



## What Happens in Vegas, Doesn't Stay in Vegas: Discipline for Off-Duty Misconduct

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ON THE FRONT LINES OF WORKPLACE LAW™

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### Does "What Happens in Vegas" Stay in Vegas?



- After an amazing Friday night show at the Penn & Teller Theater, Susan updated her Facebook page with a picture her friend took of her holding the ticket stub and a Penn & Teller t-shirt from the show.
  - She took Friday off from work after telling her supervisor that she was feeling sick.

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### Does "What Happens in Vegas" Stay in Vegas?

- While attending a bachelor party in Las Vegas, Jerry was arrested for driving drunk down the strip, without any valid identification (he was naked), and for kidnapping (Mike Tyson was unconscious in the back seat).



- Jerry is a long-haul truck driver for On-Time Transport.

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### Does "What Happens in Vegas" Stay in Vegas?



- While in Las Vegas celebrating Uber Phone Co.'s launch of its first gadget, Product Engineers, Jim and Colleen had a little too much to drink at the celebratory dinner. They ended up sleeping together that night.
  - Both are married (not to each other) and work in the Cincinnati office together.

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### Does "What Happens in Vegas" Stay in Vegas?

- While at the annual sales convention in Las Vegas, Pat accidentally left behind her copy of Octane Drink Co.'s sales manual containing anticipated sales marketing programs with recommended pricing points.
  - Pat is one of Octane's top saleswomen.



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### Off-Duty Misconduct: Stays in Vegas?

- An employee's conduct outside of the workplace generally is not the employer's concern
  - **Conduct That Stays In Vegas**
- There are some laws that reinforce this statement
  - Privacy laws
  - Title VII protections
  - Union activities
  - Credit check ban
  - Tobacco use
  - Public sector employees constitutional issues
- Exception: When there is a nexus or connection to the workplace
  - Harm to Employer's reputation or business
  - Employee is unable to perform his or her duties or appear at work; or
  - Other employees refuse or refrain from working with the employee
  - **Conduct that does NOT stay in Vegas**

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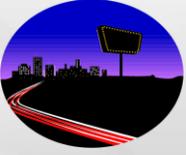
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## Conduct that Stays in Vegas



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## Privacy

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## Off-Duty Conduct that Stays in Vegas: Right to Privacy

- Tort claim in Oregon
  - Intentionally intrudes upon seclusion or private affairs
  - Intrusion is highly offensive
    - Bathroom video cameras
  - Tip: Employer owned equipment/property retain right to monitor/search



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### Off-Duty Conduct that Stays in Vegas: Right to Privacy in Social Media



- Employee sued chair manufacturer after she fell off the chair
- Chair manufacturer subpoenaed her Facebook & MySpace postings because publicly available pages revealed information inconsistent with her claims
- Court ruled no privacy violation
  - "In this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."
  - Romano v. Steelcase, Inc., 907 NYS 2d 650 (2010)

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### Off-Duty Conduct that Stays in Vegas: Right to Privacy in Social Media

- Employee was terminated for sending sexually offensive email attachments to co-workers, downloading sexual material, and storing them in a personal computer folder
- Sued claiming access to "personal folder" violated his privacy
- Employer maintained a policy warning employees not to use computers for personal use or sending offensive materials
- Court ruled there was no reasonable expectation of privacy because of the Employer's policy
  - Thygeson v. US Bancorp, 2004 US Dist. Lexis 18863 (D. Or. 2004)



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### Off-Duty Conduct that Stays in Vegas: Right to Privacy in Social Media



- During her employment, employee emailed her attorney using the company's email system
- Company Handbook prohibited personal emails, warned employees have no right to privacy using the company's email, and reserved to the employer the right to inspect all files/messages
- Court concluded no expectation of privacy in emails
  - Holmes v. Petrovich Development Co., LLC, 191 Ca App. 4th 1047 (2011)

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## Off-Duty Conduct that Stays in Vegas: Right to Privacy in Social Media

- Legislative Efforts Protecting Privacy in Social Media
  - Employers requesting Facebook log-in information
    - In 2012, 4 states (MD, IL, CA, & MI) passed statutes prohibiting an employer from asking for an employee's social media username and/or password.
    - 2013: AR, CO, IL, NV, NJ, NM, OR, UT, WA enacted similar legislation; CA and IL amended and added to existing laws.
    - 2014: LA, ME, NH, OK, RI, TN, WI.
    - 2015: similar laws enacted in CT, DE, MT, VA; IL, MD, and Oregon amended and added to existing laws.
    - 2016: similar laws enacted in NE, WV; legislation pending in AK, IL, MA, MI, NY.



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## Off-Duty Conduct that Stays in Vegas: Right to Privacy in Social Media

- Oregon's Social Media Law
  - 2013 (very similar to Washington – also passed 2013):
    - Employers can't require or request access to employee/applicant social media accounts
    - Employers can't force employee/applicant to "friend" them
    - Anti-retaliation provision if employee/applicant refuses
    - Employer may conduct investigations if employer has specific information about employee's online activity (misconduct) and employer may "shoulder surf" to accomplish investigation
      - But can't compel disclosure of passwords or authentication information during course of investigation
  - 2015:
    - Employer can't force employees to set up a social media account
    - Employer can't demand company advertising on personal social media accounts

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## Title VII

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## Off-Duty Conduct that Stays in Vegas: Title VII Protections

- Religious beliefs and practices are protected
  - But no need to accommodate such practices/beliefs in workplace if undue burden
    - *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9<sup>th</sup> Cir. 2004)(no Title VII violation for terminating employee for posting Bible verses denouncing homosexuality at work after having been warned)
    - *EEOC v. Serrano's Mexican Restaurants, LLC*, 2007 WL 505342 *aff'd* 2009 WL 20962 (9<sup>th</sup> Cir. 2009)(no Title VII violation for terminating employee who led after-work Bible study in violation of non-fraternization policy)



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## Union Activity

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## Off-Duty Conduct that Stays in Vegas: Union Activities



- Employers cannot interfere with or discriminate against employees who are engaged in Union activities during their off-duty time
  - Private Sector: *Nashville Plastics Products*, 313 NLRB 462 (1993)
  - Public Sector: *IAFF, Local 1817 v. Jackson County Fire District, No. 3*, 12 PECBR 656 (1991)

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### Off-Duty Conduct that Stays in Vegas: Union Activities in Social Media

- Off-duty Union activities may include use of social media
  - *American Medical Response*, 34-CA-12576 (2010)(Complaint issued for posting "company allows a 17 [psychiatric patient] to be a supervisor")
  - *Hispanics United of Buffalo, Inc.*, 2011 WL 3894520 (3-CA-27872, 2011)(finding illegal terminations when employees complained about another co-worker and their terms and conditions of employment)



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### Off-Duty Conduct that Stays in Vegas: Union Activities in Social Media

- No Union activity if posts are solely by and on behalf of employee's self without any inducement for group action
  - Complaining about no raise in 5 years and customers are red-necks with step-sister
    - *JT's Porch Saloon & Eatery, Ltd.*, 13-CA-46689, GC Advice Memorandum (2011)
  - Comments about working at a spooky mental institution with non-employees
    - *Martin House*, 34-CA-12950, GC Advice Memorandum (2011)
  - Calling assistant manager a "super mega puta" for counseling employee about product placement without any inducement for group action among co-workers
    - *Wal-Mart*, 17-CA-25030, GC Advice Memorandum (2011)

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### Off-Duty Conduct that Stays in Vegas: Credit Check Ban



- ORS 659A.320 prohibits employers from obtaining or using an applicant's or an employee's credit history for employment purposes
  - Exceptions:
    - Federally insured banks
    - Law enforcement agencies
    - Substantially related to job
- Fair Credit Reporting Act 15 USC 1681 *et seq*
  - Applies with outside investigators
    - Notice
    - Authorization
    - Notice before adverse action
    - Notice after adverse action

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## Tobacco

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### Off-Duty Conduct that Stays in Vegas: Tobacco Use



- Illegal for employers to require employee or applicant refrain from using lawful tobacco during nonworking hours
  - Exceptions
    - Bona Fide Occupational Qualification
    - Collective Bargaining Agreement
  - ORS 659A.315

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# Constitution

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## Off-Duty Conduct that Stays in Vegas: Public Sector Constitutional Issues

### • First Amendment: Free Speech

- Speech made by an employee pursuant to *official duties* is NOT protected by the 1<sup>st</sup> Amendment
- Speech made by an employee in his/her capacity as a *citizen* may be protected:
  - If speech is public concern, the speech may be restricted as necessary to operate efficiently and effectively
    - *Garcetti v. Ceballos*, 547 U.S. 410 (2006)



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## Off-Duty Conduct that Stays in Vegas: Public Sector Constitutional Issues

### • First Amendment: Free Speech

- While a nurse at a public hospital was being issued a ticket for speeding, she told the officer that she "hopes to never see him as a patient"
- The officer called her supervisor and she was fired immediately
- She sued claiming First Amendment violation
- Court concluded she failed to prove her comments were of a public concern
  - *Leverington v. Colorado Springs*, 643 F.3d 719 (10<sup>th</sup> Cir. 2011)



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### Off-Duty Conduct that Stays in Vegas: Public Sector Constitutional Issues



- After winning re-election, Sheriff Roberts terminated those employees who "liked" his opponent's Facebook page
- Lower court found that the "like" button was not constitutional speech, because it was "not the kind of substantive statement that has previously warranted constitutional protection."
  - *Bland v. Roberts*, 2012 WL 1428198 (E. D. Va 2012)
- On appeal, 4<sup>th</sup> Circuit reversed, holding that "liking" the opponent's page was "pure speech" and "symbolic expression," reasoning that "on the most basic level, clicking the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement."
  - *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013)

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### Off-Duty Conduct that Stays in Vegas: Public Sector Constitutional Issues

#### • First Amendment: Free Speech

- Off-duty firefighter criticized the mayor for cutting his diving team when two boys had recently drowned near the town
  - Stated, "I knew I was watching a seven year old boy being condemned to death because we had no dive team."
- The mayor suspended him for 3 days for insubordination, dishonesty, and conduct unbecoming
- Court concluded he was a private citizen speaking on a matter of public concern and, thus, it was protected speech
  - *Westmoreland v. Sutherland*, 662 F.3d 714 (6<sup>th</sup> Cir. 2011)



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### Off-Duty Conduct that Stays in Vegas: Public Sector Constitutional Issue



#### • First Amendment: Free Speech

- No violation for terminating police officers who participate in and sell pornography on the internet
  - *City of San Diego v. Roe*, 543 U.S. 77 (2004)
  - *Dibble v. Chandler Police Dept.*, 515 F.3d 918 (9<sup>th</sup> Cir. 2008)
  - *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342 (11<sup>th</sup> Cir. 2006)

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### Off-Duty Conduct that Stays in Vegas: "Ban the Box": Background

- Why?: Disparate impact on minorities. Recent DOJ studies found:
  - White men: 5.9% expected to go prison in their lifetime
  - Hispanic men: 17.2%
  - African American men: 32.2%
  - 28% of all arrests are African Americans
    - Imprisonment rate 7x higher than Whites, 3x higher than Hispanics
  - African Americans and Hispanics more likely to be arrested, convicted, sentenced for drug charges than Whites, even though drug use rates are similar.
- 2012: EEOC issues enforcement guidance that use of criminal history in making employment decisions may violate Title VII on basis of race and national origin.

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### Off-Duty Conduct that Stays in Vegas: "Ban the Box": Background

- Where: 24 states have adopted "Ban the Box" legislation – most in last 5 years
  - California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, **Oregon**, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin.
  - Of those, 9 have removed conviction history questions from job applications of private employers (CT, HI, IL, MA, MN, NJ, OR, RI, and VT).
- In addition, as of October 2016, over 150 cities and counties (and counting) have passed some form of "Ban the Box" initiatives

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### Off-Duty Conduct that Stays in Vegas: Oregon "Ban the Box" Legislation

- Refresher:
  - Oct. 2007: Mult. Co. removes questions about criminal history from job apps
  - July 2014: PDX removed language from applications from city employee positions
- HB 3025 – Became effective Jan. 1, 2016
- What does it prohibit?
  - Can't ask job applicants about criminal history on initial application
  - Applies to public and private employers
- Exceptions:
  - If conviction would automatically disqualify applicant
  - Law enforcement/criminal justice positions
  - Volunteers
- What is not prohibited?
  - Can ask about criminal history:
    - during interview
    - after conditional offer of employment has been made
  - Can still conduct criminal background check
- Enforced by BOLI

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### Off-Duty Conduct That Stays In Vegas: Oregon "Ban the Box" Legislation

- Portland's Stricter Ban the Box Ordinance, effective July 1, 2016
  - Impacts employers with 6+ employees
  - Unlike the state law, Employers in Portland can't inquire about criminal background history until after a conditional offer of employment has been made.
  - Also can't consider:
    - Arrests not leading to a conviction (unless charges pending)
    - Expunged convictions
    - Charges not involving attempted/physical harm, resolved through a diversion program
  - And, if learn about criminal history after making conditional offer of employment, Employer can only rescind if the employer can determine the rejection is job-related and consistent with business necessity.
- Employers who want to rescind the job offer after learning of conviction that is job related and consistent with business necessity must be prepared to perform Individualized Assessments
  - Factors include:
    - Nature/gravity of offense
    - Time elapsed
    - Nature of employment held or sought

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### Off-Duty Conduct that Stays in Vegas: "Ban the Box": What about Washington?

- Seattle Ordinance - 2013:
  - "Box" banned from applications – can still do criminal background checks
    - Can't post ads requiring "clean" criminal history
  - Applicant must be given opportunity to explain criminal history
    - i.e., can still run background check but must apprise the applicant, hold the job open for 48 hours to give applicant opportunity to explain.
  - Employer can't deny applicant solely based on conviction record
    - Employer can deny applicant if have "legitimate business reason" (A good faith reason to believe applicant will pose a harm to people, property, or business reputation)
    - So, if conviction related to job responsibilities or environment, can deny
  - Applies to public/private employers
  - Applies if job will be performed at least 50% of time in Seattle
- Spokane, Tacoma, and Pierce County have legislation removing "the box" from most public sector jobs.
  - Tacoma: Background checks can't be performed until after conditional offer has been made.

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### "Ban the Box" – What if current employee lied on pre – "Ban the Box" job application?

- Hypothetical: Employer's job applications had "box" prior to legislative ban. Applicant didn't check the box - despite having felony record - and was offered employment. Fast forward, "Ban the Box" is in effect and Employer discovers applicant employee lied on his or her application. Employer now wants to fire and/or otherwise discipline the employee.



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## “Ban the Box” – What if current employee lied on pre – “Ban the Box” job application?

- Some Considerations
  - At-will employment: termination for dishonesty is lawful
    - Beware of employee who is engaging in protected activity or is part of a protected class that may argue termination reason (lying) is pretext for unlawful discrimination
  - Wrongful Termination tort: termination that violates a law, contract or public policy
    - No case law (yet! - don't want to be a test case!)
  - After-acquired evidence rule: doctrine used by employers defending lawsuits that limits liability if employer can show wouldn't have hired employee anyway
    - Tenuous position if arguing that wouldn't have hired employee based on practice that is now prohibited
  - Potential adverse publicity
  - Bottom line: be cautious!

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## FLSA

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## Off-Duty Conduct that Stays in Vegas: FLSA Smartphone Issues

- *Allen v. City of Chicago*, 2015 WL 8493996 (Dec. 10, 2015, N.D. Ill.):
  - Police sergeant in Chicago P.D.'s Bureau of Organized Crime brought class action for work phone calls and reading and responding to work emails and texts during off-duty hours on his BlackBerry after he was transferred to less prestigious position. Chicago PD has process in place that allows employee to report uncompensated work time.
  - Court held: to be “compensable” under FLSA, the work must involve “substantial” duties pursued necessarily and primarily as part of a person’s job.
    - Examples of “compensable time”: responding to witness tips or emergency situations, reaching out to confidential informants, gathering information in support of investigations.
    - “de minimis” activities don’t apply (e.g., the mere act of monitoring phone while off duty)
  - However, the Court ultimately dismissed the lawsuit because the Plaintiffs failed to utilize the PD’s “reasonable process” for submitting/reporting uncompensated work time.
  - **Appeal pending in 7<sup>th</sup> Circuit.**
- *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352 (2d Cir. 2011):
  - Certain Black & Decker “retail specialists” were assigned to market specific Home Depot stores. Employees did not report to a central office, but used home as a base where they were expected to perform administrative duties such as reading and responding to company emails, checking voicemails, printing and reviewing sales reports, etc., but were instructed to not put more than 40 hours on their time sheets
  - Class action eventually settled

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### Off-Duty Conduct that Stays in Vegas: FLSA Smartphone Issues

- Other considerations regarding off-duty smartphone usage
  - DOL: proposed new OT rule that would raise minimum salary from \$23,660 to \$50,440 before employee may be classified as exempt
  - FLSA: employers are responsible for paying OT when they know or should know an employee is working after hours
    - E.g., receiving email from non-exempt employee after work hours
    - De Minimis Exception: 3 factor test
      - Practical administrative difficulty of recording additional time
      - Aggregate amount of compensable time
      - Regularity of the additional work
- Employer options?
  - OT policies that include disciplinary component; train employees/managers; "delayed delivery" on emails
  - Volkswagen approach?: In 2011, Volkswagen cut off corporate email between 6:15 p.m. and 7 a.m. for 4,000 employees in Germany

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### Off-Duty Conduct that Stays In Vegas: FLSA Issues

- *Integrity Staffing Solutions v. Busk*, 135 S.Ct. 513 (2014)
  - Hourly warehouse staffers for Amazon were required to undergo security screening for approximately 25 minutes before leaving the warehouse each day without compensation
  - Supreme Court reversed the 9<sup>th</sup> Circuit, holding that going through security screenings before leaving the workplace is not an "integral and indispensable" part of the employee's principal activities, and therefore not compensable time under the FLSA.



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### Off-Duty Conduct that Does NOT STAY IN VEGAS



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### Off-Duty Conduct that Does Not Stay in Vegas

- Typical off-duty misconduct for which discipline may be appropriate
  - Moonlighting
  - Breach of confidentiality
  - Insubordination
  - Fraternalization
  - Statutory Discrimination
    - Duty to investigate and remedy known off-duty conduct
      - *Espinosa v. County of Orange*, 26 AD Cases, 2012 WL 420149 (Cal. App. 4 Dist. 2012); *Blakey v. Continental Airlines, Inc.*, 164 NJ 38 (2000)



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### Off-Duty Conduct that Does Not Stay in Vegas

- Medical & Recreational Marijuana
  - Both are legal in Oregon
    - Employers may discipline for positive marijuana employment drug test
  - Medical marijuana is still illegal under federal law
  - Lawful, off-duty use of medical marijuana pursuant to state law is still a terminable offense, because marijuana is still illegal under federal law
    - *Coats v. Dish Network, LLC.*, 350 P.3d 849 (Colo. 2015)
  - Oregon: Employees engaged in the illegal (including federal law) use of drugs are not entitled to a reasonable accommodation.
    - *Emerald Steel Fabricators v. BOLI*, 348 Or 159 (2010)



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### Off-Duty Conduct that Does Not Stay in Vegas

- Illegal Activity/Arrests of current employees (remember "Ban the Box" limits on consideration during hiring phase)
  - Nature of arrest
    - Misdemeanor/felony
  - Duties of job and ability to perform
    - Loss of license?
  - Future liability of employer
    - Negligent retention
  - Conduct own investigation
  - Consider other policies that may impact
    - Attendance or failure to report
  - Fair Credit Reporting Act



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### Off-Duty Conduct that Does Not Stay in Vegas

- Work-related communications on personal cell phone
  - *Nissen v. Pierce County* (WA Supreme Court, August 27, 2015) – action for public records of prosecutor’s text messages
  - Court held that texts sent by public employees within the scope of employment are public records under Washington’s Public Records Act.
  - “An employee’s communication is ‘within the scope of employment’ only when the job requires it, the employer directs it, or it furthers the employer’s interests.”
    - i.e., not a spouse’s request to pick up milk on the way home from work.
  - Even if text is “public record,” Employer must still provide exemption log if requested



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### Off-Duty Misconduct Labor Arbitrations



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### Off-Duty Misconduct Labor Arbitrations

- Just Cause
  - Proof of misconduct
  - Procedural due process
    - Full and fair investigation
  - Punishment fit the misconduct
  - Connection to the workplace: Kesselman Factors
- Kesselman Factors
  - 1. Harm to Employer’s reputation or business
  - 2. Adversely affects employee’s ability to perform his or her duties or appear at work; or
  - 3. Other employees refuse or refrain from working with the employee
    - *W.E. Caldwell Co.*, 28 LA 434 (Kesselman, 1957)

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### Off-Duty Misconduct Labor Arbitrations: Connection to Workplace: Kesselman Factors



- Harm to Employer's reputation or product**
  - Amount of adverse publicity**
    - Waste water treatment plant employee convicted of arson and conspiracy
    - No nexus because newspaper did not disclose employee's city employment
      - City of Joliet, 108 LA 7 (Cox, 1936)*
    - Termination upheld for employee's postings on MySpace calling his supervisor a "Green Card Hitler"
      - Baker Hughes Co., 128 LA 37 (Baroni, 2010)*
    - 10,000 views on blog

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### Off-Duty Misconduct Labor Arbitrations: Connection to Workplace: Kesselman Factors

- Harm to Employer's reputation or product**
  - Likelihood of loss of business**
    - Clerk in a liquor store was convicted of manufacturing moonshine liquor
    - Liquor store license could not be renewed
      - Great Atlantic & Pacific Tea Co., 45 LA 495 (Livengood, undated)*
  - Notoriety, type, and seriousness of misconduct**
    - Gay employee was discharged after hosting a house party during which there were homosexual activities
    - Disapproval does not satisfy just cause
      - Rabsh's Grocery Co., 77 LA 867 (Kaufman, 1981)*



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### Off-Duty Misconduct Labor Arbitrations: Connection to Workplace: Kesselman Factors

- Harm to Employer's reputation or product**
  - Nature of the employee's position with the employer**
    - Some positions are held to a higher standard: teachers, police, and fire personnel
    - Manager of community center was charged with cocaine possession
    - Upheld termination because his job works with senior citizens and youth groups, and is even responsible for rehabilitation of persons convicted of crimes
      - Wayne State University, 87 LA 953 (Lipson, 1986)*
  - Nature of Employer's business**
    - Chemical plant employee's conviction for arson justified termination
    - Work environment with flammable and explosive chemicals presents a clear danger of repetition of arson
      - Occidental Chem. Corp., 97 LA 585 (Duff, 1991)*



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#### 2. Adversely affects employee's ability to perform his or her duties or appear at work

- In jail is not off-duty misconduct; instead it is absenteeism
- If cannot perform the duties, discipline is appropriate
  - Driver's license was required to perform the job and loss of license because of a DUI afforded just cause terminating the employee
    - *Scioto County Engineer*, 116 LA 462 (Imundo, Jr., 2001)



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#### 3. Other employees refuse or refrain from working with employee

- Discharge of food service aide who was convicted of stabbing his former wife was upheld because co-workers expressed concern about his return
  - *North Oakland Medical Centers*, 106 LA 488 (Daniel, 1996)



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### Off-Duty Misconduct Labor Arbitrations: Just Cause

- At the end of a Muscular Dystrophy fundraiser for the union, Grievant passed out beers (which he brought) to the adult volunteers
- Volunteers, including the Grievant, drank the beer with a napkin covering the can
- He then drove the ladder truck back to the station
- Fire Chief issued an 8 shift suspension to the Grievant, but didn't issue discipline to those drinking
- Arbitrator reduced the discipline to a two (2) day suspension because punishment did not fit the misconduct
  - *IAFF v. Lebanon Fire District* (Fallon, 2011)



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## What Happens in Vegas, Doesn't Always Stay in Vegas

- Not all employee off-duty misconduct may be subject to discipline
- Best approach is to:
  - Regulate off-duty conduct when there is a legitimate operational or business need
  - Analyze the connection between the conduct and the employee's job
  - Use balanced judgment on a case-by-case basis



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## Thank You



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ON THE FRONT LINES OF WORKPLACE LAW™

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