

Colorado's Off-Duty Conduct Statute Does not Protect Employee From Missing an Important Meeting Just Because He was on Pre-Approved Vacation

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Colorado, like a number of other states, has enacted a state statute that prohibits job action, such as termination of an employee, for engaging in lawful off-duty conduct during non-working hours. The Colorado statute contains two primary exceptions that allow employers to take job action if: (1) the off-duty activity relates to a bona fide occupational requirement or is reasonably and rationally related to the employee's employment activities and responsibilities; or (2) is necessary to avoid, or avoid the appearance of, a conflict of interest with any of the employee's responsibilities to the employer. Employers in Colorado (and states with similar laws) should be mindful of case law that seeks to morph the exceptions to fit modern technology and social trends.

Originally proposed by the tobacco industry to protect off-duty smokers from employment termination, the Colorado off-duty conduct statute has been consistently applied in a myriad of contexts far beyond off-duty smoking. For example, last year the Colorado Supreme Court held in *Coates v. Dish Network* that an employer did not violate the off-duty conduct statute when it terminated an employee for smoking marijuana while off work, even though possession of marijuana is legal under state law in Colorado. Because possession of marijuana remains illegal under federal law, the court concluded that smoking marijuana was not lawful off-duty activity.

In a recent case, *Williams v. Rock-Tenn Services, Inc.*, the Colorado Court of Appeals addressed the question of whether an employee who was terminated for failing to attend a work-related meeting while he was on pre-approved vacation triggered protection under the off-duty conduct statute.

The Colorado Court of Appeals affirmed the trial court's dismissal of the claim, finding that the employee's actions (missing a senior management meeting) were not protected under the Colorado statute. The court found that the employee's allegations established that the conduct was reasonably and rationally related to his employment activities, and was therefore excepted from the statute. Specifically, required attendance at a meeting to discuss a failed audit of the plant the employee managed was inherently connected with the employee's job. The court noted that the off-duty conduct statute is designed to protect employees from termination for private, personal activities, not from adverse employment consequences resulting from going on a vacation that conflicted with a meeting reasonably and rationally related to the employee's job. The court noted that, while firing the employee for missing a post-audit meeting to take pre-approved vacation may seem unfair, it was

within the company's business judgment to do so.

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