

# You Can't Af-Ford To Be Like Rob: Off-Duty Conduct



The Mayor of Toronto has been front-page news and fodder for late-night monologues. Mr. Ford's conduct, and his judgment generally, is being seriously questioned. And with good reason. Video footage of him allegedly consuming illegal drugs, rants about wanting to commit assault, and allegations of consorting with prostitutes are just some of the issues Mr. Ford has had to address. It seems that as a result of the legislative scheme associated with his public office, all Toronto City Council could do was resolve to ask Mr. Ford to take a leave of absence from his role as mayor, which he declined to do.

For employees who don't have such protection under the law, at what point can employers discipline or terminate an employee for his or her off-duty conduct?

We have previously written about disciplining employees when criminal charges are involved in relation to off-duty impaired driving and the Stanley Cup riots. The right to discipline for off-duty conduct is even less clear where there are no criminal charges but there is evidence of criminal behaviour or other behaviour that may negatively impact the employer.

As a general rule, an employer has no jurisdiction over an off-duty employee. However, there is an implied term in employment contracts that the employee will not do anything which is prejudicial or likely to be prejudicial to the reputation of the employer. Therefore, an exception to the general rule exists where the employer can show that its legitimate business interests are negatively affected in some way by the employee's behaviour, or there is a nexus created between the behavior and the workplace.

If such a connection exists, the employer may be in a position to legitimately discipline or terminate the employee for their off-duty conduct. The onus is always on the employer to meet the high threshold for discipline or cause.

Some questions an employer should consider when examining off-duty conduct are:

1. Does the conduct negatively affect the employer's reputation or business (e.g. is there public video or photos of the employee in uniform engaging in questionable conduct, is the employee the face of a business or has the person otherwise been identified as an employee of the business);
2. Does this conduct cause the employee to not fulfill his or her employment

- obligations properly or create safety issues at work (e.g. are the actions preventing the employee from completing his or her tasks in a safe and satisfactory manner or do they create safety issues for other employees);
3. Is the conduct somehow connected to the employee's employment responsibilities in such a way that causes the employer to lose trust in the employee or calls into question the employee's ability to do his or her job (e.g. a security guard who was caught looting during the riot, or a bank employee who was caught stealing); and
  4. Does this conduct cause other employees to refuse to engage or work with this individual (e.g. an employee posts hate speech on their private blog and another employee finds out about it and refuses to work with him or her)?

Before terminating an employee for cause, employers should make their own investigations into the alleged misconduct and consider the particular employee in question. The overall context of the employment relationship will be in issue.

Employers must also be aware of their obligations under the *Human Rights Code*. If the employee is acting in a certain way because of a drug or alcohol addiction, employers may have a responsibility to accommodate the employee's disability. Given the admissions of Mr. Ford, such a disability may be a factor in his case.

Employers can also communicate through a Code of Conduct that it will not tolerate Rob Ford-like antics. If appropriate, considering the type of position, employers can also include a morality clause in employment agreements.

As always, an employer can also choose to terminate an employee on a without cause basis as long as it provides reasonable notice in accordance with the employment agreement or common law.

**Bull, Housser & Tupper LLP**