

OFF-DUTY MISCONDUCT IN THE PUBLIC SECTOR

**NATIONAL ACADEMY OF ARBITRATORS | 78TH ANNUAL MEETING
AND MEMBER EDUCATION CONFERENCE, APRIL 30 – MAY 3, 2025**



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Ford Motor Company & UAW-CIO, Opinion A-132 (Harry Shulman, 1944):

We can start with the basic premise that the company is not entitled to use its disciplinary power for the purpose of regulating the lives and conduct of its employees outside of their employment relationship...what the employee does outside the plant and after working hours is normally no concern of the employer. If the employee commits no misconduct in the plant or during his working hours, he is not subject to disciplinary penalty, though he may beat his wife, spend his money foolishly or otherwise behave like an undesirable citizen.

Evolving arbitral standards

Fairmont General Hospital, 58 LA 1293 (Alfred Dybeck, 1972):

While generally an employee's conduct away from the place of business is normally viewed as none of the employer's business, there is a significant exception where it is established that an employee's misconduct off the premises can have a detrimental effect on the employer's reputation or product, or where the off-duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee involved.

Evolving arbitral standards

Marvin Hill and Mark Kahn, *Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards?* Arbitration 1986 121-154, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, 1987:

From a review of arbitration decisions, the criteria considered by arbitrators falls into one or more of these four categories:

- 1) damage to employer's business or reputation or both;
- 2) unavailability of employee (incarceration);
- 3) impact of grievant's reinstatement on other employees;
- 4) unsuitability for continued employment.

Evolving arbitral standards

THE NEXUS REQUIREMENT

There must be a demonstrable connection between the off-duty misconduct and the actual or potential damage to the employer's legitimate business interests.

- Must be reasonable and discernable
- Not mere speculation

PUBLIC SECTOR

Employees often held to a higher standard because of employer's interest in maintaining public trust.

ISSUES OF PROOF

- Objective evidence
 - Adverse media coverage
 - Proven adverse impact on operations/reputation
 - Criminal charges
- Presumed harm for egregious conduct
- Cases decided on individual circumstances in each case

REPUTATION

- Relationship between degree of interaction between employee and public and adverse effect on employer's reputation
- Opinion of damage to employer reputation insufficient

PUBLICITY FACTOR

- How widespread is the publicity? How large/small the town?
- Is employee publicly linked to the employer?
- Public reaction?
- Is misconduct connected to the business of the employer?
- Prominence/visibility of employee's job

Establishing harm to employer

SCENARIOS



FIGHT AT OFF-DUTY SOFTBALL GAME

Grievant, a police officer, received a two-day suspension for his role in a fight that occurred during an off-duty softball game. Officer played on a team composed of local police officers, although the team was not formally sponsored by the employer. During a game with another team, grievant got into an argument with the other team's second baseman. The exchange escalated into a heated argument. The second baseman then yelled **that** he would kill grievant, and grievant yelled back that the second baseman was "nothing but a common thief". The second baseman did in fact have a criminal record for theft. The second baseman then attacked grievant, both benches emptied, and a general melee ensued. As a result of the incident, a citizen wrote a letter to the editor of a local newspaper criticizing the conduct of the police team. The employer suspended grievant.

SOCIAL MEDIA

Officer posts on a personal social media account, while off-duty on his personal computer, without anything identifying him as a City of Oz officer, comments critical of the protesters in Ferguson, MO. The comments range from, “people have no idea what an officer faces on a daily basis”, “I would tune some of those fools up if I had the chance”, to “I think anyone that won’t listen to me when I tell them what to do should be shot”.

The department is confronted by a local reporter who identifies the officer and the comments and can verify the comments are made by the officer. The department moves to terminate the officer.

Would the matter be affected if this was not the officer’s first offense?

SEXUAL ASSAULT CHARGE

Jack, a fire department paramedic, is charged with the sexual assault of a woman from a neighboring town, outside the department's jurisdiction, whom he had met at a softball game. He is released on bail. The department attempts to investigate but the complainant refuses to talk to the department. Jack proclaims his innocence to the department but says that based on the advice of his lawyer, he cannot talk to the department.

There is no initial media coverage of the arrest, but rumors circulate at work that jack is "in trouble because of a rape" and several female paramedics approach the department and say they are uncomfortable working with him. When asked, they all deny ever having seen jack act inappropriately on the job.

CONT'D

Six months after the arrest the local newspaper reports that the case is going to trial and identifies jack as a paramedic in the department.

The criminal trial results in a hung jury without reaching a verdict and the prosecutor decides not to seek a retrial. The complainant files a civil lawsuit against jack for the sexual assault and two years later a jury finds in her favor and awards her \$500,000 in damages.

NAZI FLAG ON DISPLAY

Grievant, a corrections officer, was terminated after a local newspaper displayed a photograph of grievant's front porch, from which a nazi flag was flown. It was flown on the eve of the 55th anniversary of germany declaring war on the united states. Grievant had been previously disciplined for allegedly belonging to a white supremacist organization, although an arbitrator overturned this discipline. In support of the termination, the superintendent of corrections alleged that by displaying the nazi flag, grievant brought discredit upon the department of corrections and endangered the safety and security of all corrections facilities in the state. The superintendent testified that there was a negative reaction by the community and that numerous phone calls were received from the community expressing their outrage.

OFF-DUTY DUI

A state patrol officer, while off-duty in her unmarked patrol vehicle that she is expressly allowed to use off-duty, is pulled over DUI after driving erratically. The officer is compliant, does not attempt to use her office to get out of the ticket, is in civilian clothing, but is arrested for driving under the influence. This is the officer's first disciplinary offense and there is no damage to the vehicle or any other property.

The department moves for separation.

SHOPLIFTING CHARGES

Grievant has worked for 25 years as a firefighter for the municipality in which he lives. He has no prior discipline and has received numerous commendations from the department. He is well liked by his peers and supervisors alike. On the night in question, grievant is shopping at a local department store and walks out with an inexpensive hand tool. He is observed by the store security guard and his behavior is recorded by the store's security system.

Pursuant to this incident, the store presses misdemeanor shoplifting charges and the matter proceeds to trial. At trial, grievant admits to the shoplifting. However, he explains that he is undergoing a divorce and claims that his soon to be ex-wife has "cleaned him out" during the divorce. He breaks down, apologizes and tells the court that he will not engage in this behavior again.

CONT'D

The court imposes a suspended sentence with no jail time and orders grievant to undergo court-ordered therapy. The court specifically states that grievant is not being subjected to jail time so that he can go back to work and get his life in order.

The matter is reported in the local press. While grievant's name is mentioned, the article does not disclose that he is a firefighter.

The department moves to terminate grievant on the grounds that a firefighter often goes into peoples' homes and the public must be able to trust such employees with their possessions when no one is home to protect them.

OFF-DUTY PARTY

Several officers from a medium-sized municipal police department get together after work. All are out of uniform and have several alcoholic beverages outside someone's ground-floor condo, surrounded on two sides by 4x8 foot fencing. At one point, a male accepts a challenge to squeeze a female's breast. No one in attendance complains. No member of the public complains, much less had knowledge of the alleged offense.

One afternoon in the locker room, a command officer overhears one of the partygoers relaying the story to another and reports it to the internal affairs division. An investigation ensues, charges are filed and the department issues a press release in the local newspaper about the allegations and discipline.

The department moves to suspend the male for 29 days.

Would the matter be affected if the female was also disciplined?



QUESTIONS