

# Out Of Office, Out Of Work: When Off-Duty Conduct Costs Employees Their Jobs



In a time when personal lives are frequently broadcast online and the boundaries between work and personal time are increasingly blurred, the question arises: can an employer terminate an employee for something the employee does outside of work?

Generally speaking, employers do not get to dictate what employees do outside of work. However, this does not escape the reality that an employee's conduct outside of work can impugn their employer's reputation in a flash. The law attempts to reconcile that by allowing employers to terminate employees for cause for off-duty conduct in limited circumstances.

## **The Law: Off-Duty Conduct and Just Cause Termination**

Employers may terminate employees for off-duty conduct that has had a negative impact on the employer's reputation or interferes with and prejudices the employer's ability to operate its business. The misconduct does not need to necessarily occur at work to justify discipline or dismissal.<sup>1</sup> Canadian courts and arbitrators have recognized that off-duty conduct can justify termination when there is a sufficient connection between the behaviour exhibited and the employment relationship, and the employer demonstrates that their interests were harmed by the employee's conduct.

The leading arbitration decision of *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union, Local 9-670*, [1967] O.L.A.A. No. 4 (QL) (Ont. Lab. Arb.) provides a framework for assessing whether an employee's off-duty conduct justifies termination of the employment relationship. The *Millhaven Fibres* criteria has been used by arbitrators across the country, as well as in some Canadian court decisions, to assess whether the misconduct is prejudicial to the employer's interest. According to *Millhaven Fibres*, off-duty conduct may warrant dismissal for cause if one or more of the following criteria are met:

1. The conduct of the employee harms the employer's reputation or product (the harm caused must be substantial);
2. The conduct renders the employee unable to satisfactorily perform their duties;
3. The conduct leads to refusal, reluctance, or inability of other employees to work with them;
4. The conduct is a serious breach of the *Criminal Code* and injures the general reputation of the employer and its employees; or
5. The conduct makes it difficult for the employer to properly manage operations

and oversee staff efficiently.

While the *Millhaven Fibres* criteria provides a framework for employers to assess whether off-duty conduct justifies termination for cause, employers should be alert to the fact that courts and arbitrators will assess each case of off-duty conduct based on its own unique facts and the severity of the conduct. This includes the degree of responsibility exercised by the employee. In this regard, generally speaking, the greater the responsibility the employee has and the higher the level of visibility, the greater the expectation is for the employee to conduct themselves appropriately outside of work. For example, managers, executives, directors, or public facing professionals may be held to a higher standard than other types of employees.

### **Examples of off-duty conduct that has justified termination with cause include:**

1. In a recent case, a group of employees were dismissed for sexual harassment after the employer discovered the employees were making derogatory and sexist comments about a colleague in a private WhatsApp group chat.<sup>2</sup>
2. A manager was charged with a crime of moral turpitude that was committed in his personal time. He was dismissed prior to his conviction.<sup>3</sup>
3. A social worker had a romantic relationship with a client of her employer, a social services agency.<sup>4</sup>
4. A Special Provincial Constable was involved in a motor vehicle accident with a cyclist, this resulted in a physical interaction between the Constable and the cyclist. Subsequently, the Constable posted dashcam footage of the accident onto his social media. The employer asked the Constable to delete the post, which he refused. The Constable's social media clearly identified his workplace, and the social media posts had potential to damage the employer's reputation.<sup>5</sup>
5. A nurse formed a relationship with a recently discharged patient outside of business hours and the workplace premises.<sup>6</sup>

Nevertheless, these types of findings are rare and, as noted above, turned on specific factual circumstances. There is inherent risk in terminating an employee with cause, let alone for off-duty conduct, and doing so should be considered an extraordinary sanction.

### **Key Takeaways for Employees**

For employees, the takeaway is clear: while your personal life is your own, it is important to be mindful that your off-duty conduct may have on-duty consequences if the conduct negatively impacts the employment relationship. Exercising sound judgement outside of the workplace – especially if you hold a position of significant responsibility, authority, or public recognition – is essential to preserving the employment relationship.

### **Key Takeaways for Employers**

1. Terminating an employee for off-duty conduct is inherently risky.
2. Not all off-duty misconduct is grounds for termination: the key is whether there is a nexus between the employee's misconduct and the employer's legitimate business interests or reputation.
3. If an employer is considering disciplining or dismissing an employee for off-duty conduct, the employer should ensure that they have obtained independent legal advice and have conducted a thorough investigation into the conduct at issue.

4. Employers should exercise a high degree of caution in disciplining or dismissing employees for off-duty conduct and should ensure that any response is proportionate to the misconduct involved.
5. Employers should develop clear codes of conduct and social media policies to help manage employees' off-duty conduct and guide disciplinary action.

#### **Footnotes**

1. *Simpson v. Consumers' Association of Canada*, 2001 CanLII 23994 (ON CA), 57 O.R. (3d) 351 (C.A.).
2. *Metrolinx v. Amalgamated Transit Union, Local 1587*, 2025 ONCA 415.
3. *Kelly v. Linamar Corporation*, 2005 CanLII 42487 (ON SC).
4. *Smith v. Kamloops and District Elizabeth Fry Society*, 1996 CanLII 2897 (BC CA).
5. *Meneray v British Columbia Society for the Prevention of Cruelty to Animals*, 2023 BCSC 442.
6. *Harrop v. Markham Stouffville Hospital*, 1995 CanLII 7295 (ON SC).

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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