

Off-Duty Conduct Discipline Compliance Game Plan



What employees do when they're away from work is none of your business; your disciplinary authority extends only to conduct in the workplace. At least that's the common perception. And it's wrong. In fact, there **is** a point at which off-duty conduct becomes just cause for discipline. Here's an 8-step compliance game plan to help you determine when that point is reached.

Step 1. Use the *Millhaven* Factors for Off-Duty Conduct Discipline

The starting point for compliance is understanding the law. The right of an employer to discipline employees for off-duty conduct stems from nearly 5 decades of court and arbitration rulings. **Rule:** Discipline is justified when there's a "nexus," or connection, between off-duty conduct and the workplace. The leading case 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]. According to *Millhaven*, the employer has the burden of proving the nexus exists by showing that the employee's off-duty conduct:

1. Hurt the company's reputation;
2. Rendered the employee unable to do his/her job effectively;
3. Made co-workers unwilling, unable or reluctant to work with the employee;
4. Was a serious breach of the *Criminal Code*; and/or
5. Made it hard for the company to properly carry out "its function of efficiently managing its works and efficiently directing its working forces."

You don't have to prove all 5 of the *Millhaven* factors. Just one may be enough to justify discipline. But the more factors you can prove, the stronger your case will be.

Step 2. Consider Off-Duty Conduct's Harm to Reputation

Off-duty conduct can be grounds for discipline when it hurts the standing of the company and its products. Public controversy, negative press and bad publicity, e.g., headline in local newspaper "Jailer Faces Stalking Charges" [*Keating v. Ontario (Ministry of Community Safety & Correctional Services)*, [2009] O.P.S.G.B.A. No. 5], constitute evidence of actual damage to reputation. But showing that off-duty conduct has the **potential** to harm reputation may be enough. Thus, for example, the largest

corporation in a community could fire a manager accused of using his home computer to access child pornography to protect the reputation for philanthropy and support school kids that it had worked so hard to cultivate [*Kelly v. Linamar Corp.*, [2005] O.J. No. 4899].

Courts and arbitrators have consistently held that the things that employees post online can also be grounds for discipline, even if posted from home using personal computers. Examples:

- University employee continues to post anti-Semitic comments on Facebook, ignoring repeated warnings [*York University Staff Association v York University*, 2018 CanLII 41354 (ON LA)];
- Healthcare worker refers to her supervisor as “Nurse Ratched” and provides enough information about where she works to identify who she’s talking about [*Alberta v. AUPE (R Grievance)*, [2008] A.G.A.A. No. 20]; and
- Car dealer employees’ Facebook postings ridicule their boss and warn against buying cars from the dealership “since they’re all crooks” [*Lougheed Imports Ltd. v. United Food & Commercial Workers International Union, Local 1518*, 2010 CanLII 62482 (BC L.R.B.)].

Step 3. Consider Whether Off-Duty Conduct Impairs the Employee’s Effectiveness

Off-duty conduct is subject to discipline if it makes it **impossible** for employees to do their job. Example: Absence due to incarceration or loss of a driver’s licence or other professional credential. Most cases are more subtle and involve the credibility, respect and judgment the employee needs to be viable. This is especially true for employees holding positions of trust or influence. Examples:

- Consultative psychologist at maximum security prison pleads guilty to criminal harassment of women [*Tobin v. Canada (Attorney General)*, [2009] F.C.J. No. 968]; and
- Border Officer associates with individuals involved in a criminal organization and does a little drug trafficking of his own [*Stokaluk v Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24].

Step 4. Consider Whether Off-Duty Conduct Causes Complications with Co-Workers

Acceptance of colleagues is essential to an employee’s viability. So, evidence that off-duty misconduct has undermined the esteem or trust of co-workers can be critical. Example: Female employees refuse to work with prison guard criminally charged with using binoculars to spy on an ex-lover at her home from his parked car after dark [*Keating* (cited above)].

Step 5. Consider Whether Off-Duty Conduct Is a Serious Breach of the *Criminal Code*

There’s no official list of breaches considered “serious.” Violent crimes such as homicide and sexual assault will almost always constitute just cause for discipline. Non-violent crimes, such as forgery, fall in the gray area. The closer the relation between the crime and the work the employee does, the greater the justification for discipline. For example, crimes such as theft or tax fraud might justify termination of employees in financial positions or who handle cash but not manual labourers.

Being convicted or even charged of any crime would be especially damning to employees in law enforcement.

Caveat: There's a big difference between convicted of and simply being charged with one. An Ontario employer learned this lesson the hard way in a 2016 case that made national headlines featuring the termination of a 67-year-old employee after he was arrested and charged with 2 counts of sexually assaulting a minor. The employee denied the charge and sued for wrongful dismissal. **Result:** The Ontario Superior Court ruled that criminal charges alone aren't just cause to terminate for off-duty misconduct and awarded the employee \$42,000 in damages [[Merritt v. Tigercat Industries](#), 2016 ONSC 1214 (CanLII)].

Step 6. Consider If Off-Duty Conduct Impairs Your Ability to Manage the Business & Workforce

The last, and vaguest of the *Millhaven* factors, is conduct that does general harm to a business and workplace. Thus, the Facebook cases where employees criticize the business and its customers can easily fall into this category. Examples of conduct found to be just cause under this prong of *Millhaven*:

- Language teacher engaged in a conflict of interest by soliciting the students in his class to enroll in the private lessons he gave after school [*Dupont and Treasury Bd. (Public Service Commission)*, [1987] C.P.S.S.R.B. No. 188]; and
- Off-duty assault of co-worker undermines employer's ability to protect employees from workplace violence [*Tawpisin v. Muskeg Lake Cree Nation*, [2012] C.L.A.D. No. 342].

Step 7. Consider Aggravating & Mitigating Factors

There are also certain things you must do in applying the *Millhaven* factors to real-life situations at your workplace. The existence of a nexus between off-duty conduct and the workplace just means that **some** form of discipline is in order. What kind depends on the circumstances. At that point, discipline of off-duty conduct becomes just like discipline for workplace offences. To prevail in arbitration, you'll need to follow your investigation procedures and progressive discipline policy and apply the usual "aggravating and mitigating factors," such as previous disciplinary record, position, acceptance of responsibility, remorse, etc.

Example: While derogatory Facebook postings with racial overtones were just cause for discipline, the employee sincerely apologized, and the company didn't even consider lesser penalties. So, the arbitrator knocked the termination down to 4-months' suspension [*Wyndels Grievance, Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance)*, [2010] C.L.A.D. No. 297].

Step 8. Implement an Off-Duty Conduct Policy

While employers have a legitimate interest in regulating off-duty conduct, employees also need to be put on notice that they'll be held accountable for what they do when they're off-duty. Establishing a [clear written policy](#) puts you in a stronger position to terminate for off-duty conduct.

Employer Wins: Assaulting a co-worker at an after-work Christmas party was grounds for discipline where employee had been warned and was under "no illusion" that the employer "considered the conduct of employees at the Christmas party of interest to it" [*BC (PSERC) v. BC Government and Service Employees' Union (Singh Grievance)*,

[2009] B.C.C.A.A.A. No. 52].

Employer Loses: Nova Scotia arbitrator cites lack of off-duty conduct policy in reducing termination of school custodian for having consensual sexual relationship with 15-year-old girl to 3 months' suspension [[Cape Breton-Victoria Regional School Bd. v. CUPE, Local 5050](#), [2011] N.S.J. No. 34].