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## Behaving badly ... outside work.

*Small businesses have the same duty of care as their larger corporate counterparts to provide a workplace free from intimidation and harassment and recent cases highlight that an employer may be vicariously liable for the behaviour of workers both inside and outside the workplace.*

The NSW Court of Appeal recently ordered an employer pay to an employee \$861,197 in damages. The employee was injured by a co-worker *after work*, following an altercation in the workplace earlier that day. The employer was aware of the co-worker's propensity for violence as he had been involved in other workplace altercations. The Court found that the employer failed to take any disciplinary action against the co-worker and, by failing to act; the employer had breached its duty of care to the injured employee.

In separate cases, female employees have been awarded damages of more than \$100,000 because the Courts found that they had been sexually harassed during the course of their employment, even though the harassment occurred *outside* the workplace.

In the first instance a female employee was harassed at a work organized trivia night. Even though the incident occurred off the employer's premises at a Licensed Club and considerable amounts of alcohol had been consumed, it was found that the female employee had been threatened with both physical and sexual assault. The alleged perpetrator relied on the 'Bart Simpson defense' - "I didn't do it. Nobody saw me do it. There's no way you can prove anything". The Court determined that misconduct had

occurred during a workplace event as the sole reason why the employee was at the Club was because the Trivia Night had been arranged by the employer.

In similar circumstances, an employer was found to be vicariously liable after a female employee was sexually assaulted by a co-worker following a work organized event. It was found that the female employee was actively encouraged to socialise with colleagues, the co-worker had repeatedly harassed the female employee at the workplace, and the sexual assault was a culmination of that harassment. The workplace harassment included pornographic messages and displays of pornography. The female employee was awarded damages of \$100,000 for hurt, suffering and humiliation. Her claim for compensation, medical expenses, economic loss and legal costs is likely to exceed \$400,000.

Small business owners can take simple steps to protect their employees, however developing a policy and communicating it to employees is just a starting point. Convincing people to modify their behaviour need not be onerous; appointing contact officers and constant reinforcement through training, will better position employers to minimize their liability and shift the liability for poor behaviour to those individuals that engage in it.

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