

OFF DUTY CONDUCT, SOCIAL MEDIA & MARIJUANA – What Can An Employer Do?

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March 1, 2018

Background

- **Every employment arrangement is a contract**
- **The vast majority of those contracts are oral**
- **Some are in writing**
- **Some are partly written and partly oral**
- **It is an implied term of the employment contract that the employer may terminate employment for just cause**

What is “Just Cause”

- To determine whether just cause for summary dismissal exists, each case must be examined objectively, and assessed on its own facts
- The test may vary depending upon the nature of the employer’s business, and the position held by the employee

- **The law is evolving**
- **Concepts of length of service, disciplinary record, mental status and other considerations are relevant when determining if just cause exists**
- **In addition, progressive discipline and the duty to warn are also considered except where there is misconduct of a severe nature**

- **As a result, application of the standard consists of:**
 - 1. determining the nature and extent of the misconduct;**
 - 2. considering the surrounding circumstances; and**
 - 3. deciding whether dismissal is warranted (i.e. whether dismissal is a proportional response).**

Dismissal for Off Duty Conduct

- It is also an implied term of the employment contract that an employee will not do anything that is prejudicial to the interests or reputation of the employer
- Consequently, off duty conduct (outside the scope of employment and outside working hours) may constitute cause for summary dismissal
- The scope of employment is not limited to the “office”. It can include working off-site or employment related social events

- **There be a nexus between the off duty conduct and the employment relationship**
 - **the conduct must detrimentally affect the employer’s reputation (i.e. “bad press”); or**
 - **cause the employee to be unable to discharge their employment obligation properly (i.e. “in jail”); or**
 - **cause other employees to refuse to work with the employee; or**
 - **adversely affect the employer’s ability to manage its enterprise.**

- **Always consider potential human rights issues**
- **The employer needs to show potential harm, but not actual harm**

- **Considerations:**

- **Have appropriate policies in place i.e. Code of Conduct, Respectful Workplace, Social Media Policy**
- **Use termination clauses in offer letters and contracts of employment**
- **Provide training and education to employees**
- **Respond proactively**
- **Conduct a thorough investigation**
- **Don't let your emotions cloud judgment**

Examples

- **A business instructor who taught ethics was convicted of insurance fraud**
 - **A meter reader was convicted of sexual assault upon a minor**
 - **Heckling of female reporters – FHRITP and Ontario Hydro One**
 - **Attendance at public demonstrations – Charlottesville and Quebec City**
 - **Sexual Misconduct outside of work – Kevin Spacey, Aziz Ansari**
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Social Media

- **Cyber bullying**
- **Threats**
- **Poisoned work environment**
- **Racist comments**

- **Off duty social media and internet postings may warrant discipline and in some cases discharge**
- **Typically, where the post is:**
 - a human rights violation
 - creates a poisoned work environment;
 - constitutes harassment contrary to legislation and employer policy
 - just cause to dismiss may exist

- **Posts that encourage insolence, insubordination or violence will also not be tolerated**
- **Again, the contextual approach should be used, and the principle of proportionality applied**
- **Must always be properly investigated**

Examples

- **Toronto Symphony Orchestra performance by a Ukrainian born pianist cancelled due to Twitter comments**
- **Two Toronto firefighters fired due to Twitter comments about women and a third fired for Facebook comments**
- **OHL referee suspended due to comments about women on Twitter**
- **“Thank God the B**ch is dead” writer dismissed**
- **Neo Nazi blog posts (EV Logistics)**

Marijuana

- **Has been illegal since 1923**
- **Continues to be illegal until at least July 2018 or later**
- **Have regulations in place to allow reasonable access to medical marijuana**

- **Medical marijuana is not recognized as a prescription drug by Health Canada**
- **Has not been approved for use by Health Canada**
- **Therefore not on the Manitoba Drug Formulary**
- **May not be covered by your plans**

- **Cannabis Act will allow:**
 - **Adults**
 - **Access and posses**
 - **Regulated, quality controlled legal cannabis**
 - **Up to 30g of dried cannabis**
 - **Up to 4 plants per residence**

- **As with alcohol , employers may continue to expect their employees to show up sober and ready to work**
- **Subject to medical conditions, employers will still be entitled to discipline employees when:**
 - recreational use has an adverse impact on job performance;
 - recreational use contravenes legislation; and
 - use and possession is contrary to established policy

What Should Employers do?

- **Get educated**
- **Put aside old biases**
- **Balance liberal attitudes towards recreational use and conservative workplace values**
- **Review and amend existing workplace policies and procedures once the federal Act comes into force**

- **Remove express policy references to cannabis usage as an “illegal off-duty activity”**
 - **Consider your safety sensitive and non-safety sensitive positions**
 - **Address use at work, during work hours, attendance at work while impaired**
 - **Address the issue of impairment**
 - **Consider a requirement that employees disclose all medication that may cause impairment**
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- **Once declared, request the prescription. You do NOT have to accommodate illegal drug use**
- **Make meaningful inquires or accommodation**
- **Consider a zero tolerance for safety sensitive positions**
- **Adjust your smoking and scent policies**

Use is Not Impairment

- **THC is the most prevalent psychoactive constituent in Cannabis**
- **THC causes behavioural toxicity or “high” feeling**
- **THC is quickly absorbed by the brain – effects are felt within minutes. Impairment peak is 20-40 minutes after inhalation and 1-1.5 hours after consumption, and can last in some for up to 24 hours**

- **THC can be stored in fatty tissues and can be arbitrarily released into blood and urine, even weeks after consumption**
- **THC can also be stored in the brain and remain undetected in the blood**
- **Chronic users can have high amounts of THC in their blood while not exhibiting any signs of impairment**

- **Case law is becoming clear:**
 - **A positive drug test conducted by urinalysis standing alone does not estimate impairment at the time**
 - **A positive without corroborating evidence is not enough to discipline or discharge**
 - **Need corroboration or proof of impairment:**
 - **Bloodshot eyes**
 - **Fast heart rate**
 - **Sleepy, lethargic**
 - **Lack of coordination**
 - **Increased craving for snacks**
 - **Confusion, lack of focus**
 - **Unusually talkative**
 - **Misjudging time**
 - **Memory impairment**
 - **Smell**

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