from January to June 2023. It details the company's financial performance, operational results, and market trends. The report also includes a discussion of the company's strategic initiatives and a forecast for the second half of the year. The report is intended for the board of directors and senior management.

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