

Off the Clock but On the Hook

– When Does an Employee’s Off-duty Conduct Justify Discipline?



By: Ed Snetsinger

Electrical contractors know that effective marketing and a positive public image is essential to success. But what happens when an employee’s conduct away from the workplace is potentially tarnishing the company’s positive public image with questionable behaviour? When can (and when should) an employer consider disciplining, or even terminating, an employee for their off-duty conduct (including for posting offensive content on social media)?

Although Canadian adjudicators have only recently set sail into these uncharted waters, it is becoming increasingly clear where the distinction lies between off-duty conduct worthy of discipline and that which is not. Conduct which affects (or could affect) the workplace may serve as the basis for discipline. If there is no connection to, or discernible impact on, the workplace, there is little chance an employer will be able to successfully uphold its discipline of an employee for off-duty conduct.

What Adjudicators Have Said

Adjudicators have upheld significant discipline for inappropriate off-duty conduct, including social media postings, where a connection to the workplace was established:

- Although the employer had not suffered actual harm, an adjudicator ordered the “resignation” of an airline pilot who was terminated as a result of a Facebook posting with a connection to his employment. The employer was an airline owned by a number of First Nations and which primarily served clients from First Nations communities. Following his posting of a “top ten list” entitled, “You know you fly in the north when...,” considered by his employer to be offensive and degrading to First Nations people, the pilot was fired, largely in light of the irreparable harm the posting could have caused the airline’s business. An adjudicator found the airline had a “substantial and warranted” reputational concern arising out of the pilot’s postings.
- In a blog in which identified the employer, an employee posted hateful messages about East Indians and comments supporting Nazism. Upon discovering the blog, the employee was terminated for cause. An adjudicator concluded that, while there was no evidence of actual harm to the employer, because it was named

in the blog, there was serious reputational risk. This justified the imposition of discipline, but not termination. In reaching this conclusion, the adjudicator considered the fact that the comments did not directly target the employer or its employees (40 per cent of whom were of East Indian descent) and the employee had shown remorse. According to the adjudicator, had the blog entries represented the employee’s “actual views rather than the reckless ranting of an emotionally impulsive young person,” the termination would have been upheld.

Conversely, adjudicators have overturned discipline for inappropriate off-duty conduct where the employer was unable to establish a link between the offensive conduct and the workplace:

- An employee posted sexually suggestive commentary about a car, which the employee referred to as a woman on Twitter. In response to the tweet, the employer gave the employee a non-disciplinary letter advising that inappropriate and disrespectful comments on social media, even if communicated outside the workplace, could have serious, negative consequences on the workplace and would not be condoned. Thereafter, the employee retweeted an extremely graphic and sexualized picture of a woman and, as a result, he was placed on a ten-day disciplinary suspension. After reviewing the circumstances of the tweets and the evidence of their impact on the workplace, an adjudicator concluded the suspension was unjustified. The adjudicator noted there was no evidence to suggest the tweets harmed the employer’s reputation, as neither of the tweets made reference to the employer, nor was there anything in the employee’s Twitter profile to link him to the employer. Consequently, the adjudicator ordered the suspension be removed from the employee’s file and he be compensated for losses suffered as a result of serving the suspension.

“TO JUSTIFY DISCIPLINE FOR AN EMPLOYEE’S OFF-DUTY CONDUCT, AN EMPLOYER MUST BE ABLE TO ESTABLISH A CONNECTION BETWEEN THE OFFENSIVE CONDUCT AND THE WORKPLACE.”

Lessons for Employers

To justify discipline for an employee’s off-duty conduct, an employer must be able to establish a connection between the offensive conduct and the workplace. Where there is no connection between the conduct and workplace, an employer will be hard-pressed to establish it has suffered harm which would justify disciplining an employee.

For instance, discipline may be justified where an employee’s conduct negatively targets the employer, management or co-workers, or where an employee posts images showing a person behaving inappropriately while wearing a company uniform or driving a company vehicle. Even if the connection to the workplace is not

direct (for example, a company symbol is visible in the background of a picture), as long as the inappropriate off-duty conduct can be reasonably traced back to the workplace, the employer has a legitimate interest in counseling and/or disciplining an employee.

To this end, employers may consider the following best practices:

Develop a Social Media Policy

- With the assistance of experienced employment counsel, develop and/or update a social media policy that reflects the company's overall approach to social media. Provide suggestions or guidelines that identify appropriate and inappropriate social media use, prohibit activity that could have a negative impact on the company, and advise employees their activities may be monitored during and outside working hours.
- Ensure every employee has read and agreed in writing to be bound by the policy (whether in an employment agreement, workplace handbook or set of policies).
- Enforce the social media policy consistently, transparently and fairly.
- From time to time, review the policy and consequences of inappropriate social media activity with employees.

In the Event of an Incident

- Meet with the employee to identify and discuss the inappropriate off-duty conduct.
- Explain why the conduct does not accord with the company's expectations (or, even better, its social media policy, if relevant to the impugned conduct).
- Ask for and note the employee's explanation for their conduct.

- If the conduct is not connected or related to the workplace, use counseling as an opportunity to review expectations (and/or the social media policy) with the employee and reinforce appropriate behaviour.
- If the conduct is related to the workplace, consider the appropriate level of discipline.

Inappropriate off-duty conduct, including social media activity, can have a substantial impact on the workplace. It is therefore important (and good practice) for all employers to actively manage and proactively maintain ongoing dialogue with employees about the significance of this growing issue.

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