

Legal consequences of social media in the workplace

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The use of social media in society is becoming increasingly prevalent and its usage complicates employment relations and, in turn, employment law. Employers are at risk because of the use of social media by employees. These risks are exacerbated by the fact that there is currently no specific law in South Africa that governs the use of social media.



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One of the problems with social media is that many people do not always consider the consequences of their posts. The upsurge of 'name and shame' posts on Facebook is a particularly concerning example of people not understanding the implications of their posts.

These posts may constitute an invasion of privacy, cyber-bullying and even defamation. They may also illustrate unlawful conduct on the part of the person responsible for the post.

Reckless driving posts

A classic (and all too common) example is the posting of a photo or video clip of a reckless driver speeding along on the wrong side of the road. What is alarming about this type of post is not just the unlawful and dangerous conduct depicted in the photograph or video clip, but also the fact that, all too frequently, the incriminating photograph or video clip is taken and sometimes even uploaded, whilst the photographer is driving and thus the photographer is equally guilty of reckless and negligent driving.

The conduct of employees on social media platforms is more frequently exposing employers to the risk of vicarious liability and brand damage. In the example above, if the employee responsible for the post was driving in the course and scope of his or her employment, the employer may well be held liable for any harm caused because of the conduct, especially if the employee is subsequently involved in a motor vehicle accident because of being on a mobile.

Threats

Probably the most well known case, highlighting the risks of an ill-considered tweet, was coined the Twitter Joke Trial in the UK in 2012. The offending tweet, which resulted in the arrest, prosecution and conviction of Paul Chambers was, "Crap.

Robin Hood airport is closed. You've got a week and a bit to get your shit together otherwise I'm blowing the airport sky-high!"

Although Chambers' conviction was ultimately overturned on appeal, this case illustrates that any post, even one intended as a joke, may have far reaching (and expensive) consequences. In this case, these consequences were not just felt by Chambers. The Crown Prosecution Services faced public uproar and was accused of wasting public funds.

Because of this case as well as others, the most senior prosecutor in England and Wales, Keir Starmer, issued guidelines on how posts on social media platforms should be dealt with. He stated, "Social media is a new and emerging phenomenon raising difficult issues of principle, which have to be confronted, not only by prosecutors, but also by others including the police, the courts and service providers."

Considering risks

In considering the risks to employers (and their employees), it is therefore essential to explore:

- the impact of social media on the Constitutional rights to dignity, privacy and freedom of expression;
- the risks that defamatory or harassing statements may result in vicarious liability for employers;
- the risk of work place harassment and cyber-bullying and the impact of this conduct on the work environment; and
- what conduct may justify disciplinary action and even dismissal.

That breaches of fiduciary duties and, even possible insider trading, may flow from seemingly innocuous posts on social media is also worthy of reflection.

In considering the relevant legal principles, the most obvious starting point is the Constitutional rights to dignity, privacy and freedom of expression, as "the Bill of Rights is the cornerstone of democracy in South Africa ... [and] enshrines the rights of all people in our country." In the words of Judge Nigel Willis, "social media have created tensions for these rights in ways that could not have been foreseen by the founders of the Constitution."

Dignity is an essential right and value in our society and is a value that informs the interpretation of all other rights. There is a close link between dignity, privacy and free expression and these three rights often serve to strengthen one another.

The right to privacy fosters human dignity and is recognised as falling within the concept of dignitas. A breach of privacy could occur either by way of an unlawful intrusion upon a person's personal privacy, or by way of an unlawful disclosure of private facts. The right to privacy includes protection against the dissemination and use of personal information, which includes the views or opinions of another person about the affected person (via the Protection of Personal Information Act). This is one of the reasons why 'naming and shaming' people on Facebook is problematic, as this practice often involves an infringement of the intrinsic right to privacy.

Freedom of expression

This raises the inevitable question of my right to free expression. Surely, naming and shaming someone on Facebook falls within the realm of free expression.

Freedom of expression is another essential Constitutional right. It too is closely related to dignity especially in the context of South African's history and democratic development. Social media provides new and innovative means of giving South Africans a voice and they can play an important role in safeguarding the right to freedom of expression.

In a recent case (*Braithwaite vs McKenzie* 2015), involving defamation on social media, Judge Mahendra Chetty said, "In today's world the most effective, efficient and immediate way of conveying one's ideas and thoughts is via the internet. At the same time, the internet reaches out to millions of people instantaneously. The possibility of defamatory postings on the internet would therefore pose a significant risk to reputational integrity of individuals."

Social media is not primarily print media and is in fact all about being social. Freedom of expression is not unfettered and must be interpreted in the light of other fundamental rights, especially the right to dignity. That free expression is not a superior right in South Africa was highlighted by Judge Kate O'Regan, who said, "With us, the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression ... What is clear though and must be stated, is that freedom of expressions does not enjoy superior status in our law." (*In Le Roux and others vs Dey* 2011)

No carte blanche

It is here that many social media users go wrong. There seems to be a mistaken belief that the freedom of expression gives carte blanche to social media users to say and post what they want to with impunity. This belief is fostered by the social nature of these platforms and users seem to view posts on social media as no different from a private chat with a close friend. These posts are publications and, sadly, posts of a salacious nature tend to be shared and liked with worrying frequency and thus run the risk of going viral and causing untold reputational damage.

Thus, "those who make postings about others on social media would be well advised to remove such posting immediately upon the request of an offended party. It will seldom be worth contesting one's obligation to do so. After all, the social media is about building friendships around the world, rather than offending fellow human beings. Affirming bonds of affinity is what being "social" is all about." (*Willis J: Herholdt v Wills*)

Social media users do not have carte blanche to say what they please. The same laws govern online conduct as offline conduct and the law of defamation protects rights to privacy, dignity and reputation and balances the right to unimpaired reputation with the right to free expression. Overstepping the right to free expression may render the author liable for defamation.

ABOUT ROSALIND DAVEY

Rosalind Davey is a partner at corporate law firm Bowmans and obtained BA and LLB degrees from the University of Natal and was admitted as an attorney in 2002.

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