

Member's Quarterly

Summer 2026 Edition

Feature

Off the Clock, but On the Hook: Off-Duty Misconduct

Employer rights and obligations

What should an employer do upon learning of an employee's misconduct against a fellow colleague outside of working hours?

The default rule is that an employer has no authority over what employees do in their personal time. However, where an employee's off-duty conduct affects the employer's legitimate interests in some way, the employer may have the right, and sometimes, even an obligation, to address this conduct.

Generally, to justify disciplining an employee for off-duty misconduct, an employee must show that the behaviour falls into one or more of the following categories:

- i. The conduct detrimentally affects the employer's reputation or product;
- ii. The behaviour renders the employee unable to properly discharge their employment obligations;
- iii. The conduct causes other employees to refuse to or be reluctant to work with that person;
- iv. The employee had been engaged in a serious breach of the Criminal Code in a way that injures the general reputation of the employer and its other employees; or
- v. The behaviour inhibits the employer's ability to efficiently manage and direct the production process

In all cases, employers are expected to demonstrate that there is a real causal connection between the off-duty conduct and the operation of the employer's business. Importantly, employers must be cautious not to rely on mere suspicion or speculation; they must carefully investigate the ways in which, as well as the extent to which, the employee's off-duty activities would affect their interests. This inquiry would necessarily require an examination of the nature and severity of the off-duty conduct.

The nature of the employer may also play a role in its rights and obligations to respond to an employee's misconduct outside of work hours. For example, a school board with public responsibilities to parents and vulnerable youth may find it easier to justify a broader than normal scope to discipline its employees for their off-duty misconduct. A further factor for consideration is the proximity of the employees to one another – Do the employees share office space or have common duties that will bring them into contact with one another?

In *Corporation of the City of Calgary v Amalgamated Transit Union, Local 583*, 2023 CanLII 20867 (AB GAA) [City of Calgary], a male transit operator offered a female colleague an opportunity to test drive his vehicle, which the female colleague was interested in purchasing. The test drive occurred after working hours. During this test drive, and despite clear statements that she was not interested in a romantic



Kyle Allen
J.D.
Partner,
Brownlee LLP



Bonnie Hu
J.D.
Associate,
Brownlee LLP

Member's Quarterly

Summer 2026 Edition

Feature continued

relationship, the male employee made several unwanted sexual advances on his female colleague, suggesting that they could be friends with benefits and stroked her breast without her consent. The employer subsequently found out about the test drive "through the grapevine", though the female employee never reported the incident.

While the Arbitrator in City of Calgary did not comment on the employer's duty to investigate, they found that the employer's actions after it learned of the test drive, including the decision to investigate and discipline the employee who had sexually harassed his female co-worker, were justified. Notably, the Arbitrator remarked that the only reason why the coworkers knew one another was because they worked for the same employer. Further, the Arbitrator found that the off-duty misconduct created operational challenges as it would be difficult for the City to guarantee that the male employee and the female employee would not come across one another in the course of their transit operator duties. Another factor in this decision was that transit operators are public-facing and unsupervised employees that work in a position of trust over vulnerable populations.

As many employers already know, occupational health and safety ("OHS") legislation typically requires an employer to identify both existing and potential hazards at a worksite, including sexual harassment and domestic violence. Further, employers owe an OHS duty to all of its workers to take measures to eliminate hazards, or to control the same, if elimination is not reasonably practicable. In the event of a complaint or an incident, employers must investigate. As such, an employee's off-duty misconduct against a fellow colleague could trigger an employer's OHS obligations to protect its employees from a potentially unsafe or hostile situation in the workplace.

What an employer can or must do to address an employee's off-duty misconduct against another employee depends on the specific facts of the matter. Therefore, employers are encouraged to seek legal advice upon learning of such off-duty misconduct to determine the scope of their rights, as well as any obligations they may have, to address the situation.

Kyle Allen is a Partner in Employment and Labour Law with Brownlee LLP in Edmonton. He can be reached via email at kallen@brownleelaw.com.

Bonnie Hu is an Associate with Brownlee LLP in Edmonton and can be reached via email at bhu@brownleelaw.com.