

Labour & Employment

Dismissing the alt-right employee, with and without cause

By **Stuart Rudner**



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(September 5, 2017, 8:25 AM EDT) -- What can you do if one of your employees is caught "on tape" (as we used to say) at a rally of white supremacists / neo-Nazis, avidly chanting racist, anti-Semitic and other offensive slogans?

Or if one of your employees has a personal blog proclaiming their belief that the white race is the only pure one and that blacks, Jews, Muslims and others are inferior and should be exterminated like the Nazis attempted to do?

Or if one your professionals has a side business running a neo-Nazi record label with artists that write offensive lyrics.

The simple answer is that in most cases, you can dismiss an employee if you find their views unpalatable. However, you will have to provide them with severance pay unless you can prove that you had just cause to dismiss them.

"Outing" people has taken on a whole new dimension in recent years. After the recent conflict in Charlottesville, Va., people quickly took to social media to identify the white supremacists, neo-Nazis and others supporting the alt-right. Interestingly, they also identified their employers, putting their employment in jeopardy. Within days, there were reports that at least one person had lost their job.

Generally speaking, what an employee does on their own time is their own business. However, the law has always provided for discipline and dismissal as a result of off-duty conduct in limited circumstances. Historically, this was not a common occurrence. However, the rise of technology and social media have made the laws regarding off-duty conduct more relevant.

In the past, an individual might have joined his colleagues for a beer after work and complained about his boss. He had a small audience, and there was no record of what he said. Now, it is more likely that an employee will take to Facebook or Twitter to bash their boss, leaving a permanent record of their ill-conceived words, which were viewable by a tremendous audience. Or, as in those in Charlottesville, people may have done something anonymously while off-duty, and that would have no consequences on their employment.

Now, with almost everyone carrying a camera in their pocket and the ability to easily mass-distribute photos, behaviour that would previously have stayed "below the radar" will often be widely seen. A great example is the man who was immediately dismissed after a video of him yelling sexually inappropriate comments at a female news reporter went viral. He was quickly identified as an employee of Hydro One, who immediately dismissed him (although he was subsequently reinstated after grievance arbitration). You can see my blog post on this incident on my website.

In recent years, we have seen many situations in which individuals have lost their jobs as a

result of off-duty conduct. More often than not, it involves ill-advised comments on social media. Usually, the comments have nothing to do with their job or their employer, other than the fact that they cause the employer embarrassment.

Dismissing an employee in most states, which have laws based on "employment at will," is pretty easy. In Canada, employees enjoy greater protection, although job security is generally limited to those who are unionized or the small percentage of workers who are federally regulated and not in managerial roles. The question at the beginning of this article relating to an employee of a professional services firm and is based on the true story of Aaron Davis, a lawyer with a Patterson Thunete, a Minneapolis law firm, who was also the owner of a record label specializing in white supremacist-themed heavy metal. He was fired shortly after his second job came to light.

The only other exception to the principle that employers can dismiss an employee at any time and for any reason is based on human rights legislation. In most Canadian jurisdictions, this legislation does not protect political views, though it does in Newfoundland, British Columbia, Manitoba, Quebec, Nova Scotia, Prince Edward Island, New Brunswick, Yukon, and Northwest Territories.

Aside from those exceptions, employers have the right to dismiss an employee at any time for almost any reason, or no reason at all. However, the employee would be entitled to notice of dismissal or severance pay unless just cause for dismissal existed. In other words, there would be nothing stopping an employer from deciding that they do not want someone who holds such offensive views in their organization and terminating the relationship.

Paying a hefty severance package to a racist, homophobe, anti-Semite, or sexist may be quite unpalatable for some employers. The only other option is to dismiss the employee for just cause. That will be far more complicated. As I have expressed in many contexts, including my book, *You're Fired! Just Cause For Dismissal In Canada*, the issue of when just cause for dismissal exists is extremely complex. Every situation must be assessed based upon its own particular circumstances, and the assessment of whether an employer is justified in summarily dismissing an employee will depend not only upon the misconduct in question, but all relevant factors. This is referred to as the contextual context.

Off-duty conduct can justify discipline (including dismissal) where the conduct impacts either the reputation of the organization, or the working relationship. For example, if one of the demonstrators was identified as an employee of a particular company, presumably that would damage the company's reputation. Discipline would be warranted, and dismissal might be, once all relevant factors are taken into account.

The argument for summary dismissal would be even more compelling if other employees came to management and expressed their discomfort working with this individual, as it would have a clear impact on the working relationship. That said, there's at least one case where such circumstances were insufficient to justify summary dismissal.

In *EV Logistics v. Retail Wholesale Union, Local 580*, the employer received an anonymous e-mail from an employee concerned about the contents of another employee's blog which expressed support of Nazi Germany and mentioned the employer's name. As a result, his employment was terminated. The employee successfully grieved the termination, and the wording of the decision suggests that the arbitrator was influenced by his view that the grievor was more of a naïve kid than an evil racist. I suspect that in other circumstances, or before a different adjudicator, a different verdict would have been reached.

So what can you do if you discover that one of your employees is a neo-Nazi or white supremacist? In almost all cases, you will be able to terminate the relationship. The only question will be whether you have just cause to do so, or whether you will have to do so without cause basis and provide them with some severance pay.

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