

## Canada: When Can You Fire An Employee For Off-Duty Misconduct Or Vulgarity?

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When do an employee's nasty or vulgar remarks or social media posts, undertaken online in the privacy of his own home, or live at some off-duty social event or sporting activity, entitle an employer to dismiss him for just cause? This question is particularly topical in light of the intense national media attention recently directed at Hydro One's abrupt dismissal of Shawn Simoes, the now infamous Hydro One employee who made lewd and offensive comments to a female reporter at a Toronto FC soccer game in early May of this year.

### Recent developments in the law:

On this issue, Canadian employment law appears to be in the midst of rapid and draconian change. Up until quite recently, it was all but impossible for an employer to fire an employee for cause for any objectionable off-duty remarks, unless it could be shown that those remarks irrevocably undermined his ongoing future ability to do his job, or constituted a serious and intentional attempt to damage his employer's reputation. Barring those extreme circumstances, off-duty employees were generally free to say, or write, whatever they wanted, to whomever they pleased, so long as they refrained from doing so while *at work*.

No longer. In the last few years there has been dramatic change on this front. With the rise of social media, the potential impact which an employee's off-duty comments or posts can have on your organization's public reputation has escalated enormously. More and more, courts are beginning to recognize that the misbehavior of off-duty employees, while seemingly irrelevant to their on-duty work performance, can nonetheless prejudicially affect their employer's public 'brand', and thereby constitute just cause for dismissal.

Today, many HR professionals still assume that an employee cannot generally be punished for misconduct which he carries out while attending an off-duty event, or writing online in the privacy of his own home, and that such misconduct can only be sanctioned if it wholly undermines confidence in the employees' ability to do his work. This assumption is now increasingly outdated, if not wrong. In cases where the employer's 'brand' is significantly impacted, employers currently have the authority to dismiss, employees, even when their actions outside the workplace are totally unrelated to, and have absolutely no objective impact on, their actual ability to do their job. The recent case of Shawn Simoes is just the latest example in an increasing trend where employers are successfully invoking the off-duty, but much publicized, bad behavior of their employees, to justify their termination.

### Current law in Ontario on terminating employees for off-duty misconduct:

Employees have long owed a legal duty of good faith toward their employer which, according to the courts, requires them to avoid off-duty behavior that would obviously cause significant harm to their employer. But exactly how bad does the misbehavior have to be for it to amount to just cause for dismissal?

As stated only last year in *The City of Toronto v Toronto Professional Fire Fighters' Association, Local 3888* (Nov. 2014), the applicable test for determining whether off-duty misconduct 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 employer as to render that employment untenable."

In the *City of Toronto* case, the arbitrator upheld the termination of a firefighter for sending out tweets which denigrated women, disabled persons and minorities, and which were reported in *The National Post*. The arbitrator later ruled that the tweets violated the Ontario *Human Rights Code* and a number of the employer's own written HR policies.

In recent years, Ontario courts and arbitrators have identified several factors to be used to determine the lawfulness of terminating an employee for his off-duty misconduct, including (i) the nature and seniority of the employee's position within the organization; (ii) the employer's reasonable expectations of how the employee would behave; (iii) the seriousness of the employees' off-duty misconduct; and (iv) the actual and potential harm of such misconduct to the employer's business and reputation.

What's more is that the potential damage to the employer's reputation need not even be proven through direct evidence. It is enough for the employer to establish that the employee's misconduct is of such magnitude as to have the *potential* to impact negatively on the employer's public reputation or 'brand'.

When determining whether or not off-duty misconduct amounts to just cause for dismissal, courts and arbitrators often refer to the test enunciated in *Millhaven Fibres Ltd. v Oil, Chemical and Atomic Workers I.U Loc 9-670*, which requires that the employer show that the off-duty misconduct (i) harms the company's reputation or product, (ii) renders the employee unable to perform his duties satisfactorily, (iii) causes other employees to refuse or hesitate to work with the offending employee, (iv) contravenes the *Criminal Code*, or *Human Rights Code*, or (v) seriously undermines the employer's ability to efficiently manage its operations and workforce. Evidence of the breach of any single one of these 5 factors can be sufficient to amount to just cause for dismissal.

### What precautions employers should take to maximize their future ability to punish offending employees:

In the new age of social media, off-duty misconduct has the potential to do immense damage to your organization's public brand and its reputation with clients and suppliers. Sometimes the best way of containing that damage, and of restoring public faith in your organization, is to immediately, and publicly, fire the offending employee, just as Hydro One decided to do in the case of Shawn Simoes. In so doing, your organization sends a clear message to its customer-base that it strongly disapproves of such misbehavior before that misbehavior has time to seep into the public's consciousness and taint your 'brand'.

In order to increase your ability to discipline employees who engage in off-duty misconduct, you should consider taking the following precautions:

- *Draft a Code of Conduct which prohibits off-duty misconduct:* Although most existing Codes of Conduct do not cover off-duty conduct, all Ontario employers would now be wise to adopt a written code which expressly bans any form of off-duty harassment or other misbehaviour which could potentially be injurious to its public reputation. An employer who takes this precaution, as Hydro One had previously done prior to the Simoes incident, is far more likely to see an Ontario court or tribunal later uphold its disciplinary sanctions, when these are challenged by the offending employee;
- *Amend your employment agreement template to include a 'morality' clause:* As a further measure of protection, a prudent employer may wish to amend its employment agreement templates to provide that its employees, even when off-duty, must conform to certain behavioral norms in order to safeguard the employer's public image, and to specify that the first reported failure to do so will constitute just cause for immediate dismissal. Doing so will not only later make it far more difficult for the offending employee to successfully challenge his or her termination but will also ultimately serve to incite *all* your employees to be more careful about engaging in any off-duty misbehavior which could be publicized and damaging to your company and 'brand'.

In prohibiting the more egregious forms of off-duty misbehaviour, your organization will need to strike a careful balance between forestalling potential damage to its public reputation and 'brand', in an age of increased publicity through social media, and the legitimate desire of your staff to preserve some degree of continued privacy in their personal lives. Understandably, few employees will be prepared to confer on their employer an untrammelled right to police *all* of his or her private, off-duty activities. Soloway Wright LLP's employment lawyers can assist you in striking the right balance between these two competing interests, thanks in part to their unique experience in working closely with both management and employees.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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