



# Off-Duty Misconduct and Inflammatory Social Media Behaviour

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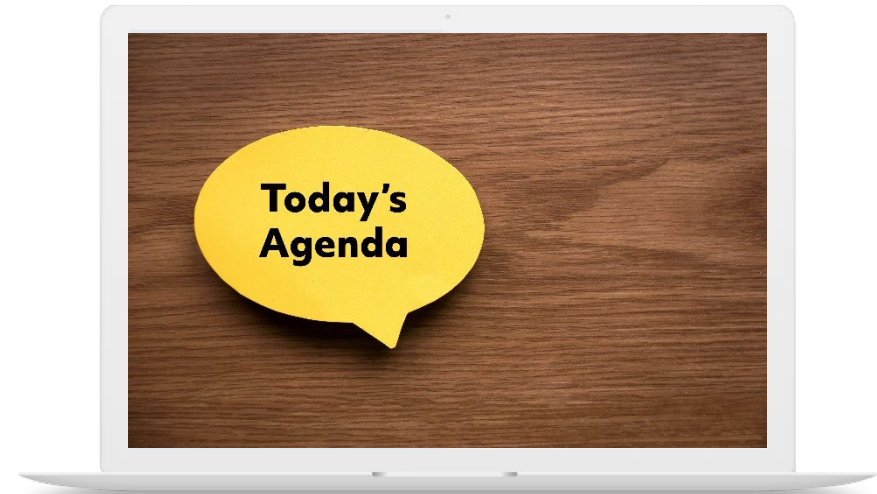
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# Off-Duty Misconduct: The Basics

# Off-Duty Conduct – The Basics



Conduct that occurs outside of working hours when the employee is on their own, personal time and not acting on behalf of the employer



An employer has **no jurisdiction/authority** over what employees do outside working hours, unless it can show that its **legitimate business interests are affected in some way**

# Proving the Nexus – The Basic Principles

Real causal connection  
between off-duty conduct  
and the business

Employer must undertake  
meaningful investigation  
of how employee's  
personal activities will  
affect its interests

- Adjudicators will balance the competing interests of the employer and the employee
- Interference with employee's private life must be proportional

# Off-Duty Misconduct: Discipline

Five conditions/circumstances developed in the early case law:

- 1)The conduct harms the employer's reputation or product
- 2)The conduct renders the employee unable to satisfactorily perform his or her employment obligations
- 3)The conduct leads to a refusal, reluctance or inability of the other employees to work with them
- 4)The conduct is a serious breach of the *Criminal Code*
- 5)The conduct inhibits the employer's ability to efficiently manage and direct the workforce

***Millhaven Fibres Ltd. v Oil, Chemical & Atomic Workers Int'l Union, Local 9-670 (1967)***

# Objective Test

- “The test, so far as possible, is an objective one: what would a reasonable and fair-minded member of the public [...] think if apprised of all of the relevant facts. Would the continued employment of the grievor, in all of the circumstances, so damage the reputation of the employer as to render that employment impossible or untenable?”
  - Arbitrator Goodfellow
    - *Ottawa-Carleton District School Board v. O.S.S.T.F., District 25, 2006 at para 17*



# Social Media



# Off-Duty Misconduct: Social Media



## Social Media

- 01 Employee conduct on social media can have an impact on the workplace, but often occurs outside the physical workplace, frequently during non-business hours
- 02 Decision-makers have drawn from the early cases on off-duty misconduct to determine when social media use may result in discipline

# Off-Duty Misconduct: Social Media

What types of misconduct online can result in discipline up to termination for cause?

? Incompatible with employment obligations

? Critical of management, co-workers and/or clients

? Threatening toward management, co-workers and/or clients

# Off-Duty Misconduct: Social Media

What types of misconduct online can result in discipline up to termination for cause?



Conduct in breach of employer's policies or legislation



Behaviour that causes reputational harm to employer



Disclosure of confidential/private information



# Caselaw

# Examples of Social Media Misconduct

## *Municipality of Chatham-Kent and CAW-Canada, Local 127 (2007)*

- Grievor – PSW at LTC home with 8 years of service
- Blog **very** critical of employer, management, co-workers and residents
- Also included residents' first names and photos with residents
- Grievor claimed that blog was intended to be for "friends" only but had not set permissions for access correctly

## *Canada Post v C.U.P.W. (2012) (Ponak)*

- Grievor posted on Facebook violently disparaging her supervisors and employer
- Grievor had a public profile
- Termination upheld

# Examples of Social Media Misconduct

## *City of Toronto and TPFA, Local 3888 (2014) (Newman)*

- Firefighter with 2.5 years' service terminated for cause
- Various tweets that were disparaging of women, people with disabilities and visible minorities
- Grievor's Twitter activity clearly identified him as a Toronto firefighter
- City of Toronto had recently launched a diversity program
- Comments were included in an article in the *National Post* about the City of Toronto Fire Department
- Grievor was dishonest and evasive during investigation

# Examples of Social Media Misconduct

## *City of Toronto and TPFA, Local 3888 (2014) (Newman)*

Union argued termination was excessive because of the grievor's:

- remorse
- letter of apology
- sensitivity training
- belief that the tweets were private
- statement that he never intended to harm his employer



# Examples of Social Media Misconduct

## *City of Toronto and TPFA, Local 3888 (2014) (Newman)*

Arbitrator Newman dismissed the grievance:

*"We may all be guilty of using services and devices without thoroughly reviewing the lengthy terms, rules, and conditions of service. But when engaging in social media use, it is my view that the user must accept responsibility when the content of his or her communications is disseminated in exactly the manner promoted by the social media provider. This is what social media is intended to do. **Once we use these devices, once we load that gun, it is potentially dangerous.**"*

# Examples of Social Media Misconduct

## *City of Toronto and TPFA, Local 3888 (2014) (Misra)*

- Firefighter with 2.5 years' service terminated for cause
- Grievor's profile identified him as a firefighter
- One of the comments was reported in the same *National Post* article about the City of Toronto Fire Department
- 3 inappropriate tweets
- Clean disciplinary record
- No evidence of poisoned work environment

# Examples of Social Media Misconduct

## *City of Toronto and TPFA, Local 3888 (2014) (Misra)*

- Arbitrator Misra upheld the grievance and substituted a 3-day suspension:

*"The question is what would a reasonable and fair-minded member of the public think of the Grievor's tweets if apprised of all the relevant facts."*

- Only 1 of the 3 tweets was actually inappropriate
- Insulting to women but not directed at anyone in the workplace

# Examples of Social Media Misconduct

## *Metrolinx v. Amalgamated Transit Union, Local 1587, 2025*

- **When Can Employers Discipline for Off-Duty Social Media Misconduct?**
- Metrolinx, a regional transportation provider, dismissed five employees for sexual harassment after discovering derogatory and sexist comments made in a private WhatsApp group.
- Metrolinx conducted an investigation and terminated the employees, prompting the Union to grieve the dismissals
- The Court dismissed the Union's appeal and confirmed that an arbitration award ordering reinstatement of five terminated employees was unreasonable, establishing important precedents regarding statutory duties to investigate and workplace discipline boundaries.

# Examples of Social Media Misconduct

## *Metrolinx v. Amalgamated Transit Union, Local 1587, 2025*

- “An employer’s duty to investigate is not just a duty owed to the victim, but to all employees, who have a right to work in an environment free from demeaning and offensive comments.”
- The Court has acknowledged that social media platforms can create situations where private conduct can become workplace issues, particularly when employees are involved and workplace relationships are affected.
- **Accordingly, off-duty conduct can be subject to workplace discipline when it manifests negative impacts within the workplace environment.**



# Practical Tips

# Practical Tips For Employers

Conduct your own investigation

## Factors to consider:

- Is employee/ employer identifiable?
- Do comments cause actual damage, or can damage be presumed?
- Was misconduct repeated or was it a single incident?
- Was it particularly egregious (e.g. involving violence)?

Consider public relations/financial impact

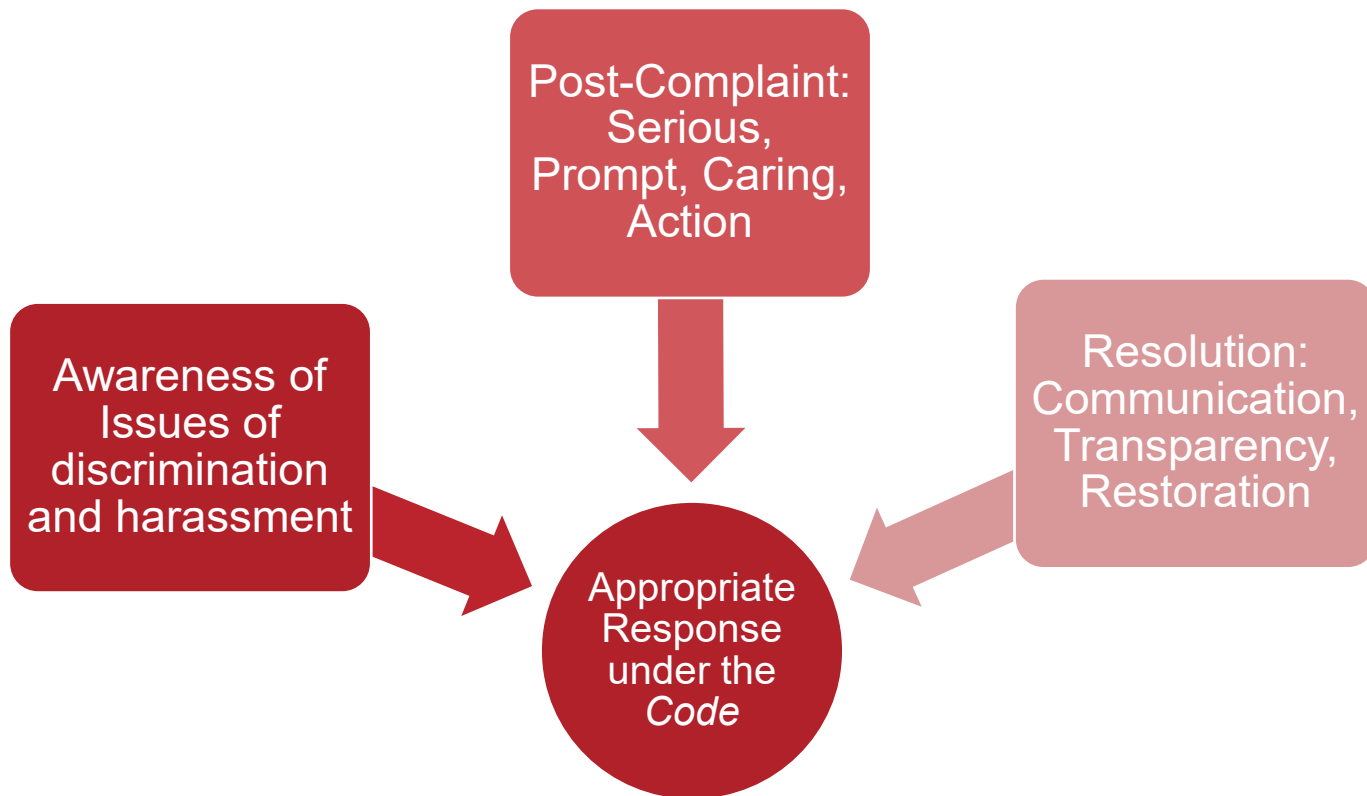
# Duty to Investigate: Statutory Framework

*Human Rights Code*

*Occupational Health and  
Safety Act*



# Duty to Investigate under the Code



# Duty to Investigate under the OHSA

- Pursuant to section 32.0.7(1)(a)
- duty to investigate both “incidents and complaints of workplace harassment.”
- duty to carry out an investigation that is “appropriate in the circumstances”.

# Importance of Policies

- Review policies on **Social Media Use** and **Human Rights**
- Determine if a Social Media Use Policy is in place and whether that policy has been communicated to employees
- By establishing clear guidelines which include reference to off-duty conduct, the kinds of behavior demonstrated in these cases may be avoided
- Clear Policies = evidence to rely on in upholding discipline for misconduct



A photograph of a modern office interior with glass walls, wooden floors, and a view of a city skyline. The image is partially obscured by a large blue diagonal graphic element.

# Thank You

If you have any questions about this presentation or want to learn more about how we can help with your legal needs, please visit **[hicksmorley.com](http://hicksmorley.com)**