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Off-Campus and Off-Duty Employee Misconduct

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I. INTRODUCTION

Off-duty off-campus conduct by employees presents a challenge to even the most seasoned administrator and attorney. When a school district employee engages in social networking that is discovered by a student, commits a crime that shows up in the police blotter, or engages in a highly publicized unpopular activity away from school, it can affect the community's trust in the school district and the employee's ability to do his or her job. On the other hand, employees of educational institutions have rights that limit the disciplinary reach of their employers. Statutes, collective bargaining agreements, and the Constitution can all provide protection for employees in these situations and must be considered *before* disciplinary action is taken or before it is presumed permissible.[1]

[1] *This material is designed to provide accurate and authoritative information in regard to the subject matter covered. It is presented with the understanding that the presenters are not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought for the particular circumstances.*

II. A FRAMEWORK FOR MANAGING OFF-CAMPUS CONDUCT AND POSSIBLE DISCIPLINE

A myriad of circumstances can arise in which discipline might be warranted for off-duty misconduct. Thinking through the following can help an employer to assess whether discipline is permissible and, if challenged, to show that the discipline decision was made with due regard for the employee's rights.

1. What is the employee's position, and what are the legal parameters of discipline?

   a. At-will employee?

   b. Executive with a contract?

   c. Teacher or administrator under the Accountability for Schools in the 21st Century Law?

   d. Just-cause employee through collective bargaining agreement?

2. What are all the pertinent facts?

   a. Time and place—is there a relationship to school or a school event at all?

   b. Were students involved in the situation?

   c. Were minor children but not students involved in the situation?

   d. Has there been publicity that could compromise the person's ability to do his or her job effectively?

   e. Do Morrison factors (page 5 below) weigh in favor of discipline?

3. Have procedural considerations been addressed?

   a. Due process—notice and an opportunity to be heard?

   b. Any collective bargaining agreement provisions?

4. Does the conduct involve activity protected by the Constitution, such as someone's speech or association? Does it involve activity protected by statute? If so, what additional evaluation must be conducted?

5. How can the district manage possible publicity/community knowledge?

If there will be discipline, what facts specifically relate to school operations, and how do they relate? The employer should keep a record of this evaluation and consider

describing the relationship of the conduct and its impact on school operations in the dismissal letter.

III. LEGAL CONSTRAINTS AND THEIR RELATIONSHIP TO OFF-DUTY MISCONDUCT

A. At-Will Employment.

Apart from any restriction imposed by a law or contract, an employer and employee are entitled to end the employment relationship at any time and for any reason. School districts typically have few at-will employees, but sometimes they are found in the administrative ranks, or occasionally confidential or other nonbargained employees are at will.

School districts must be careful, however, not to assume that an employee is at will just because he or she is not in a bargaining unit. Some districts have policies—perhaps progressive-discipline policies—that effectively impose "just cause" types of standards on employees without agreements. Similarly, under ORS 342.549, administrators not subject to the Accountability for Schools in the 21st Century Law are supposed to have employment contracts. Those contracts sometimes either explicitly or implicitly impose restrictions on when a district can end the employment relationship.

Dismissal of an at-will employee for off-duty misconduct is permissible but not risk-free. If an employee truly is at will, in theory an employer can dismiss for conduct that occurs off duty. But a district must be careful not to jump to a conclusion that there is no risk in ending employment for someone who is at will. An at-will employee cannot have his or her employment terminated for exercising free-speech or association rights, for example, or in violation of nondiscrimination or nonretaliation statutes. And an employee who is at will may assert that the U.S. Constitution provides a measure of substantive protection from dismissal when there is absolutely no rational link to employment, although in such a case the employer can argue that no property right in employment gives rise to such a right. (See Section B.2 below.)

And although discrimination or retaliation might not be the reason for dismissal of an at-will employee engaging in off-duty misconduct, a school district may risk an inference of discrimination if it has treated others in different classes/statuses differently. Consider a situation in which a minority at-will employee loses employment because he was arrested for reckless endangerment after driving at an excessive speed. That is a legitimate nondiscriminatory reason for termination. But if an employee who is not a minority received a reprimand for the same or similar conduct, a court or administrative agency might find that the employee's protected status, not the conduct, motivated the harsher treatment and the school district is at risk for a discrimination claim.

B. Constitutional Issue: Due Process, Free Speech, and Free Association.

School districts are governmental entities, and as a result they are constrained by constitutional rights of employees. Most pertinent with respect to off-duty misconduct are protections related to due process and individual freedoms under the First Amendment.

1. Procedural Due Process.

Due process arises under the Fifth Amendment. Under it, the government cannot take a person's property without "due process," which is notice and an opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill, 470 US 532 (1985). While one should not understate the importance of due process, it is probably the simplest of the constitutional provisions to satisfy in the employment relationship. The first question under a due-process case is whether the employee has a property right in his or her employment. Property rights are created and defined by laws and contracts. Property rights for school district employees typically come from collective bargaining agreements, the Accountability in Schools for the 21st Century Law, or contracts. Once a property right is established, then an employer must give an employee notice that it is considering "taking" the property (by dismissal from employment) and the employee must have an opportunity to be heard. Loudermill, 470 US at 541-42.

2. Substantive Due Process.

Due process also restricts a public employer from infringing on a property right if there is not some rational relationship to employment. Norton v. Macy, 417 F2d 1161, 1164 (DC Cir 1969). These constitutional cases typically arise out of alleged immorality under teacher-tenure statutes and touch on private conduct. Historically, these issues included dismissals based on sexual activity at home or off duty under which an employee has a privacy right and also when there has been no link to school activity or duties associated with employment. Typically, these issues arise under collective bargaining agreement just-cause evaluations, so constitutional cases are somewhat uncommon.

3. Free Speech and Free Association.

Under the First Amendment, an employee may not be disciplined for speaking on a matter of public concern unless the employee's interest in such speech is outweighed by a reasonable belief on the part of the administration that the speech will disrupt the school, undermine school authority, or destroy close working relationships. Pickering v. Bd. of Educ., 391 US 563 (1968). This is often a difficult calculus.

These principles apply for speech and association related to school, and become stronger when speech is made away from school. Imagine, for example, a teacher with strong political leanings that run contrary to the sentiment of the majority of the community members of the school. If the teacher is an outspoken supporter of the less popular viewpoint on an issue, but keeps his or her engagement outside of school, it is very risky to discipline the teacher.

Similarly, Oregon's whistleblower statute often walks hand in hand with a First Amendment claim. It precludes public employers from prohibiting any employee from disclosing, or taking or threatening to take disciplinary action against an employee for the

disclosure of, any information that the employee reasonably believes is evidence of, among other things:

1. "A violation of any federal or state law, rule or regulation by the state, agency or political subdivision";

2. "Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision." ORS 659A.203.

Of course, a substantial amount of information could fall within the category of "disclosure" of mismanagement. Thus, anytime an employee is engaging in speech activity, a school district should proceed with extraordinary caution before dismissing from employment.

C. Collective Bargaining Agreements and Just Cause.

Most collective bargaining agreements require discipline or discharge to occur only when an employer has "just cause" or "cause" for the discipline. There are various formations of the just-cause standard, but in general, arbitrators applying just-cause standards are looking for fairness and will overturn discipline if an employer cannot show a demonstrable connection between the misconduct and the job. Some arbitrators consider the following factors when evaluating off-duty conduct from a California case, Morrison v. State Bd. of Educ., 461 P2d 375 (Cal 1969):

1. the likelihood that the conduct may have adversely affected students or other employees;

2. the degree of the adverse effect;

3. the proximity or remoteness in time of the conduct;

4. the type of certificate or license held (if any);

5. mitigating or aggravating circumstances;

6. praiseworthiness or blameworthiness of motives resulting in the conduct;

7. the likelihood of reoccurrence of the conduct; and

8. the extent to which punishment might affect constitutional rights of the employee.

Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 1312 (Alan Miles Ruben ed, 6th ed 2003).

Considering these factors and keeping a record of how they were considered is very helpful in case of a challenge.

D. Accountability for Schools in the 21st Century Law.

Licensed teachers and administrators are subject to ORS 342.805 to 342.937, the Accountability for Schools in the 21st Century Law. Under these statutes, a probationary teacher or administrator can be discharged for any cause that a school board believes is, in good faith, sufficient. While this is not technically "at will," this standard for probationary employees is not far from it.

Contract teachers and administrators, however, may not be dismissed except for certain statutory grounds. Some statutory grounds relate directly to performance, such as inefficiency, insubordination, and inadequate performance. Others contemplate some circumstances in which off-duty misconduct may result in dismissal, such as immorality, conviction of certain crimes, or perhaps "neglect of duty." ORS 342.865.

IV. CASES AND LEGAL CHALLENGES

A. Constitutional Issues.

1. Free Association/Speech.

Melzer v. Bd. of Educ., City of New York, 336 F3d 185 (2d Cir 2003). This case addressed the First Amendment right to associate with whomever a person pleases and for whatever purpose. The plaintiff, who had taught school in New York City for 30 years, was a member of the North American Man/Boy Love Association ("NAMBLA"). The teacher was a self-described pedophile, but never engaged in any illegal or inappropriate conduct at school. The teacher was very active in NAMBLA. In the mid-'80s, the teacher was investigated following an anonymous letter to the school board stating that the teacher was a member of NAMBLA. No action was taken at that time. An investigation was reopened a few years later, and a local television station featured a secretly recorded video of a NAMBLA meeting. The teacher was recognizable in the video and could be seen advising another teacher to keep his membership secret until he became tenured. This media attention affected the school environment. Parents threatened to remove their children from school and conduct a sit-down strike at school if the teacher was allowed to return from the sabbatical that he was on at the time. City officials became involved, and the students themselves had an assembly to discuss the issues. The board of education ultimately decided to dismiss the teacher. The court applied a constitutional test whereby it weighted whether the disruption outweighed the constitutional right at issue. The court noted that First Amendment activity that is not undertaken at school is almost always protected, but nevertheless, the teacher's membership substantially disrupted the school environment. The court found that actual disruption had already occurred and that substantial disruption was likely to recur if the plaintiff returned as a teacher. Other evidence included an expert's testimony that some students would have trouble concentrating in the plaintiff's class. Because the plaintiff was a teacher who acted in loco parentis and instructed groups of students that included adolescent boys, it was reasonable to predict that parents would fear his influence and actions.

2. The Missouri Social Networking Law.

In the summer of 2011, Missouri's legislature passed a law restricting teachers from associating with students on social networking sites. The law precluded a teacher from using a non-work-related Internet site that allowed exclusive access to students. The Missouri teachers' union brought a lawsuit to stop enforcement of the law, and the suit succeeded because the court found that the law was overbroad—it prohibited conduct protected by the Constitution. http://www.msta.org/files/resources/publications/injunction.pdf. This decision does not, however, mean that reasonable work-related restrictions on social networking conduct by teachers or other school employees is uniformly protected. For example, a teacher who joined in bullying behavior toward a student on a social networking site would not be protected. Nevertheless, these cases present unique challenges, and as with any other discipline for off-duty conduct, a school district should proceed cautiously before disciplining a teacher for social networking activity.

B. Just Cause.

OSEA v. Springfield Sch. Dist., Boedecker, March 31, 2008. A maintenance worker with a good employment record was cited for driving under the influence of intoxicants but diverted the charge. The diversion resulted in a suspended license. He could obtain a hardship permit if he obtained a letter from his employer verifying a need to drive on the job. The arbitrator found that the district would not provide the letter because it might expose the district to higher insurance premiums. Although the parties' agreement did not have a just-cause clause, the arbitrator found that the employee had not violated any rule of the employer and as a result could not be discharged. Thus, although not a just-cause case, the case is instructive that it is helpful to have a rule that captures the misconduct when dismissing for off-duty misconduct.

C. Accountability for Schools in the 21st Century Law Cases.

1. In Ross v. Springfield Sch. Dist., No. FDA 80-1, aff'd, 56 Or App 197, rev'd and remanded, 294 Or 357 (1982), order on remand (1983), aff'd 71 Or App 111 (1984), rev'd and remanded, 300 Or 507 (1986), order on second remand (1987), revised order on second remand (1988), the Fair Dismissal Appeals Board (the "FDAB") and appellate courts struggled with off-duty misconduct. The teacher visited an adult bookstore, where he engaged in sexual acts. The district attorney brought an action against the bookstore to shut it down, and the teacher was named as a witness. News about the teacher reached the schools and community, and the teacher was dismissed for immorality.

After various appeals, the FDAB defined "immorality" as referring to selfish or malicious conduct that generally shows a disregard for the rights or sensitivities of others. It concluded that the teacher's acts met the standard because he had performed sex acts in a public location without regard to the sensitivities of others who might be present. The FDAB also determined that there must be a nexus between the conduct and the teacher's job duties to constitute grounds for dismissal. Here, because the community became aware of the conduct and had negative consequences, and because the teacher lost his ability to be a positive role model, a sufficient nexus existed.

2. In Shipley v. Salem Sch. Dist. No. 24J, No. FDA 81-24 (1982), rev'd and remanded, 64 Or App 777 (1983), order on remand (1984), the FDAB reversed dismissal for immorality in which the teacher had been sued by a boy in a Big Brother program and the boy prevailed. The complaint related to allegations of sexual touching. The FDAB determined that although the boy perceived the touching to be sexual, the teacher did not, and so the facts did not establish immorality. This is a difficult case, but demonstrates that for cases away from school the standard of proof may, as a practical matter, be higher.

3. In Kari v. Jefferson Cnty. Sch. Dist. No. 509-J, No. FDA 88-6 (1989), rev'd, 102 Or App 83 (1990), aff'd, 311 Or 389, on remand (1991), the FDAB and the courts struggled with off-duty misconduct. The teacher, as part of her duties, taught in a say-no-to-drugs program. She knew, however, that her husband had been using and selling marijuana out of her home where she, he, and her two children lived. After various appeals, the FDAB reversed the dismissal, finding that the teacher did not engage in immorality or neglect of duty.

4. Bergerson v. Salem-Keizer Sch. Dist., No. FDA 02-2 (2002), rev'd and remanded, 194 Or App 301 (2004), aff'd, 341 Or 401 (2006), like other cases under the Accountability for Schools in the 21st Century Law, took some time to wind through the courts. Here a teacher, during the course of a divorce, drove her van into the back of her husband's unoccupied truck during a confrontation. The FDAB initially found that the conduct met the ground of immorality but that dismissal was unreasonable and clearly excessive. The supreme court ultimately reversed the decision, determining that the FDAB ultimately had not explained what was unreasonable about the school district's actions. Ultimately the case settled after four years of litigation.

V. TRICKY ISSUES

A. Criminal Conduct.

There is no consensus among arbitrators about when off-duty criminal conduct will warrant discipline or dismissal. The considerations in the Morrison test described in Section II.C above are good issues to bear in mind when evaluating criminal conduct. An unpublicized driving under the influence is probably not a good case for an employer to take action. Shoplifting by a school principal did not warrant termination under one arbitration decision. Elkouri, supra, at 1314 n.50. On the other hand, fraud on the government (such as disability or welfare fraud) undermines the trust that an employer must have in many employment positions and probably presents a stronger case. Employers should be aware that when criminal conduct is involved, arbitrators often hold employers to a higher standard of proof of wrongdoing than for noncriminal conduct.

B. Criminal Investigations.

When criminal investigations are ongoing employers face difficult choices. Although nothing prohibits an employer from conducting its own investigation while a law-enforcement investigation is ongoing, law enforcement often wants the employer to abstain from conducting its own investigation because law enforcement fears interference with its processes.

Waiting for a conviction or plea can be helpful for an employer, but typically the employee must be on paid administrative leave pending criminal resolution, which can take some time. School districts should work to maintain positive relationships with local law enforcement to facilitate a cooperative investigatory effort that considers the legal and practical interests of all parties.

C. Publicity.

The Morrison factors and other cases do evaluate publicity. But publicity can be a dangerous area for an employer to hang its hat. First, the employee may have no control over publicity. Second, sometimes the school district takes steps that actually increase publicity—such as school board members' publicly condemning conduct. When publicity is outside of the teacher's control and not an expected result of the conduct, an employer should be wary about using it as a key justification for discipline or dismissal.