Off Duty Conduct – Ask the Expert



Can You Terminate an Employee for Posting Anti-Semitic Remarks on Facebook?

Off-duty conduct is grounds for discipline when it directly impacts the workplace.

QUESTION

We just discovered that one of our employees is a member of the Neo-Nazi party and has made a series of disparaging comments about Jewish people on his Facebook page. Can we fire him?

ANSWER

It depends.

EXPLANATION

I can certainly understand why you wouldn't want to have a person like that in your organization. But how employees live their lives away from work isn't legitimate grounds for discipline **UNLESS** there's a "nexus" between their conduct and the workplace. As the employer, you'd have the burden of proving such a nexus in any grievance or legal proceeding for wrongful dismissal.

However, thanks to decade of case law, we have a pretty good idea of where courts draw the lines. Specifically, there are 5 basic factors establishing a nexus between off-duty conduct and the workplace. What you need to do at this point is determine which, if any, of those factors apply to your particular case by asking whether the employee's Neo-Nazi affiliations and anti-Semitic postings:

1. Hurt your organization's reputation—while such conduct may be unsavory, it may not affect your reputation if people in the public don't know the employee or associate him with your organization;
2. Render the employee unable to do all or part of his job effectively—this might be the case if he works in a sensitive or public-facing position or a church, charity or other organization requiring employees to meet high standards of morality or decency;
3. Make co-workers unwilling or reluctant to work with the employee—this will turn, in large part, of whether other staff know about his conduct;
4. Constitute a serious offence under the *Canadian Criminal Code*—this probably

won’t help your case because: a. you need an actual conviction; and b. even if the employee is committing a crime, the question of whether it’s “serious” enough to justify termination is subject to debate; and
5. Make it hard for your organization to manage its workers and direct its work forces.

Note: Establishing any one of the above factors may be enough to justify termination; but the more factors you can prove, the stronger your case for termination will be.