Off Duty Misconduct: When Can You Terminate?



An employee's off-duty conduct resulted in dismissal. Sylvia Hatzantonis, an employee of Toronto District School Board ("TDSB"), was terminated for:

- Engaging in comment and conduct inconsistent with that expected of a TDSB employee;
- Attempting to conceal her conduct by soliciting and counselling others to provide false evidence; and
- Dishonesty and breach of trust during the TDSB's investigation in an attempt to mislead.

Background: The Off-Duty Misconduct

Ms. Hatzantonis attended a TDSB school in order to pick up her 13-year-old daughter. On arriving and finding her daughter crying, an altercation began between Ms. Hatzantonis and EM, a 14-year-old student who was believed to have upset her daughter.

A spectator had recorded a video capturing Ms. Hatzantonis demanding that EM apologize to her daughter, shouting and swearing at EM, threatening to tell EM's parents about drug use and sex, telling EM that she works for the TDSB and can find out anything she wants about him and shouting insults about EM's mother as he walked away.

TDSB became aware that the video was posted on YouTube and consequently placed Ms. Hatzantonis on home assignment pending an investigation. Ms. Hatzantonis was eventually terminated and the union alleged it was an unjust dismissal.

Subsequently, the Crown brought criminal charges against Ms. Hatzantonis including charges for uttering death threats, intimidation, assault, and causing a disturbance. Following the completion of two anger management courses and payment of a fine, the criminal charges were withdrawn and Ms. Hatzantonis agreed to a peace bond.

Harm to the Reputation of the Employer

In order for an employer to be warranted in their discipline of off-duty conduct there has to be a real and material connection between the employee's off-duty conduct and the employment.

In Ms. Hatzantonis' case, it was found that her conduct had a sufficient nexus to her employment and thereby worthy of sanction because she identified herself as an employee, was on TDSB property, the target of the abuse was a TDSB student and she used her position as a TDSB employee to threaten the student.

In *Millhaven Fibres Ltd. v O.C.A.W., Local 9-670*, 1967 CarswellOnt 789 (Ont. Arb.) it was determined that an employer must establish at least one of the following before disciplining or terminating an employee for off-duty conduct:

1. the conduct of the employee harms the company's reputation or product;
2. the employee's behaviour renders the employee unable to perform his duties satisfactorily;
3. the employee's behaviour leads to refusal, reluctance or inability of other employees to work with him or her;
4. the employee has been guilty of a serious breach of the *Criminal Code*, and thus rendering the employee's conduct injurious to the general reputation of the company and its employees;
5. the employee's conduct places difficulty in the way of the company properly carrying out its function of efficiently managing its works and efficiently directing its working forces.

Ms. Hatzantonis's conduct was found to have harmed the reputation of TDSB. Where this has been established, courts or tribunals, will examine the nature and circumstances of the misconduct to determine the appropriate disciplinary measure.

In Ms. Hatzantonis' case, while there were some mitigating factors, termination was found to be the appropriate discipline in part because she was dishonest in her description of the events, attempted to minimize the seriousness of her actions and attempted to conceal her conduct by soliciting and counselling students to provide false evidence.

Implementing an Effective Off-Duty Misconduct Policy

In this digital age, it is more likely than ever that an employee will be caught engaging in off-duty misconduct. However, not every incident of off-duty misconduct constitutes just cause for termination. A balance must be reached between the private lives of employees and the reputation of employers.

A high burden must be met in order to discipline or terminate an employee for off-duty conduct. However, many of the best practices for misconduct in the workplace should be applied to off-duty misconduct. Employers should be developing an employment policy that includes specific off-duty and social media guidelines, disseminate the policy to all employees and ensure they understand that employment misconduct can apply to situations where they are not at work including online, and consider consulting with legal counsel in developing and implementing a policy.

In the event that an employee's off-duty misconduct comes to the attention of an employer it is best to engage the procedures swiftly and confidentially and a workplace investigation may be necessary. Having clear guidelines and expectations of employees for off-duty conduct is the best way to prevent such incidents from impacting your workplace.

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