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**CARTERS SPRING 2020
CHARITY & NFP WEBINAR SERIES
April 29, 2020**

**“YOU CAN’T FIRE ME FOR THAT:
I’M OFF DUTY!”**

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Mr. Kwasniewski is a partner with the firm and joined Carters' Ottawa office in 2008 to practice in the areas of employment law, charity related litigation, and risk management. After practicing for many years as a litigation lawyer in Ottawa, Barry's focus is now on providing advice to charities and not-for-profits with respect to their employment and legal risk management issues. Barry has developed an expertise in insurance law, and provides legal advice pertaining to insurance coverage matters to charities and not-for-profits.

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OVERVIEW

- May an Employer Discipline or Terminate an Employee for Off-duty Conduct?
 - Just cause at common law
 - Off-duty conduct as grounds for dismissal
 - Cases where employers have successfully dismissed an employee for off-duty conduct
 - Improper social media use by employees resulting in termination for cause
 - Cases where dismissal or discipline for off-duty conduct was not justified
 - Protecting organization from liability

OVERVIEW



A. MAY AN EMPLOYER DISCIPLINE OR TERMINATE AN EMPLOYEE FOR OFF-DUTY CONDUCT?

1. Basic Principles

- Off-duty conduct is outside of office hours when the employee is on their own personal time and not acting on behalf of the employer. An employee's off-duty conduct is generally off-limits, subject to certain exceptions
- However, employers have a management right to impose reasonable rules to govern conduct in the workplace and can discipline and discharge employees who break those rules
- When an employee is guilty of serious workplace misconduct, the law recognizes the employer's right to dismiss the employee for just cause

2. Just Cause at Common Law

- **McKinley v BC Tel, [2001] SCR 161:** The Supreme Court of Canada legal tests:
 - a) *Does the evidence establish employee misconduct on a balance of probabilities; and if so,*
 - b) *Does the nature and degree of the misconduct warrant dismissal because it gave rise to a breakdown in the employment relationship, in that the misconduct “violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer?”*
- Employer has the burden of proof that the facts justified a termination for cause

- Certain types of misconduct are recognized by courts to constitute just cause, which are related to an employee’s conduct in the workplace, such as (but not limited to):
 - Dishonesty (for e.g. fraud and theft of employer or customer property)
 - Insolence and insubordination
 - Breach of trust
 - Conflict of interest
 - Chronic absenteeism or lateness without reasonable justification
 - Sexual or other workplace harassment
 - Intoxication
 - Misrepresentation as to qualifications or credentials

MISCONDUCT

3. Off-duty Conduct as Grounds for Dismissal

- ***Re Millhaven Fibres Ltd v Atomic Workers Int'l Union, Local 9-670, [1967] OLAA No 4:*** Employers have a limited right to discipline or potentially even terminate an employee for off-duty conduct where:
 - The employee's conduct harms the company's reputation in the community, its business or product
 - The employee's behaviour renders him or her unable to perform their duties satisfactorily
 - The employee's behaviour leads to the refusal, reluctance or inability of the other employees to work with him or her

- The employee is guilty of a serious breach of the *Criminal Code*, causing injury to the general reputation of the company and its employees, or
- The employee's conduct makes it difficult for the employer to properly carry out its functions of efficiently managing its work and efficiently directing its workforce
- Proof of one of these factors is sufficient for termination for cause
- Employer will need to consider these factors and the evidence available to support them



4. Cases Where Employers Have Successfully Dismissed an Employee for Off-duty Conduct

- ***Kelly v Linamar Corporation, [2005] OJ No 4899:***
 - Court concluded that employer had cause to terminate manager who had regular contact with suppliers and customers in the community after he was arrested and charged with possession of child pornography
 - Termination for cause was appropriate in the circumstances because the employer had a strong reputation in its community of being a good corporate citizen and engaging in community-based activities, including youth



- Court found that the employee was in a public position, so he had a duty not to engage in conduct that would undermine his ability to do so
- Termination took place almost immediately after the criminal charges became public and before the criminal charges were resolved, but employee did eventually plead guilty to child pornography possession charge
- ***Grand Erie District School Board v Ontario Secondary School Teachers' Federation, District 23, 2016 CanLII 72391 (ONLA):*** Teacher who was involved in an international cheese smuggling operation terminated for cause

- ***Stokaluk v Deputy Head (Canada Border Services Agency), 2015 PSLREB 24***: Border services officer spent his off-duty time associating with individuals involved in a criminal organization and was also involved in drug trafficking
- ***Ottawa-Carleton District School Board v Ontario Secondary School Teachers' Federation, District 25, [2006] OLAA No. 597***: Chief custodian of School Board held to be incapable to carry out his responsibilities by robbing a bank during lunch hour



- ***Ross v New Brunswick School District No. 15, [1996] 1 SCR 825***: Teacher who made racist public statements and writings undermined his capacity to live up to the community's values for educators
- ***Smith v Kamloops and District Elizabeth Fry Society (1996), 20 CCEL (2d) 303 (BCCA)***: Social worker had a sexual relationship with a sex offender who was a client of the employer, which violated the employer's ethics code and potentially prejudiced employer as a non-profit organization
- ***York University Staff Association v York University, 2018 CanLII 41354 (ONLA)***: University employee posted anti-Semitic comments on Facebook and publicly criticized the university for disciplining him

5. Improper Social Media Use by Employees Resulting in Termination for Cause



- ***Chatham-Kent v National Automobile, Aerospace, Transportation and General Workers Union of Canada, [2007] OLAA No. 135:***

- Employee, who was a personal caregiver at a home for the aged, had created a website accessible to the general public and published resident information and pictures, and made inappropriate comments of the residents of the home for the aged
- Arbitrator upheld termination on the grounds of breach of confidentiality and inappropriate remarks about management and residents

- ***Wasaya Airways LP v Air Line Pilots Association International, [2010] CLAD No. 297:*** Airline pilot posted comments on his Facebook page publicly degrading and belittling the customers and the company
 - Airline's primary customers were native peoples whom he targeted in many of his online comments
 - Arbitrator upheld termination of the employee as they created potential harm to the company's reputation and its ability to efficiently manage its business
- ***Canada Post v CUPW, [2012] CLAD No. 85:*** Arbitrator upheld termination of a postal clerk who made derogatory comments about Canada Post and his supervisors on Facebook, causing one supervisor to miss time off work for mental distress

- ***City of Toronto v Toronto Professional Firefighters Association, Local 3888, 2014 CanLII 76886 (ONLA):***



- Arbitrator upheld termination of a firefighter for sending out “tweets” which denigrated women, disabled persons and minorities, which were reported in the National Post newspaper
- Arbitrator noted that in situations involving social media posts, the test as to whether the conduct warrants dismissal is whether “*a reasonable and fair-minded member of the public, if apprised of all the facts, [would] consider that the [employee’s] continued employment would so damage the reputation of the [e]mployer as to render that employment untenable*”

- ***Strom v The Saskatchewan Registered Nurses Association, 2018 SKQB 110:***

- A registered nurse posted comments on social media relating to the end of life care that her grandfather received at a care facility
- She was unhappy with level of care, and in her comments she criticized the competence and professionalism of the staff, including registered nurses, who worked at the facility
- The Saskatchewan Registered Nurses Association (“Nurses Association”), after a hearing before a discipline committee, ruled that in publicly posting these comments, nurse had engaged in professional misconduct

- The discipline committee assessed a fine of \$1000 and ordered her to pay costs of the disciplinary proceedings in the amount of \$25000
- On appeal, the Saskatchewan Court of Queen’s Bench ruled that the disciplinary decision of the Nurses Association was not unreasonable and was within its authority under *The Registered Nurses Act, 1988*
- Further appeal now before the Court of Appeal for Saskatchewan



6. Cases Where Dismissal or Discipline for Off-duty Conduct Was Not Justified

- ***Merritt v Tigercat Industries, 2016 ONSC 1214:***
 - Employer dismissed an employee with 17 years of service after he was charged with sexually assaulting two minors on the basis of the criminal charges and the reputational harm those charges had allegedly caused to the company
 - Court ruled that the dismissal for cause was not warranted because the charges did not relate to the employee’s employment with the company or co-workers, and there was no evidence that the charges would damage the employer’s reputation, and the employee was not in a position of responsibility with the company

- As employee had not been found guilty of a criminal offence as a criminal trial had not yet occurred, he was entitled to the presumption of innocence
- Court ruled that the employee was wrongfully dismissed and awarded him damages equivalent to 10 months wages
- An employee being charged with criminal conduct is not always enough to establish just cause

NOT GUILTY

- ***Klonteig v West Kelowna (District), 2018 BCSC 124:***
 - The British Columbia Supreme Court held that dismissal for cause was not warranted for a 13 year Assistant Fire Chief who failed two roadside breathalyzer tests
 - Employee's off-duty misconduct was not sufficiently incompatible with employment or detrimental to the employer's reputation to justify dismissal for cause
 - Employee was driving the employer's vehicle when he failed the breathalyzer tests. However,
 - The vehicle was unmarked
 - There was no public knowledge of the employee's administrative suspension
 - Employee's conduct was not as morally reprehensible as in other cases



- The employee was not the public face of the fire department, as his role was primarily administrative
 - Employee's conduct also did not cause his fellow firefighters to lose confidence in him
- Courts determining whether off-duty conduct justifies termination for cause will adopt a contextual approach *i.e.* one that must look at both the circumstances surrounding the misconduct and the nature of the employment relationship
 - Proportionality is important, in that a balance must be struck between the severity of the employee's misconduct and the sanction imposed by employer

7. Termination on a Without Cause Basis

- If an employee commits off-duty conduct that employer does not condone, and no longer wants that employee to remain with the organization, there is the option to terminate on a without cause basis
- In some cases, it may be easier and less costly to terminate an employee without cause, paying the required termination package, and getting a signed release from the employee



a) Compliance with legislation for termination on a without cause basis

- The legal right to terminate employees on a without cause basis is clear, but the termination cannot be contrary to the minimum standards prescribed by the *Employment Standards Act, 2000* (Ontario), including termination pay, potentially severance pay and benefit continuance for the minimum prescribed period
- Any termination cannot be based upon the grounds set out in s. 5(1) of the *Ontario Human Rights Code*



8. Protecting Organization from Liability

- Make it known to employees that the church or charity has a legitimate interest in regulating off-duty conduct which has a potential negative impact on the employer
- Employers can establish written policies with respect to off-duty conduct, so that employees know that they may be held accountable for off-duty conduct which has a direct impact on the employer
- Employers can add clauses to employment agreements, so that employees, even when off-duty, must conform to certain behavioural norms to safeguard the employer's public image and reputation

- Such a clause would include, within the contractual definition of “just cause”, wording such as:
 - *“Just cause shall include personal conduct, either on or off duty, by the employee which is of such a serious and substantial nature that it would injure the reputation or interests of the employer if the employee is retained as an employee”*



CONCLUSION

- Discipline or termination for off-duty conduct requires careful consideration, as legal issues can be complicated and nuanced
- Employers, including churches and charities, should know the applicable legal tests in relation to off duty conduct before taking steps against any employee in relation to the conduct in question
- There are no simple solutions and each fact situation is different
- When in doubt, seek professional advice

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