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Features

When off-duty conduct crosses the line

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[Hacker using laptop. Hacking the Internet. Photo: scyther5 iStock/Getty](#)

After weeks of public protests and demonstrations related to COVID-19, many employers are asking whether they can discipline or terminate an employee for off-duty conduct.

Particularly in this age of rampant social media, the internet and smartphones, an employee's off-duty conduct has the potential to cause significant brand damage to an employer.

In Vancouver, a company truck driver was recently fired after appearing to brush a cyclist at a Vancouver convoy protest.

The altercation was caught on a smartphone and posted to Twitter where it has been viewed almost 100,000 times.

To discipline or terminate, that is the question

The fact an employee's off-duty behaviour may be distasteful or obnoxious, may not be sufficient to warrant termination for cause or discipline. To justify discipline or termination for cause, the employee's off-duty conduct must negatively impact the employer's legitimate business interests and there must be a nexus between the employee's actions and the employment relationship.

For example, in *Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Groves)*, Re a unionized employee tweeted sexually suggestive commentary about a car, which the employee referred to as a woman. The employer gave the employee a non-disciplinary letter advising him 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.

The employee subsequently retweeted an extremely graphic and sexualized picture of a woman and, as a result, was placed on a 10-day disciplinary suspension.

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. The adjudicator concluded the suspension was unjustified because there was no nexus between the tweets and employer.

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.

By contrast, in *YUSA and York University (Balaskas)*, Re the university received a complaint that one of its unionized employees was posting antisemitic content on his publicly available social media. The employee's social media profile clearly identified

the university as his employer. The university placed the employee on a paid administrative leave and investigated the complaint, following which the employee's employment was terminated.

The arbitrator upheld the termination on the basis the posts constituted hate propaganda, were contrary the university's policies, and there was a nexus between the employee's off-duty conduct and the university such that the off-duty conduct inflicted reputational harm on the university.

Lessons for employers

An employer may not be able to prevent an employee from engaging in misconduct while off-duty, or even sanction an employee for such conduct. However, a balance can be struck by having a clear and unambiguous social media policy, monitoring usage as it relates to, or impacts, the workplace, and enforcing workplace policies consistently and fairly.

When developing a social media policy, consider including the following components, tailored to your workplace:

A statement regarding the employer's overall approach to the use of social media and the impact on the workplace

- Notice that social media activity may be monitored by the employer

A requirement that employees:

- – exercise good judgment and protect the reputation of the workplace, etc.
- – maintain a clear distinction between their personal social media activities and professional online presence. For example, many employees use LinkedIn for professional social media and limit their personal social media presence to Facebook, Instagram, etc.
- not purport to speak for the workplace or use company property (e.g., a logo)

- keep workplace confidential information, confidential
- not disparage the workplace or any of its members (employees, management, etc.)

Ensure every employee has read and agreed in writing to be bound by the policy (whether in an employment agreement, workplace handbook or a set of policies). Finally, review and update the policy regularly to ensure it accurately reflects the employer's objectives and clearly stipulates the consequences of a breach.

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