# NEW ENGLAND CONSORTIUM OF STATE LABOR RELATIONS AGENCIES 16th ANNUAL CONFERENCE

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## DISCIPLINARY ACTION FOR OFF-DUTY CONDUCT


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I. Introduction: Intersection of Work and Employee's "Private Life"

II. Framework for Legal Analysis

A. What standard applies?

1. Public vs. private sector

2. Organized workforce (CBA - just cause): General Arbitral Standard: Proof of off-duty misconduct, even when serious or criminal, does not justify automatic discharge. The employer must show a demonstrable effect on its business. The employer must demonstrate some meaningful nexus between the off-duty conduct and the employee's employment.

3. Specific contractual language re: off-duty misconduct

a. *DCYF/Union CBA*: "The off-duty activities of an employee will not be grounds for disciplinary action unless said activities are detrimental to the employee's work performance or the program of the agency."

Foster care coordinator pled guilty to possession of cocaine (misdemeanor). Possession and use occurred off-duty.

After an investigation, DCYF terminated employee. DCYF argued its policies require an employee to act in a way to support the public trust and act in compliance with law, employee's job required her to remove children from situations where there is drug abuse and place them outside that situation, and her ability to effectively and credibly testify in court is compromised by her criminal conduct as it could be used to impeach her testimony.

Union argued no impact on employee's work performance, no proof that her actions were detrimental to the program of the agency and DCYF's ethics policies did not apply to off-duty conduct.

The Arbitrator found that because the CBA contained a specific section on off-duty conduct, the general "just-cause" and nexus analyses did not apply. Because there was no evidence that the employee's off-duty conduct was detrimental to her work performance or to the program of the agency, grievant was reinstated with full back pay

The arbitrator noted that DCYF's case might have been enhanced if the incident had received some notoriety. But, arguments are based on speculations as to how some people might have viewed the situation. No evidence was presents that anyone (foster parents or clients) considered the incident as diminishing the image or mission of the agency.

b. *Town/Firefighter Union CBA*- Wellness Program negotiated with Union requires yearly medical exams including marijuana. Under Program, 15 mL considered "positive." In addition, a policy unilaterally adopted by the Town provides, "as a condition of employment, employees must refrain from ingesting illegal substances at all times and from reporting to work or working with the presence of drugs or alcohol in his or her body."

FF tested positive for marijuana under the policy twice, but denied he used. Town terminated.

Town argued that the policy prohibits reporting for work testing positive, even if not impaired. City's physician claimed that the test proves the FF "unfit for duty."

Union argued that the test, standing alone, does not justify discharge. No evidence that FF was impaired while on duty.

Arbitrator examined the basis for discharge given by the employer: that the positive drug test demonstrated the FF was impaired. However, there was no evidence that FF was impaired while on duty. Although City has zero-tolerance policy, it does not require automatic discharge ("up to and including termination.").

But, the Arbitrator gave him a 60 day suspension "for testing positive for a prohibited drug – marijuana – whose usage could have jeopardized the safety of the employee or his fellow Firefighters."

4. At-will employment

B. What does it mean to be "off-duty"

1. Did activity occur during working hours?

a. Employee break-time

2. Did activity occur on the employer's property?

a. What if the employee is in a "cloud"

C. Nexus test

1. Harm to the employer's business (direct evidence required?)

a. Economic harm

b. Reputation

c. General considerations

i. nature of employer's business

ii. nature of grievant's employment

iii. nature of the conduct

iv. level of publicity

2. Adverse effect on the employee's ability to perform his or her job

a. Job abandonment

b. Required licensing and clearances

3. Leads other employees to refuse to work with the offender

III. Nature of Off-Duty Conduct

A. Social media cases

1. *Schirnhofer v. Premier Compensation Solutions*, 303 F. Supp.3d 353 (W.D. Pa. 2018). Plaintiff billing coordinator in a financial services business submitted a doctor's note requesting reasonable accommodation of extra breaks to cope with anxiety. Employer denied the request. Plaintiff vented her frustration on Facebook in posts saying "For every reaction there is a reaction," and "Sometimes I wish I could go back to the old days and handle s*** the old way." Employer terminated plaintiff for making implied threats on Facebook. Plaintiff sued asserting ADA reasonable accommodation claims, as well as discrimination and retaliation claims.

At trial, the jury awarded plaintiff almost $300,000 in damages on the ADA discrimination claims. The jury appeared to have based its award more on the employer's refusal to grant additional rest breaks rather than the fact that plaintiff was terminated for her Facebook posts.

2. *Cummings v. Unemployment Comp. Board of Review*, No. 1944 CD 2017, 2019 WL 1574856 (Pa. Commw. Ct. April 12, 2019). Plaintiff assistant manager got into a heated argument with her supervisor at work and later posted on Facebook that she "would have sliced his throat open if it didn't happen at work." Employer terminated employee, and plaintiff applied for unemployment benefits. Employer took the position that the Facebook post constituted disqualifying misconduct. Plaintiff argued that it could constitute disqualifying misconduct because (a) the posts were made on off-duty time and (b) the posts were hypothetical in nature, rather than an actual threat.

   The three judge review panel rejected both arguments. The panel ruled that although plaintiff did not make the threatening statement in work, there is no requirement that an employee's misconduct must occur on the employer's premises while the employee is on duty to be considered work-related. The panel also rejected plaintiff's argument that the post was hypothetical in nature because the words "expressed an intent to cause physical harm."

3. *Desert Cab Inc. d/b/a ODS Chauffeur Transportation and Paul Lyons* (367 NLRB No. 87, February 8, 2019). Plaintiff was employed as a driver for a taxi and shuttle transportation company in Las Vegas. Plaintiff driver became frustrated when he was repeatedly sent to wait at locations that, in his opinion, and for various reasons were not profitable for his employer. He texted his employer regarding his concerns and received no response. He then posted comments on Facebook regarding his company's decisions to send drivers to certain locations.

   The employer upon learning of the driver's Facebook posts, terminated him on the premise that the posts constituted "bad mouthing" of the business and reflected badly on the business. The plaintiff driver did not deny the comments posted on Facebook and maintained that he was correct in stating that it was costing the company a lot of money to send drivers to certain locations that were not profitable for either the company or the driver.

Driver was terminated for "gross misconduct," which the employer defined as "violating standards of professionalism by posting derogatory and demeaning comments specifically targeting the business clientele and the business on social media." Driver maintained that his conduct was protected activity under the National Labor Relations Act. NLRB agreed. The NLRB determined that the Facebook posts were concerted activities based on the totality of the record evidence and that the concerted activities were engaged in for the purpose of "mutual aid and/or protection" under Section 7 of the NLRA. Critical to the decision was the fact that the posts were made to the driver's friends on Facebook, who included the employer's employees, drivers, and at least one manager. The NLRB characterized the Facebook post as "continuation of an ongoing labor controversy and . . . the next step to make . . . fellow workers aware [of unprofitable assignments received from the employer]."

4. Arbitrating off-duty conduct cases involving social media

   a. Obtain a copy of the tweet or post;

   b. Determine whether post relates to working conditions or wages;

      NLRA prohibits employers from taking action against employees acting together to improve their wages, hours and/or conditions of employment.

   c. Determine whether tweet or post would be considered harassment if said face-to-face.

B. Drug-related offenses

1. Medical marijuana

   a. Maine has become the first jurisdiction in the nation to protect workers from adverse employment action based on their use of marijuana and marijuana products, provided the use occurs away from the workplace.

b. *Michigan Sugar Co. and BCW, Local 261-G.* Employee was terminated for failing to comply with the terms of the LCA i.e. not enrolling in EAP-directed rehabilitation.

The union argued that the grievant acted in the good-faith belief that, having been issued a medical marijuana card by the State of Michigan, he did not have to comply with company rules and regulations for employment. Moreover, he reasonably sought a clear explanation for the reason he was directed to enter the EAP and did not understand that failure to comply with EAP directives might result in termination.

The employer maintained that the grievant, having signed the LCA, was required to abide by its terms and failed to provide a valid excuse for his refusal to cooperate with the directive that he enter rehabilitation.

The arbitrator denied the grievance. Describing the grievant's medical marijuana defense as “nonsense and totally unacceptable and unconvincing,” the arbitrator held that while the State of Michigan could excuse “certain variations or application” of state law, the company was not required to do so. Rather, the company and union “are absolutely free to enter into any agreement they feel is proper in that regard.” Moreover, the grievant understood that in order to comply with the terms of the LCA he had to accept whatever treatment the EAP deemed appropriate. Finally, the arbitrator rejected the grievant' s claim that he merely sought in writing the exact reasons why he was being required to enter the program.

c. *Monterey County (CA) and SEIU, Local 817*.

An Office Assistant II with approximately six years' service was terminated for possessing marijuana at work. The incident occurred when a small, “coin-sized” sealed plastic bag was discovered in the grievant's desk drawer when it was being emptied in preparation for a remodeling of the work area. At the time, the grievant was absent from work while recovering from a drive-by shooting. When contacted, the grievant stated that he had a medical marijuana card. Under state law, individuals with medical problems could secure such a card in order to purchase limited amounts of the drug. The card had been issued by a “cannabis club” for the grievant's back injury and a bulging disc.

The Arbitrator ruled that termination was unjustified. Given the grievant's lengthy absence from work, coupled with a lack of evidence that his desk was locked at all times or that other persons did not use his desk, the County failed to definitively establish that the marijuana belonged to the grievant. However, the Arbitrator determined that it was “quite likely” the marijuana belonged to the grievant, as he was an acknowledged user of the drug for medical reasons. The Arbitrator noted that a Sheriff's Department Sergeant who investigated the incident found that the grievant's “medical marijuana” defense was valid and that it was not likely he would be convicted of possession. That defense effectively rebutted the charge that the grievant violated the County's drug-free-workplace policy. Finally, the record showed that the grievant's performance was consistently rated as fully meeting expectations and he was considered a valuable employee. Based on the foregoing, the Arbitrator directed the Employer to reinstate the grievant and make him whole.

d. Medical Marijuana and Disability discrimination claims

i. *Callahan v. Darlington Fabrics*, 2017 WL 2321181 (R.I.Super.)

*ii. Barbato v. Advantage Sales,* 477 Mass. 456

2. Alcohol-related offenses

*a. Toll Co. and Brotherhood of Teamsters Local 120*

The grievant, a Truck Driver with approximately seven years' service, was discharged following an off-duty incident in which he pled guilty to careless driving and had his driver's license suspended for 45 days. The record showed that the grievant failed a breathalyzer test and was initially charged with Driving While Intoxicated (DWI). However, the DWI charge was dismissed upon the grievant's guilty plea to an amended charge of careless driving. The grievant received a stayed jail sentence, was fined, and given alcohol-problem assessment and alcohol abuse counseling. When he applied for reinstatement, the grievant was informed that the Company had determined that he had been convicted of an alcohol-related offense. Thus, his violation of the alcohol and drug policy justified his termination.

The Union argued that discharge was not justified, as the grievant was not guilty of violating the Company's rules. "No evidence exists that the grievant is, or has ever been, a danger to himself or others while on the job, while operating Company equipment, or even within days of having to report for work," contended the Union. Furthermore, the policy relied upon by the Employer to support its discharge action was applicable only to on-duty infractions, not off-duty conduct. The Union also pointed out that the grievant was not found guilty of any alcohol-related offense. Finally, neither the Company's reputation, nor its operations were adversely affected by the grievant's off-duty incident.

The Employer took the position that termination was justified, as the grievant was convicted of an alcohol-related offense. Furthermore, his misconduct---which resulted in a temporary loss of driving privileges---affected his attendance. In addition, there was evidence of the grievant engaging in an "ongoing practice of illegal drug and abusive alcohol use." Consequently, the Employer could not take the chance that the grievant would cause an accident in a Company vehicle while under the influence of alcohol or drugs.

The Arbitrator ruled that termination was not justified under the circumstances. At the outset, noting the circumstances of the off-duty driving incident, he found that the grievant's pleading guilty to careless driving was "nothing more than a useful legal fiction under the facts of this case." The Arbitrator added that "the fact that the grievant signed off on an implied consent advisory and pled guilty to the lesser charge of careless driving cannot alter the circumstances of his arrest which included two readings of .10 blood alcohol level and two failed field sobriety tests." However, the Arbitrator concurred with the Union that the negotiated contractual language "strongly suggests that the intent and purpose of the parties at the time of this language was incorporated into the CBA was to limit grounds for abuse of drugs or alcohol to on-duty misconduct." Nevertheless, the Arbitrator also held that the Employer was not prevented from disciplining or discharging an employee for off-duty misconduct if it could show that such behavior negatively impacted the Company's operations. In this case, the Employer was unable to establish a nexus between the off-duty incident and its business, held the Arbitrator. He stated that "the closest the Company came to showing some minor degree of nexus was the relatively brief time when the grievant's license was suspended until he promptly re-qualified for his driving privileges. At no time was the grievant's job performance, per se, ever adversely affected. Neither was there any public attention given to the July 1998 incident or its aftermath which connected him as an employee of the Toll Company." In addition, the grievant's inability to report for duty due to the loss of his driving privileges occurred over two months before the Employer made the decision to terminate his employment. The Arbitrator noted that the termination letter made no mention of an attendance problem as a basis for the termination decision. Finally, after examining the chemical-dependency assessment of a certified diagnostician, the Arbitrator concluded that the Company "need have no misgivings over possible liability exposure by assigning the grievant to his former job in compliance with this binding arbitration decision, in light of his long record of safe driving of Company trucks and the professional assessment that he is not chemically dependent."

The Employer did not have just cause to discharge the grievant for his off-duty conviction for careless driving. The grievant was to be reinstated to his former position and be made whole for lost wages and benefits. "Said loss of wages and benefits shall be limited to only that time when the grievant's license and certifications, required to drive the equipment he was formerly assigned, remained in full force." In addition, the grievant had to show that he "diligently pursued" other employment during the make-whole eligibility period. "Any failure to do so will count against back pay," stated the Arbitrator.

C. Constitutionally-protected speech

1. Public sector:

a. Protection under First Amendment:

i. Speech not made pursuant to employee's official duties

ii. Speech addresses a matter of public concern

iii. Employer's interest in promoting efficiency of public service does not outweigh interests of employee in speaking freely

D. State laws restricting discharge or discrimination against employees for engaging in "lawful activity" off the employer's premises and outside of work hours. (CA, CO and NV)

E. Smoking or use of tobacco products (RIGL 23-20.10-14)

F. Other criminal behavior involving moral turpitude

a. *Critical Care Technician in Emergency Department*. Placed on unpaid leave pending criminal proceedings regarding off-duty assault to her estranged husband's girlfriend.

Local paper reported that she "forced her way into the home of her estranged husband's girlfriend and cut off the woman's hair," brandished "some sort of weapon" and said, “this time it’s gong to happen.” Alleged that the employee punched the woman and used scissors to cut her hair. Suspension was 3 weeks <u>after</u> employer learned of article.

Charges were either continued without a finding or dismissed. Placed on probation for 18 months and ordered to have a mental health evaluation. Second newspaper article ran with the disposition. No mention of employer. She passed her psychiatric evaluation, asked to be put back on the schedule, but was terminated instead.

Employer argued that the ED is a high-pressure work environment with difficult, antagonistic patients. Media’s interest in the incident created a real risk that someone would recognize Grievant as an employee of the Hospital.

Union argued due-process violations and that there was no basis for legitimate concern for the safety of the patients. Grievant had worked there for 9 years without incident and her off-duty misconduct was plainly an “intensely personal outburst gone awry.”

Arbitrator addressed suspension and the termination separately. Contract contained different standards for suspension and termination. The three-week delay in the suspension undermines the Hospital’s argument regarding its genuine concern about patient safety. Its decision was based on a newspaper article without further investigation and was arbitrary and capricious.

Termination was without just cause. Reinstatement and full back pay awarded. No evidence that the off-duty, off-premises confrontation has a discernible connection to her employment at the hospital.

b. *Dump-truck operator, DPW*. Placed on unpaid leave pending investigation that he assaulted his father off-premises (although, in the Town he worked for) and off-duty. Later terminated after pleading nolo to simple assault.

CBA: “Seniority shall be considered broken and employment ended … when an employee falsifies a Town record or engages in any other dishonest activity.”

Town claimed when police responded to the assault, Grievant made inconsistent statements.

Town argued they did not have to prove a nexus between the off-duty conduct and the termination because the CBA says an employee can be terminated for “any other dishonest activity.” Even if nexus had to be shown, grievant admitted trustworthiness was an important component of his job.

Union argued that the statements were not inconsistent and that there was no nexus between the off-duty conduct and his duties as a Town laborer. No evidence that the conduct harmed the Town’s reputation, rendered grievant unable to perform his duties or that his fellow workers were reluctant or unwilling to work with grievant, who had a 23-year service and clean record.

Arbitrator found that a nexus existed: giving conflicting statements at a crime scene to on-duty Town police officers which statements became part of Town records. “If the Union’s theory concerning nexus were adopted here, the result would be that it would be okay to make dishonest statements at a crime scene to Town police officers when off-duty, but that is would not be okay to do so when on-duty. Clearly, this would constitute a nonsensical distinction.”

IV. Employee political activity

A. Some states, including MA, expressly prohibit employers from discriminating against employees because of political activities away from workplace.

B. CT – Employees serving in state legislature are protected against employment discrimination based on that service and are entitled to leave of absence from work to serve in legislature. Employer arguably prohibited from retaliating against employee for supporting or opposing particular legislative bills.

C. NY – Prohibits employers from discharging employee because employee is running for public office; also prohibits discrimination based on off-duty campaigning or fundraising for candidates for public office, provided activities take place outside workplace.

D. NY – Lawful, off-duty recreational activities protected. Includes sports, games, hobbies, exercise, reading, viewing of TV and movies. Questionable whether dating, romantic, sexual relationships protected.

V. Employee privacy laws

VI. Employee protected activity – NLRA and State Labor Relations Acts

Speech about workplace conditions and terms of employment, including posts on social media, may constitute "concerted activity" under NLRA and, potentially, under whistleblower laws.