

# Off Duty Conduct Quiz



## **QUESTION**

Can an employee be fired for doing something on his/her over time, even if the behavior has nothing to do with work and does not involve colleagues or supervisor?

## **ANSWER**

Yes, in the right circumstances.

This is not new law. The law has always provided for discipline or dismissal as a result of off-duty conduct, in limited circumstances. However, the issue rarely came up before the advent of social media, cellphone cameras and YouTube. Now, a new situation seems to arise every week involving an employee doing something while off-duty that leads to workplace consequences.

## **PREAMBLE**

The issue of off-duty conduct comes up more often in the U.S as its population is much greater than Canada. In Canada, there have been dismissals for off duty conduct which include the following examples:

- A Toronto Symphony Orchestra performance by a Ukrainian-born pianist cancelled due to comments she made on Twitter regarding the conflict between Russia and Ukraine.
- Two Toronto firefighters dismissed due to inappropriate comments and Twitter, and a third due to FaceBook comments.
- Jian Ghomeshi, star radio host of our national broadcaster, fired due to harassment and sexual assault which came to light after his miscalculated FaceBook post.
- An Ontario Hockey League referee suspended after posting insulting comments about the women of Sault Ste. Marie on Twitter.
- Two Ontario Hockey League players also suspended due to offensive comments about women on Twitter.
- Perhaps most offensive of all, an individual who wrote "Thank God the b\*tch is dead" on a Facebook wall created in memory of a 15-year-old girl who committed suicide after years of bullying.

## **WHY IS IT RIGHT**

**Two Types of Dismissals: with cause or without cause in Canada**

The vast majority of dismissals are without cause (including downsizings, reorganizations and the like), in which case the employee is entitled to notice of dismissal or pay in lieu thereof. The amount of notice, or pay in lieu, is based upon a number of factors.

However, if someone is dismissed with cause, they are not entitled to anything; no notice, no severance, no pay in lieu.

The threshold for establishing just cause for dismissal is quite high, as the punishment must be a proportionate response. **In assessing whether just cause is warranted, the alleged misconduct cannot be considered in isolation; all relevant circumstances must be taken into account.**

Additional factors to be considered include:

- The individual's length of employment;
- The individual's disciplinary record;
- The nature of the individual's position;
- The degree of trust required;
- The individual's response when confronted with allegations of misconduct;
- Any mitigating factors; and
- Anything else that relates to the employee's honesty or trustworthiness or the viability of continuing the employment relationship.

**Proportionality is a fundamental principle in this context, and in many cases, courts will conclude that discipline was warranted but that summary dismissal was too harsh.** That said, there are frequent examples of dismissals that held up under judicial or arbitral scrutiny.

Regarding discipline and dismissal, do [not to react in haste](#); there must be a proper [investigation](#) and consideration of the issues before a decision regarding discipline is made.

## **WHY IS EVERYTHING ELSE WRONG**

**What you do on your own time is USUALLY your time!!!**

**Our laws start with the assumption that what an employee does on their own time is their own business.** However, there have always been exceptions. As set out back in the 1967 decision in *Re Millhaven Fibres Ltd. and Oil, Chemical and Atomic Workers I.U Loc 9-670*, discipline can be imposed for off-duty conduct where:

1. The employee's conduct harms the company's reputation or product.
2. The employee's behaviour renders the employee unable to perform their duties satisfactorily.
3. The employee's behaviour leads to refusal, reluctance or inability of the other employees to work with him or her.
4. The employee is guilty of a serious breach of the Criminal Code, causing injury to the general reputation of the company and its employees.

**OR**

5. The employee's conduct makes it difficult for the employer to properly carry out its functions of efficiently managing its work and efficiently directing its workforce.

**In short, if the conduct impacts the employer or the employment relationship, it can justify discipline.**

It is critical to remember that the considerations above relate to dismissal for cause. However, **most employees in Canada (unless they are unionized) can be dismissed at any time, for almost any reason, as long as they are provided with sufficient notice or pay in lieu.** As a result, an employer is perfectly entitled, in most cases, to decide that they do not approve of an employee's conduct and that they will therefore let them go. Certain grounds are protected by human rights legislation, so an individual cannot be fired due to their gender, religion, disability, etc.

The bottom line is that **whether you agree with it or not, off-duty conduct can lead to discipline and dismissal**, either with or without cause. And the same conduct that may have gone unnoticed in the past may now have consequences, due to the fact that it may "go viral" and attract unwanted attention for you and your employer.