

45th Annual Montana Arbitration and Labor Relations Conference October 2, 2025

DRUGS, SEX & ROCK
N' ROLL

Arbitrators' Views of
Off-Duty Misconduct

SPEAKERS

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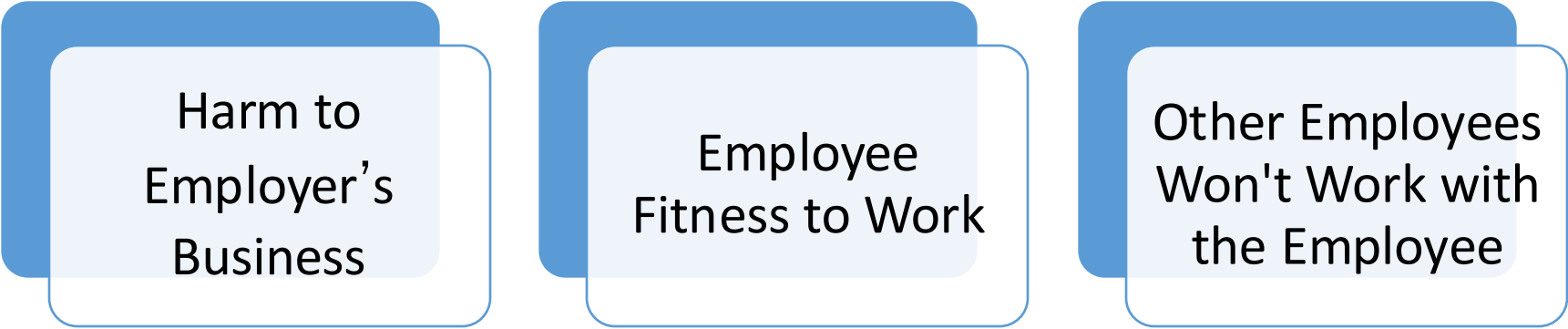
www.scottdisputeresolution.com

The Traditional Nexus Test

The Employer Can't
Discipline For Off-Duty
Conduct Without a
“Workplace Nexus”

Nexus is objective evidence
that connects the conduct
to the employee's ability to
do the job.

Ways to Prove Nexus



Harm to
Employer's
Business

Employee
Fitness to Work

Other Employees
Won't Work with
the Employee

Harm to the Employer

Notoriety

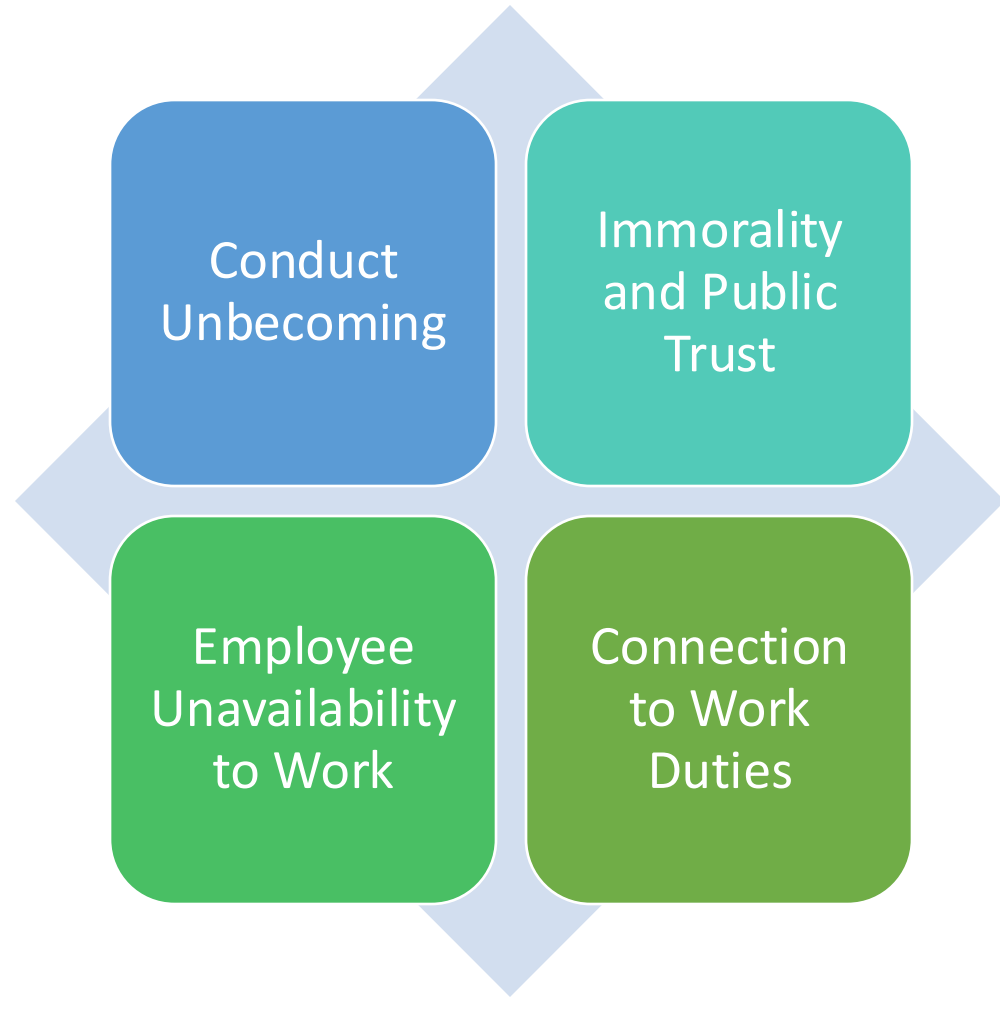
Disparagement (social media)

Provable Loss or Disruption to Business

Other Employees Refusal to Work



Fitness



Conduct
Unbecoming

Immorality
and Public
Trust

Employee
Unavailability
to Work

Connection
to Work
Duties

Are there differences?

Public Sector: “role model” arguments for police, fire, teachers etc.

Free Speech under Federal/State constitutional provisions?

Private Sector?

Examples of "Sex" Cases

Sexuality cases-
current focus on
trans and non-binary
identities (gender)

Sexual conduct at
work/not at work

Sexual harassment
esp. outside of work

Examples of Drug Cases

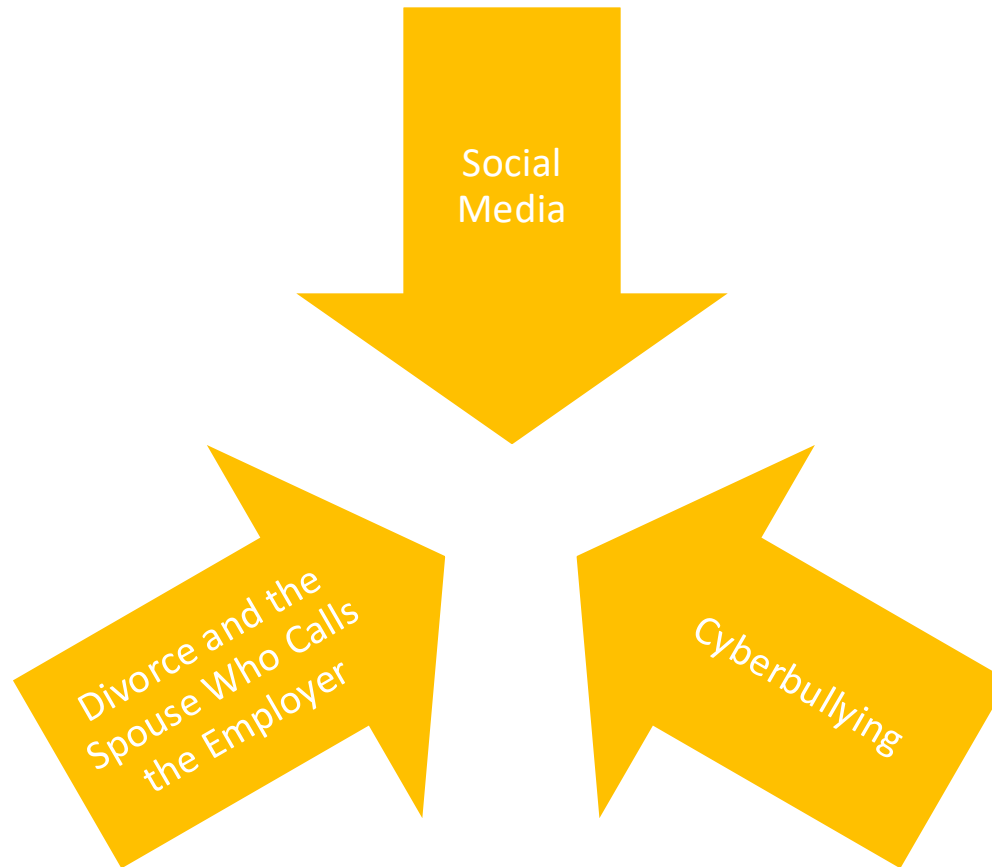
Drug Test Shows Off-Duty Use

Employee Goes to Rehab

Employee Admits to Off-Duty Use

Police involvement even without arrest

Rock N' Roll



FACTORS ARBITRATORS CONSIDER

Did the employee use employer equipment, facilities, access or time?

Was the employee identified as a worker of the employer (uniform, work vehicle, etc.)?

Were coworkers directly impacted?

Survey: Factors Arbitrators think are important

- Is there a policy about off duty conduct?
- Is rule enforced in a non-discriminatory manner = 96 percent
- The employee “knew or should have known” about the policy= 94 percent
- Was the employer policy “reasonable”? = 71 percent
- What was the content of the speech= 21 percent

But....
Lines Have
Blurred
between
Work and
Private life.



Remote Work and the Blurry Line

Many workers now work from home.

People with disabilities seek remote work

Younger people more likely to switch to telecommuting.

(April 8 MIT Study)

https://john-joseph-horton.com/papers/remote_work.pdf

Law Review Articles

Raphael, Alyson, Arbitrating "Just Cause" for Employee Discipline and Discharge in the Era of COVID-19 , 34 Geo. J. Legal Ethics 1237 (2021)

Bhargava, V.R. Firm Responses to Mass Outrage: Technology, Blame, and Employment. J Bus Ethics 163, 379–400 (2020).

TD. Johns, Toward a More Modern Application of the “Nexus to the Workplace” Test: Arbitral Considerations in Off-Duty Employee Misconduct Cases, 23 Harvard Negotiation Law Review 1 (2017)

R. Kearney, “Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases” 69 Notre Dame Law Review 3 (1993)

S. Sugarman, ”’Lifestyle’ Discrimination in Employment”, Earl Warren Legal Institute Working Paper, UC Berkely (2002)

A. Levinson, “What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators are Dealing with Them,” Tennessee Journal of Business Law, Vol. 11, (2010).

More Law Review Articles

A. Levinson, “Industrial Justice: Privacy Protection for the Employed,” *Cornell Journal of Law and Public Policy*, Vol. 18 (2008-2009).

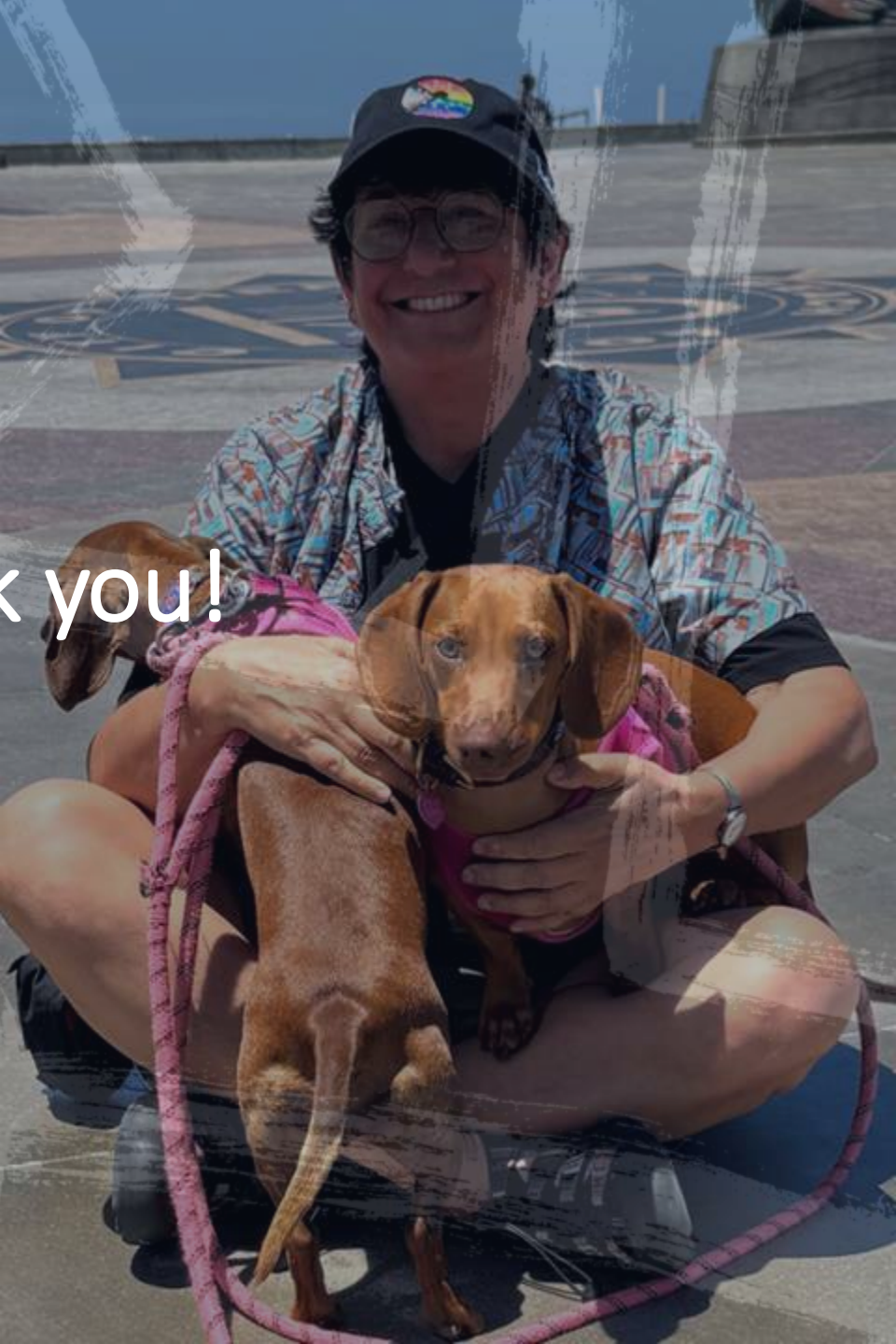
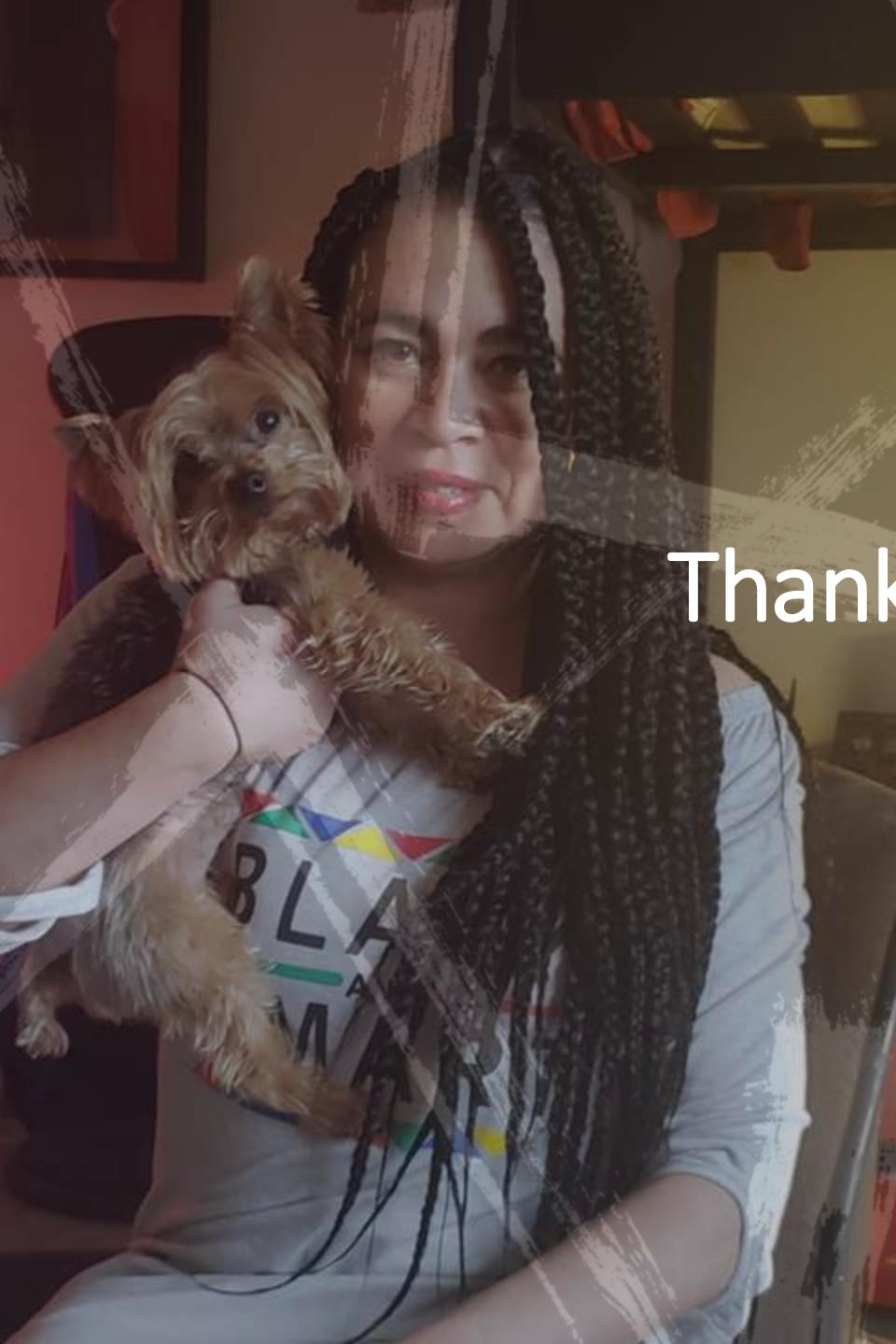
“Defamation in the Internet Age: Why *Roommates.com* Isn’t Enough to Change the Rules for Anonymous Gossip Websites,” *62 Florida Law Review* 259 (January 2010).

L. Gelman, “Privacy, Free Speech, and ‘Blurry-Edged’ Social Networks,” *Boston College Law Review*, Vol. 50:1315, (2009)

Arrayales, Joshua, “Getting Off Off-Duty: The Impact of Dobbs on Police Officers’ Private Sexual Lives,” *51 UC Law SF Const. Q.* 397 (2024)

Phungula, Simphiwe, “Private Acts in Public Spaces: The Impact of Social Media on the Workplace and the Business of the Employer, 43 Pt. 2 *Indus. L.J.* (Juta) 2237 (2022)

Butz, Nikolaus T. and McChrystal, Caz “The Contentious Crossfade between Professional and Private Behavior...” *17 Southeast Case Research J.* (2020)



Thank you!