

When Can You Discipline Employees for Off-Duty Misconduct?

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Many would say that what an employee does on his own time is his own business. But this is not always true and the appropriate response to off-duty misconduct is not always clear-cut. Consider these cases:

- Two hourly employees leave work and head to the local watering hole. After a couple of beers, an argument begins and the two end up in a fight. Both are arrested and charged with disorderly conduct. Both make bail and show up for work the next day, black eyes and all. May the employer discharge the two employees because of the off-premises fight?
- The employer operates a day care. An employee is arrested and charged with criminal sexual conduct. The employee pleads not guilty and is released on bond. May the employer discharge the employee?
- A male employee does not like his female boss. The employee goes home after work and posts on his personal blog that his boss is a "witch" and that he will be looking for her on Halloween "riding her broom." May the employer discharge the employee?

Whether the employer may discipline or discharge an employee for off-duty misconduct depends on a number of factors.

Who Is the Employer?

A governmental employer faces significant restrictions when it comes to discipline for off-duty misconduct. A public sector employee enjoys a number of constitutional rights with respect to his governmental employer. These include the right of association and free speech. These constitutional rights generally do not apply to private sector employees.

A governmental employee stands up at a public forum and says his employer, the local county, is wasting tax dollars and the voters should do something about it. A private sector employee working for a gun manufacturer stands up at a public rally and says that all gun manufacturers should be put out of business. The local county will face a serious legal challenge if it discharges its employee. But the gun manufacturer may face no legitimate legal challenge.

Is the Employee At Will?

An at-will employee may be discharged at any time, with or without cause. In general, if an employer does not like an employee's off-duty activities, the employer may proceed with an at-will termination.

Who isn't at will? Unionized employees aren't at-will employees and may only be discharged for cause. Most arbitrators will not uphold a discharge of a union-represented employee for off-duty misconduct unless the employer can show a significant connection to the employment.

In *Baker Hughes, Inc.*, arbitrator Barry J. Baroni faced such an issue. An hourly, union-represented employee was upset by information his German-national plant manager presented at an employee meeting. The hourly employee then wrote derogatory comments about the manager on his "MySpace" page, even making a specific reference to Hitler.

The employee was fired for violating its antiharassment policy. The union grieved, arguing that "harassment violations only apply on company premises." Arbitrator Baroni upheld the termination and ruled that the employee's conduct constituted insubordination. He noted:

"[A]rbitrators have consistently upheld management's right to discharge an employee for verbal abuse, or threatening behavior toward a co-worker or a supervisor, away from the plant, when there is a 'sufficient [n]exus' or connection to the workplace."

He also noted that "arbitrators have long recognized that insubordinate off-duty language directed at a supervisor can have long-lasting and harmful effects in the workplace."

Other Considerations

The law protects certain off-duty activities by employees. These include advocating unionization, filing a workers' compensation claim and whistle-blowing (e.g., reporting the employer to OSHA or another governmental agency).

Existing policies also may play a role. A policy statement that an employee's activities on his own time are his own business seriously limits the employer's right to take action. Alternatively, a statement on expected professionalism – both on and off duty – may significantly increase an employer's position. Other important policy statements may prohibit fraternization with subordinates, use of unlawful substances and off-duty illegal conduct.

Employers should tread carefully in regard to the issue of discipline for off-duty misconduct. An analysis of all of the factors is wise. In the end, perhaps the most important question is: How does this conduct affect the employer?