



SMK LAWYERS

# **SOCIAL MEDIA AND WORKPLACE HEALTH AND SAFETY**

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# Social media and workplace health and safety: Agenda

- § Introduction to social media
- § Legal issues relating to social media
  - § DEC workplace policies
  - § Work v private – relevant connection to employment
  - § Appropriate workplace behaviour, what can be regulated
- § Social media and workplace bullying
  - § What is the state the law currently?
- § Recent cases involving social media, privacy and out of work conduct

# Introduction to social media

**From:** [REDACTED]  
**Sent:** Wednesday, 27 August 2008 9:50 a.m.  
**To:** Kyle Doyle  
**Subject:** RE: Absence on Thursday 21st 2008

Hi Kyle,  
I believe the proof that you are after is below



## Kyle Doyle

is not going to work, fuck it i'm still trashed. SICKIE WOO!

Updated on Thursday

Networks:	Australia
Sex:	Male
Interested In:	Women
Birthday:	[REDACTED]
Hometown:	Sydney, Australia
Political Views:	Liberal Party Of Australia
Religious Views:	Agnostic

## Mini-Feed

# Introduction to social media

## Three KFC employees in hot water for dip in restaurant's sink



# Introduction to social media

## Domino's workers fired over snot pizza



# DEC social media polices

- § The department supports employees participation in social media online applications such as social networking sites, wikis, blogs, microblogs, video and audio sharing sites and message boards that allow people to easily publish, share and discuss content
- § Aim of participation is to:
  - § engage and interact with our various audiences
  - § promote staff expertise.

# DEC social media polices

- § The following standards apply to employees' work use and **personal use of social media** at any time, when it has a **clear and close connection** with the department:
  - § Always follow relevant department policies including the Code of Conduct.
  - § Do not act unlawfully (such as breaching copyright) when using social media.
  - § Make sure your personal online activities do not interfere with the performance of your job.
  - § Be clear that your personal views are yours, and not necessarily the views of the department.
  - § Do not disclose confidential information obtained through work.

# DEC social media polices

- § DEC's social media Terms of Engagement also state:
  - § Be aware when you mix your work and personal lives – the general public consider us 'the voice' of the department 24/7. Represent us well.
  - § Play fair; be polite, be considerate – don't pick fights or engage in them, remember what you say will be public for a long time.
  - § Consider what you say before you say it – it'll be on the web for a long time!

# The work/private distinction

- Is there a clear distinction?

# The work/private distinction

- § The issues relating to employees' use of social media are not limited to employee usage whilst at work.
- § At work, to minimise the risk of damage, disputes or injuries, employers can implement detailed social media policies and consider the use of disclaimers for work-related social networking.
- § This could avoid:
  - § Vicarious liability of employers for the opinions/communications of employees
  - § Defamation
  - § Reputational or brand damage
  - § Loss of productivity

# The work/private distinction

- ⌘ Social media/networking sites allow individuals to deliberately advertise their personal details and publish publicly-accessible opinions on a myriad of subjects including their employment.
- ⌘ Whether at or away from work, social media posts or tweets by employees that disparage the employer, colleagues or inappropriately purport to represent the employer's opinion may lead to legitimate disciplinary action; if there is a relevant *or close* connection to employment.

# What is the “relevant connection” to the employment?

- § Did the conduct occur during ordinary work hours?
- § Did the employee use the employer’s IT systems to engage in the conduct in question?
- § Did it occur via equipment provided or paid by employer?
- § Did the communication specifically relate to events that occurred at work or between work colleagues?

# What is the “relevant connection” to the employment?

- ⌘ Has an express term of the employment contract been breached?
- ⌘ Does the communication breach the employee's implied duty of trust and confidence?
- ⌘ Is the conduct likely to cause serious damage to the employment relationship?
- ⌘ Does it damage the employer's interests?
- ⌘ Is it incompatible with the employee's duties in some way?

# What is the “relevant connection” to the employment?

- § All this raises the question of how far companies can or should go in regulating the private conduct of their workers?
- § What is clear is that **employers could be liable for the conduct of employees for bullying, defamation, or harassment on social media.**
- § The question of an employer’s liability turned on whether the employee’s conduct was considered sufficiently connected with their work and whether an employer had failed to take precautions to prevent the conduct from occurring, for example by establishing social media policies.

# What is the “relevant connection” to the employment?

- ⌘ Every case will be decided on its own facts, but broadly speaking, conduct likely to cause serious damage to the employment relationship or harm the employer's brand is most likely to justify a ‘relevant connection’.

# Ongoing effect of Facebook

*"A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see ... It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences".*

Fitzgerald v Dianna Smith t/a Escape Hair Design  
[2010] FWA 735

# Inappropriate workplace behaviour

- § Bullying
- § Harassment
- § Discrimination
- § Victimisation

# Workplace Cyberbullying etc

- ⌘ Workplace bullying, harassment, discrimination and/or victimisation is not a new issue.
  
- ⌘ Examples of this conduct include:
  - ⌘ Malicious or threatening emails or SMS communications to an individual's phone or email address
  - ⌘ Electronic communications that feature offensive content such as explicit images or jokes/comments about ethnicity, religion or sexual preference
  - ⌘ Electronic communications aimed at correcting or providing feedback to an individual that are copied to a group with the effect of publicly shaming or demeaning the individual
  - ⌘ Malicious or threatening comments about an individual posted on blogs or social networking sites
  - ⌘ Sharing embarrassing, offensive or manipulated images or videos of an individual
  - ⌘ Screen savers or desktop backgrounds featuring offensive content

# Workplace Cyberbullying etc

- ⌘ Although cyberbullying shares many similarities with more traditional methods of bullying, it has the potential to be more aggressive and escalate a lot faster.
- ⌘ The anonymity, large audience, range of attack methods, lack of face-to-face communication and ability to contact the victim 24 hours a day contribute to the severity of cyberbullying.
- ⌘ Cyberbullying doesn't just happen during work hours.
- ⌘ The increased prevalence of take-home laptops and portable communications devices such as BlackBerries and iPhones make cyberbullying a problem outside of the physical work environment and traditional working hours

# What is the state the law currently?

- ⌘ Our current laws, which were drafted to cover traditional print and broadcast media, struggle to deal with social media. In particular, the lightning speed at which material is passed from one user to another, across borders, can quickly cause global damage to reputation.
- ⌘ Presently, cyberbullying is treated in the same way as physical bullying.
- ⌘ Legal remedies in Australia have included action under:
  - ⌘ Anti-Discrimination Legislation
  - ⌘ Common Law (eg for physical and/or psychological injury)
  - ⌘ Constructive Dismissal aspect of Industrial Relations Law
  - ⌘ Occupational Health & Safety Law
  - ⌘ Workers Compensation schemes
  - ⌘ Criminal Law

# What is the state the law currently?

- Even where social media policies are a relevant factor considered by the courts, it may not be sufficient for an employer to exculpate liability.
- 'workplace safety' or 'occupational health & safety' (OH&S) law covers relationships in the workplace, and typically imposes a duty on employers to ensure the health, safety and welfare at work of all employees. That duty has been interpreted broadly - in for **example *Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 144*** - and encompasses systems of work and the **working environment**, including supervision and instruction.

The expectation is that employers are responsible for what takes place within the workplace and thus, for example, cannot comprehensively escape liability by claiming that they were unaware of what managers were doing to subordinates or staff were doing to each other.

# What is the state the law currently?

- ⌘ In applying current statutes courts have accepted characterisations of workplace bullying as "**repeated, unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety**" and DEC's reflects this:
  - ⌘ Bullying is repeated verbal, physical, social or psychological behaviour that is harmful and involves the misuse of power by an individual or group towards one or more persons. Cyberbullying refers to bullying through information and communication technologies.
  - ⌘ Bullying can involve humiliation, domination, intimidation, victimisation and all forms of harassment

# What is the state the law currently?

- ⌘ Breach of workplace safety laws, including failing to ensure a safe working environment, that leads to injury or damage means that employers could be liable for employees' bullying, defamation or harassment on social media

# What is the state the law currently?

## Future directions?

- § In 2011 the Victorian parliament introduced legislation to amend the Crimes Act so that serious workplace bullying could result in a gaol term of up to 10 years. The definition of what type of behaviour is covered by the legislation includes **“using abusive or offensive words” that could reasonably be expected to cause physical or mental harm to a person** (including self-harm).
- § The introduction of this legislation reflects the wider problem of inappropriate workplace behaviour and making those responsible accountable for their actions. The legislation also covers online bullying which is of particular importance with the growing use of social media sites.

# Workplace Cyberbullying etc

## Implications for Employers

- § Employers need to be particularly diligent in ensuring:
  - § That they have clear policies and guidelines outlining what is acceptable behaviour,
  - § Defined processes for dealing with employees who do not abide by these policies and
  - § A policy covering use of social media both during and outside working hours.
  - § They provide adequate training and education on social media.



# Recent cases

# Relevant connection/bullying?

- § In *O'Keefe v Williams Muir's Pty Ltd* (2011), Mr O'Keefe posted comments on his Facebook page about the failure of William Muir's to pay him as required, and made a threat indirectly to one of his employer's staff.
- § The comments were "Damien O'Keefe wonders how the f&\*k work can be so f&\*king useless and mess up my pay again. C..ts are going down tomorrow."
- § Ms Kelly Taylor is the respondent's Operations Manager responsible for payment to employees. Within the administration section of the respondent's business, there are approximately 10 female staff. The applicant had been having discussions with Ms Taylor (either directly or by e-mail) regarding his pay issues for some period of time. The applicant had advised Mr Williams (Respondent Director) that the target of his comments had been Ms Taylor. Mr Williams was firstly responding to the fact that one employee had called a female employee a "c..t" and that he had done so publically on his **Facebook** page where other employees could see what was written.
- § The Facebook page was set to **maximum privacy settings** to only a select group of 70 friends. The posting did not mention the employer's name, but his friends contained a number of employees in the same company and it was clearly apparent who he was referring to.
- § William Muir's employee handbook stated: "In communicating with other staff, customers and suppliers, employees should be courteous and polite, maintain a high level of honesty and integrity and present themselves and the business professionally. Employees will not use offensive language, resort to personal abuse or threaten or engage in physical contact."
- § It was held that the use of the language and the threat were unacceptable behaviour and justified termination of employment. Clearly, the actions and processes of the company were directed at promoting or providing a safe place of work. Fair Work Australia was supportive of both the company's action and process.
- § Fair Work Australia found the post justified the termination of O'Keefe's employment, even though he made the post on his home computer and outside working hours.
- § Fair Work Australia deputy president Deirdre Swan said: "Threatening another work employee is a serious issue and one which would not be tolerated **in any workplace**. The manner in which the threat was made and the words used provided sufficient reason for the respondent's dismissal of the applicant on the grounds of serious misconduct.'

# Relevant connection?

## Teacher suspended over vitriolic blog

- § A high-school English teacher was suspended for a profanity-laced blog in which she called her young charges "disengaged, lazy whiners" is causing a sensation by daring to ask: why are students unmotivated - and what's wrong with calling them out?
- § The teacher did not use her full name or identify her students or school in the blog, which she started in August 2009 for friends and family. Students brought it to the attention of the school, which suspended her with pay.
- § Some of the blog posts included:
  - § "My students are out of control," "They are rude, disengaged, lazy whiners. They curse, discuss drugs, talk back, argue for grades, complain about everything, fancy themselves entitled to whatever they desire, and are just generally annoying."
  - § Quoting from the musical *Bye Bye Birdie*: "Kids! They are disobedient, disrespectful oafs. Noisy, crazy, sloppy, lazy LOAFERS."
  - § She also listed some comments she wished she could post on student evaluations, including: "I hear the trash company is hiring"; "I called out sick a couple of days just to avoid your son"; and "Just as bad as his sibling. Don't you know how to raise kids?"
- § The teacher is defending her suspension stating that she had the right to post her thoughts on her personal blog and that it's a free speech issue.

**Patrick Walters February 18, 2011**

Read more: <http://www.smh.com.au/technology/technology-news/teacher-suspended-over-vitriolic-blog-20110217-1ay8g.html#ixzz1TpQutq5>

# Workplace safety consideration

- § An IT support worker responded to what a Fair Work Australia commissioner said were “infantile and violent” comments made by a colleague on a work email during work hours with “LOL”.
- § The worker claimed unfair dismissal following termination of his eight years employment, after in addition to other matters, he posted the acronym, which means “laughing out loud”, in reply to lewd and offensive statements from his fellow worker.
- § The Commissioner stated:
  - § ....the conversation also provides a valid reason by virtue of “its effect on the safety and welfare of other employees”. This is because in the light of the eventual publication of the conversation, the applicant’s conduct in responding in the way he did to the SDE must be considered as conducting negatively to the safety and welfare of the Alfred female employee named in the conversation as to be the victim of rape. Fairness to [the worker] requires it be noted that [he] did not initiate this comment or introduce such a repellent notion.