

Just Cause: Blue Jay Fan Beer Can Tosser Tests Limits of Off-Duty Conduct Termination



If stupid behaviour away from work were just cause for termination, nobody would have a job. But off-duty stupidity may rise to the level of a fireable offence when it's done in front of a worldwide TV audience.

Ken Pagan is learning this lesson the hard way. The 41-year-old-sports reporter was the Blue Jay fan who threw a beer can at Baltimore Orioles outfielder Hyun Soon Kim during the recent wildcard playoff game at the Rogers Centre. Pagan's employers at Sportsmedia were among the millions who witnessed and were outraged by the act. Sportsmedia immediately suspended Pagan and now has to decide whether to fire him for his off-duty behaviour. Although it's a difficult decision, it's one that many HR managers confront.

Is Misconduct Away from Work Just Cause to Terminate?

Off-duty conduct is legitimate grounds for discipline if there's a nexus between the behaviour and the workplace. Alas, the rule, which comes from decades of litigation, is easier to state than to apply to real-life situations. Just ask the folks over at Sportsmedia.

As Sportsmedia's lawyers are no doubt advising their client, the employer must prove the nexus between off-duty conduct and workplace. A venerable 1967 Ontario case called *Re Millhaven Fibres Ltd. & Oil, Chemical and Atomic Workers I.U. Loc. 9-670* sets out 5 ways an employer can meet this burden. Let's go through each of the *Millhaven* factors and see how they may play out in the Pagan situation.

1. Conduct Hurts Company's Reputation

Explanation: A nexus exists when the off-duty conduct hurts the standing of the company or its products. The employer doesn't have to show actual damage; the mere potential for harm may be enough to justify termination. Real-life examples include conduct that causes negative headlines, e.g., "Jailer Faces Stalking Charges," or making derogatory blog posts about bosses, co-workers or clients.

Application to Pagan Situation: Pagan's behaviour has at least the potential to cause Sportsmedia embarrassment. On the other hand, his transgression wasn't criminal or malicious. It was just stupid and juvenile. And it was an isolated incident. Courts tend to be more forgiving of juvenile behaviour, e.g., male tax agents' mooning women in a parking garage, especially when the conduct is committed by an employee with a record as spotless as Pagan's apparently is.

Outcome: Inconclusive

2. Conduct Hurts Employee's Effectiveness

Explanation: The conduct-workplace nexus also exists when the off-duty behaviour makes it impossible for employees to do their job effectively, e.g., incarceration or loss of a driver's licence or other credential.

Application to Pagan Situation: Effectiveness cases often consider the behaviour's impact on the employee's credibility, respect and judgment, e.g., a grade school teacher's involvement in child pornography, an accountant in embezzlement, racist and other offensive comments. Again, Pagan's behaviour was stupid but not dishonest or discriminatory. But acting like a buffoon, especially in such a public way, is apt to be more damaging when committed by a member of the media. Moreover, targeting a player could damage Pagan's standing with the athletes and sports officials he's charged with covering as a sports reporter.

Outcome: Tilts slightly in favour of termination

3. Conduct Causes Complications with Co-Workers

Explanation: Acceptance of colleagues is also essential to an employee's viability. Evidence that off-duty misconduct has undermined the requisite esteem or trust of co-workers is often critical, e.g., refusal of female employees to work with prison guard criminally charged with using binoculars to spy on an ex-lover at her home after dark.

Application to Pagan Situation: The argument could be made that Pagan's actions did impair his credibility and viability with other sports reporters and colleagues especially to the extent they occurred at a baseball game viewed by millions.

Outcome: Tilts slightly in favour of termination

4. Conduct Is Serious Violation of Criminal Code

Explanation: Convictions and even accusations of "serious" crimes are usually just cause to terminate. Violent crimes like homicide and sexual assault are obvious examples of serious ones. Non-violent crimes fall in the gray area. General Rule: The closer the relation between the crime and the employee's work the more likely the justification for termination. For example, theft or tax fraud would most likely justify termination if the employee handles cash or exercises a financial position within the company.

Application to Pagan Situation: Pagan was charged with one criminal count of mischief. The question is whether this is a serious violation. Pagan didn't kill, rape or rob anybody; but throwing a beer can at a ballplayer is a violent and dangerous act. Moreover, there's a fairly close connection between the alleged violation and Pagan's work as a sports reporter since it occurred at a sporting event and targeted an athlete.

Outcome: Tilts slightly in favour of termination

5. Conduct Interferes with Managing the Business

Explanation: The fifth and vaguest *Millhaven* factor is conduct that does general harm to a business and workplace. Examples include cases where employees criticize the business and customers on social media sites and conflicts of interest.

Application to Pagan Situation: We don't have enough facts to determine if Pagan's transgression harmed Sportsmedia's business and, if so, to what extent. Obviously, though, this question will certainly be central to the company's internal investigation.

Outcome: Inconclusive

Other Factors

Based on the few facts we know, it appears that at least 3 of the 5 *Millhaven* factors would be in play as potential justifications for firing Pagan. But as in any other case of discipline, there are a number of other factors that Sportsmedia would have to consider in deciding whether to terminate, including:

- Pagan's lack of a disciplinary record;
- The fact that he's apparently well-liked and respected as a sports reporter;
- Whether the company has a clear off-duty conduct policy;
- Whether the company consistently enforces that policy;
- Whether the internal investigation is timely, complete and fair;
- Whether Pagan expressed remorse and responsibility for his behaviour;
- Whether it can document that it carried out its investigation and disciplinary process fairly.