

Social Media in the Workplace: Pitfall for Employers

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Social media, considered an ingenious invention by many, is increasingly becoming a necessary tool for most companies and organisations in the expansion, marketing and networking of their business. However, despite the wonders of social media with its ease of accessibility, existence beyond work hours and speed of light communication, its use is not without risk, particularly in workplaces. Management of these risks by employers is crucial to maintain control over the numerous consequences that arise from the unrestricted and undefined use of social media by employees, most of which have a negative impact on businesses.

Issues include the inappropriate use of social media for personal use, defamation, harassment, misleading and deceptive conduct and uncertainty over the ownership of intellectual property such as blogs and contact lists. Though employers are not in control of the use of social media itself with regard to what is and not published, they can control the conduct of their employees during work hours. Social media now presents a real legal threat to employers, and it is an absolute must for businesses to have dedicated and well-communicated social media policies governing the usage of these technologies. As discussed below, in the absence of such pre-emptive measures, employers are susceptible to unnecessary time-consuming and costly legal disputes.

Inappropriate Use

In *O'Connor v Outdoor Creations Pty Ltd*,¹ Fair Work Australia (FWA) suggested that the excessive use of social media by employees during work hours may constitute a valid reason for dismissal. Richard O'Connor, a landscape architect employed by Outdoor Creations had his computer accessed, from which it was claimed that he had engaged in Google Mail's chat service during working hours on more than 3000 occasions in the previous three months. This founded the grounds of his dismissal by Outdoor, with Outdoor stating that there had been a "serious decline" in his productivity, and that he was guilty of theft, because he was accepting payment for work without completing any.

Mr O'Connor's representative disputed the extent of the use of social media claimed by Outdoor and Outdoor failed to provide verified evidence about the extent of Mr O'Connor's use of the internet during working hours. Therefore, FWA held that the dismissal was unfair. The

Commissioner stated that although the excessive use of the internet for personal purposes may be misconduct, Outdoor was still obliged to provide Mr O'Connor with an opportunity to respond to the allegations, which they did not do.

Although the case turned on a lack of evidence, a clearly defined social media policy may have avoided the need to litigate at all, as the limitations and consequences of internet use at work would have been known by each employee.

Disparaging Comments

In *Stutsel v Linfox Australia Pty Ltd*,² Linfox's employee, Mr Stutsel, was dismissed for serious misconduct as a result of comments posted on his Facebook profile concerning two of his supervisors. They were considered to be racially derogatory and sexually discriminating to two of his managers, prompting the termination of his employment by Linfox.

Issues that were raised included whether the actions of Mr Stutsel amounted to misconduct and whether the termination was harsh, unjust and unreasonable. Mr Stutsel was successful in claiming that he was unfairly dismissed, and was reinstated to his position. FWA likened the comments to a "whinge about work" and the racial references were held as not amounting to being racially derogatory, or intended to vilify Mr Stutsel's manager on racial grounds. In arriving at the final outcome, the FWA Commissioner placed significant weight on Linfox's absence of a social media policy, which therefore failed to provide Linfox with a proper basis on which to rely on its termination of Mr Stutsel.

The outcome of this case may have been different if Linfox had adopted a clear social media policy, specifically prohibiting the publication of such comments within social media forums and stating what were the consequences for breach or non-compliance. Employers should take heed of FWA's finding that induction training and employee handbooks are no longer sufficient in workplaces, particularly since large companies are now implementing and enforcing detailed social media policies for their employees.

Ownership of Intellectual Property

An important issue that has recently been debated relates to the ownership of intellectual property published online. A Californian Court has recently been asked to consider this in the case of *PhoneDog v Kravitz*.³

PhoneDog, a US based company engages in the business of providing online news and reviews of mobile phone devices. In April 2006, PhoneDog hired Noah Kravitz as a product reviewer and blogger. As part of his employment, Mr Kravitz was required to create online content to be distributed to PhoneDog customers via Twitter and other forms of media. He utilised the Twitter account “@PhoneDog_Noah” to promote PhoneDog, the business, and during the course of Mr Kravitz’s employment, he had obtained 17,000 followers to his PhoneDog Twitter account.

Upon his employment ending with PhoneDog in October 2010, Mr Kravitz, despite PhoneDog’s request, refused to relinquish use of the PhoneDog Twitter account. He continued to retain the 17,000 followers he had obtained during his employment at PhoneDog, changing his Twitter account to @noahkravitz”. Mr Kravitz, in December of 2010, commenced fulltime employment with a competitor of Phone Dog, and continued to use the same Twitter account.

PhoneDog commenced proceedings against Mr Kravitz in California alleging:

1. Misappropriation of trade secrets;
2. Intentional interference with prospective economic advantage;
3. Negligent interference of prospective economic advantage; and
4. Conversion.

PhoneDog sought damages in the sum of US\$340,000 from Mr Kravitz calculated by way of 17,000 Twitter followers costing PhoneDog \$2.50 each per month for an 8 month period. PhoneDog also sought a preliminary and final injunction to stop Mr Kravitz using the Twitter account.

PhoneDog later amended its complaint, to allege that PhoneDog had an economic relationship with its users (including the 17,000 Twitter followers) and stated that Mr Kravitz owed a duty of care to PhoneDog. The District Court of California agreed with PhoneDog and held that Mr Kravitz had interfered with PhoneDog’s economic relationship with the 17,000 Twitter followers and that Mr Kravitz did owe a duty of care to PhoneDog.

This case touches on an important, and yet to be determined grey area as to the legal boundaries of ownership of intellectual property published online via Twitter or similar social media account. Specifically, the problem PhoneDog had, was that while the Twitter account bore the company’s name, the account was updated and maintained entirely by Mr Kravitz personally. Twitter and LinkedIn, which are used professionally, are also individual accounts, introducing a

dilemma when it comes to who actually owns the account. Whereas courts have held that company client lists are company property, when it comes to the list of followers of a company’s employer’s social media account which include the company name, such as “@PhoneDog_Noah”, there has been no judicial commentary in Australia on whether the same principles applies.

What Should Employers Do?

Companies and businesses can do much to prevent the time-consuming and costly outcome of litigation, by defining the scope of acceptable use and ownership of content within social media through company policies when it comes to the drafting of their employment contracts. Given the increase in the number of social media cases, ensuring that a policy is adopted and well understood by all employees is a necessary step that any employer should undertake.

Employers should minimise risk and uncertainty by:

1. Incorporating terms into employment contracts which specify that any intellectual property in social media utilised by employees in the course of their employment is owned by the employer;
2. Creating, implementing and enforcing a social media policy which includes terms that indicate that social media accounts are relinquished upon cessation of employment;
3. Enforcing social media policies and relevant terms in employment contracts; and
4. Generating an environment in the workplace of policy awareness and acceptable social media use.

Employees too should be aware of company policies and the specific terms of their contracts, to ensure that their conduct is contained within the boundaries of appropriate use.

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¹ *O’Connor v Outdoor Creations Pty Ltd* [2011] FWA 3081

² *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444

³ Northern District of California Case No. C 11-03474