



Using the Internet to Conduct Background Checks on Applicants for Employment

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Almost half of the employers responding to a 2009 survey by the employment website Career Builder.com reported using social media Internet sites as a part of their background check on job applicants.¹ It isn't hard to see why employers would turn to the Internet and to social media sites in particular for background information on job applicants. For no more than the cost of an Internet connection and by doing no more than typing in a name, employers can learn information that a form application, résumé, or conventional third-party background check would never turn up.

In fact, Googling an applicant (typing the applicant's name into an Internet search engine, such as Google) has become so commonplace that many employers don't think twice about whether there are legal limits on the information they seek and the uses to which they may put such information. This bulletin discusses the legal issues that North Carolina public employers should consider before they use the Internet to conduct or supplement background checks of prospective employees.

Getting Hired in Paradise

Consider the following scenario:

Mary is human resources director for the city of Paradise, North Carolina. Recently she completed a project designed to streamline and standardize the city's hiring process. For the first time, the human resources department will conduct Internet background checks on every applicant for a city job who meets the "preferred qualifications" standard set forth in the job description and job advertisement. The city already does a criminal history and credit history background check on applicants but only after making a conditional offer of employment. Under the new policy, human resources will conduct Internet searches

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1. Rosemary Haefner, "More Employers Screening Candidates via Social Networking Sites," at www.careerbuilder.com/Article/CB-1337-Getting-Hired-More-Employers-Screening-Candidates-via-Social-Networking-Sites/?ArticleID=1337&cbRecursionCnt=1&cbid=0f88ad6913c04dd89f232c7586da9eab-328897918-wy-6&ns_siteid=ns_us_g_More_employers_screen (last visited June 3, 2010).

on all applicants meeting the preferred requirements and use information they find to “weed out” any applicants who have misrepresented themselves or who otherwise seem unsuitable before passing the applications on to the relevant department head.

Before implementing the new policy, the manager directs Mary to ask the city attorney, first, whether it is legal to Google a job applicant and, second, whether it is legal to view information that is publicly posted on a job applicant’s social networking profile. The city attorney tells Mary that there is nothing unlawful in this policy but that it does involve some risks. The new procedure does not violate any employment or communications privacy laws. Neither federal or state employment laws nor general privacy laws prohibit an employer from using an Internet search engine to find online information about a job applicant. But the search will most likely disclose certain types of information about a candidate, and simply having that information could put the city at risk. Antidiscrimination laws prohibit employers from using certain information in making employment decisions, and if an employer obtains that information from an Internet search, the very fact of obtaining the information could be part of the evidence of unlawful discrimination.

The Risks of Searching for Information from the Internet

Going to the internet for information about a prospective employee is not unlawful. Using what turns up there just might be. Various federal laws protect individuals from discrimination from employers on the basis of personal characteristics, such as race, gender, religion, disability, and age. These laws include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA). A North Carolina law protects individuals from discrimination in employment on the basis of the individual’s lawful use of a lawful product. The extent to which information learned from an Internet search might result in a violation of one of these statutes depends on the particular provisions of each statute. In general, however, the risk that Internet background searches pose for a public employer is that an unsuccessful applicant will allege that personal information disclosed through the Internet search was unlawfully used in the hiring process.

Internet Search Reveals Information about an Applicant’s Membership in a Protected Class

An Internet search, especially of social media sites like Facebook, MySpace, or Buzz, may turn up photographs of the applicant. Photographs are likely to reveal the applicant’s race and, where the person’s name has not made it clear, gender. Even a single photograph (social media pages often feature multiple pictures) can reveal the existence of a disability (the applicant sitting in a wheelchair, for example) or something about the applicant’s religion (a man or woman wearing a cross or a woman wearing the hijab, or veil, indicating she is a Muslim), national origin (Asian features), age, or military status (applicant in military uniform). Information about an applicant’s race, gender, religion, national origin, age, disability, or military status can be revealed in other ways as well. “I celebrated my 50th birthday today!” a Facebook post might read. A search of an applicant’s name might pull up the website of a church or synagogue and reveal that the applicant is the president of his or her congregation. The search may pull up a local newspaper

story about an applicant's earlier military deployment. Chances are good that an Internet search will reveal at least some information about the personal characteristics of some, if not all, applicants.

Is an Employer Prohibited from Knowing an Applicant's Race, Gender, Religion, National Origin, Age, Disability, or Other Personal Characteristics before an Interview?

The law does not prohibit an employer from acquiring knowledge of an applicant's race, gender, disability, or other personal characteristics before deciding whether or not to interview the applicant. Nor is there any general penalty for learning such information during an interview, though an employer may not ask questions about an applicant's medical conditions or history (as discussed more fully below). What matters is what the employer does with the information.

It is:

- unlawful under Title VII to discriminate in hiring on the basis of race, color, gender, religion, or national origin;²
- unlawful under the ADEA to discriminate in hiring on the basis that an applicant is over forty years of age;³
- unlawful under the ADA to discriminate in hiring on the basis that an applicant has a disability;⁴
- unlawful under the GINA to discriminate in hiring on the basis of genetic information and medical history;⁵ and
- unlawful under USERRA to discriminate on the basis of an applicant's status as a current or former member of the United States Armed Forces.⁶

An employer therefore must ensure that no one involved in the hiring process allows any knowledge about an applicant's membership in a protected class to influence the decision-making process in any way.

The Internet Background Search: Intentional or Accidental Inquiry into Protected Class Status?

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal antidiscrimination laws, warns employers on its website against intentionally seeking out information about an applicant's race:

In general, it is assumed that pre-employment requests for information will form the basis for hiring decisions. Therefore, employers should not request information that discloses or tends to disclose an applicant's race unless it has a legitimate business need for such information. . . . Asking for race-related information on the telephone could probably never be justified.⁷

2. See 42 U.S.C. § 2000e *et seq.*, as amended.

3. See 29 U.S.C. §§ 621–34.

4. See 42 U.S.C. §§ 12111–13.

5. See Pub. L. No. 110-233, 122 Stat. 881 (codified at 42 U.S.C. §§ 2000ff *et seq.*).

6. See 38 U.S.C. §§ 4301–33.

7. In the same paragraph, the EEOC advises, "If an employer legitimately needs information about its employees' or applicants' race for affirmative action purposes and/or to track applicant flow, it may obtain the necessary information and simultaneously guard against discriminatory selection by using a mechanism, such as "tear-off" sheets. This allows the employer to separate the race-related information from

The mere fact that an employer asks for information that should not be used in making employment decisions is a significant red flag. The EEOC has made similar observations about inquiries into an applicant's religion.⁸ It is reasonable to assume that this is the EEOC position with respect to asking for information about any protected class status.

Sometimes employers accidentally learn about an applicant's membership in a protected class—more often than not, this information is voluntarily disclosed by the applicant. The EEOC acknowledges that it is not a violation of law for an employer to learn an applicant's race, color, gender, religion, national origin, or age even at the time that an applicant submits an application. For example, when an employer asked the EEOC whether it could view unsolicited video clips sent by job applicants, the EEOC explained:

Under Title VII, it is not illegal for an employer to learn the race, gender or ethnicity of an individual prior to an interview. Of course, Title VII requires that all individuals be provided equal, nondiscriminatory treatment throughout the hiring process. If an employer representative observes a job seeker in a video clip, and either learns or surmises the person's gender, race, or ethnicity, such knowledge could increase the risk of discrimination or the appearance of discrimination. Employers need to take care in training hiring officials and human resources staff about the appropriate responses when gender, race, or ethnicity is disclosed during recruitment. Video clips might be analogized to information on a resume that clearly tells an individual's race, such as, "President, Black Law Students Association." In this situation, as with the video clip, the employer needs to focus on the person's qualifications for the job.⁹

An Internet background search is an intentional search for information by an employer and falls somewhere between an unsolicited video clip submitted by a job applicant and the intentional asking of questions designed to reveal an applicant's race, color, gender, religion, national origin, age, disability, or military status.¹⁰ Assuming the employer is not purposefully looking for information on Title VII-protected categories or the age of the applicant, stumbling across such information would be similar to a situation in which an employer learns an applicant's race through information an applicant provides on his or her résumé or by viewing an unsolicited video clip. It seems reasonable to conclude that an employer who learns through an Internet background check that an applicant is African-American (or white) or Latino or Catholic, Jewish, or Muslim, or who learns anything else about an applicant's race, color, gender, religion, or national origin, will not violate Title VII merely by conducting the background search. But in the event that a rejected job applicant files a discrimination complaint with the EEOC, the

the information used to determine if a person is qualified for the job." See U.S. EEOC, "Pre-Employment Inquiries and Race," at www.eeoc.gov/laws/practices/inquiries_race.cfm.

8. See U.S. EEOC, "Pre-Employment Inquiries and Religious Affiliation or Beliefs," at www.eeoc.gov/laws/practices/inquiries_religious.cfm.

9. U.S. EEOC Office of Legal Counsel, "Title VII/ADA: Recordkeeping Responsibilities for Electronic Resumes with Video Clips/Employer Knowledge of Ethnicity, Gender, and Disability Prior to Interview," informal discussion letter, October 5, 2004, at www.eeoc.gov/eeoc/foia/letters/2004/titlevii_ada_recordkeeping_video.html.

10. The EEOC does not enforce USERRA, but claims of discrimination based on military status are litigated using the McDonnell-Douglas burden of proof developed under Title VII, and it seems likely that the U.S. Department of Labor, which enforces USERRA, would view evidence of knowledge of military status in much the same way as does the EEOC with respect to Title VII protected categories.

EEOC may consider the fact that the employer learned protected-class information through an Internet search as evidence that its hiring decision was discriminatory. As such, there is some risk merely in conducting an Internet search and gaining information about protected class status.

Discrimination claims begin with a complaint by a rejected applicant. It is possible that applicants who know that an employer learned of their race, color, gender, religion, national origin, or age through an Internet search before deciding against interviewing them might assume that the information entered into the decision not to hire them and might be more likely to pursue a discrimination claim. Whether an applicant is more likely to pursue a claim of discrimination after being rejected following an early-stage Internet search rather than at a later point in the application process is impossible to predict. It is fair to say, however, that the earlier in the process that an employer uses a selection device that reveals protected information, the greater the pool of potential plaintiffs.

The Need for Guidelines and Consistent Practices

One way for a manager or department head to avoid learning a particular applicant's race, color, gender, or other protected characteristic is to assign the Internet search to members of the human resources staff, giving them clear guidance as to what information they are to search for and download for consideration by decision makers. For example, the search could be limited to educational information or to information and comments made by the applicant about former employment. The search could include or be limited to information suggesting current drug use. Any set of search guidelines should direct searchers to omit information revealing the applicant's Title VII personal characteristics, age, or disability. A process such as this would protect the interviewers from learning about an applicant's protected personal characteristics.

As is the case with all employment selection practices, it is important that employers use Internet searches in a consistent way. In the example of the city of Paradise, Internet searches were to be conducted on all applicants who met the preferred requirements for a position. This is a relatively clear and identifiable group whose members are clearly not chosen on the basis of protected class status. In contrast, conducting Internet searches only on some applicants based on some sort of subjective feeling of the employer can lead to trouble.

Mary, the Paradise human resources director, is a good friend of Rob, the human resources director of the town of Bad Mountain. Bad Mountain has an opening for a mechanic in the public works department. The Bad Mountain human resources department receives an application for the mechanic position from someone named Ricky Edwards. Several bits of information on the application make Rob wonder whether Ricky is not short for Richard, but perhaps for Erica instead. Searching the Internet, Rob turns up a picture of a female Ricky Edwards who seems likely to be the applicant.

As it turns out, Ricky Edwards has considerably less experience than the three men who are chosen as finalists and invited in for an interview. But Ricky, learning of the Internet search, is suspicious. She uses the name "Ricky" professionally to avoid gender discrimination. Now she thinks that the town has declined to interview her because it learned she is female and does not think that women can be good mechanics.

While Ricky would have to show much more than the facts set forth above to bring a successful employment discrimination case, the fact of the search would certainly be admissible

as evidence from which a jury might, with other evidence, infer bias. And in this case, Rob has, in fact, (a) conducted the search for the very purpose of determining whether Ricky is male or female and (b) not conducted a search on any other applicant. Even if Rob did not admit it, a jury could easily reach this conclusion based on the fact that the town did not conduct an Internet search on any of the other applicants for the mechanic position. A well-thought out policy that limits Internet searches on applicants to particular positions and to particular points in the application process and that identifies the information to be considered would have avoided this situation.

Internet Search Reveals Applicant's Lawful Use of Lawful Products: Tobacco and Alcohol

Consider the following scenario:

The city of Paradise has advertised an accountant position in its finance department. Ten of the applicants meet the finance department's preferred qualifications. Following the new policy, Mary does an Internet search on each of the ten candidates. The search does not turn up anything at all on four of the candidates. Six candidates have Facebook pages; three of them are private, meaning that the profile information is visible only to those who have been designated as "friends"; the other three pages are public, meaning that the profile information is open for all to see. Of the latter three candidates, one has a profile that is unremarkable. The other two pages, however, each reveal something about the candidates that gives Mary pause.

One of the applicants, Ben, has posted pictures of himself that reveal he is a smoker—probably a heavy smoker inasmuch as almost all of the informal shots show him with a cigarette dangling from his mouth or his hand. Mary frowns. She knows that smokers have helped drive up the cost of health insurance for the town and that the council has debated whether to charge smokers a surcharge on their health insurance premiums. She also recalls the difficulties that smokers had when town facilities went smoke-free. Cheaper and easier, Mary thinks, not to hire this guy.

May the city reject Ben's application because he is a smoker? North Carolina law clearly says "no." Section 95-28.2 of the General Statutes (G.S.) prohibits employers, both public and private, from refusing to hire or otherwise engaging in employment discrimination against a person

because the prospective employee . . . engages in or has engaged in the lawful use of lawful products if the activity occurs off the premises of the employer during nonworking hours and does not adversely affect the employee's job performance or the person's ability to properly fulfill the responsibilities of the position in question or the safety of other employees.

Tobacco remains a lawful product, and Ben's use of cigarettes in his private life cannot form the basis of any employment decision. The city of Paradise may decline to hire him if he is not the best candidate for the position but not because he smokes. An employer who violates G.S. 95-28.2 may be liable for lost wages and benefits and subject to an order to offer employment to the rejected applicant.¹¹

11. See G.S. 95-28.2(e)(1) and (3).

The Facebook page of an applicant named Emily presents a different and more difficult problem.

Emily is a recent college graduate. Her application shows summer internships relevant to the accountant position and boasts a 3.5 grade point average. Most of the pictures she has posted of herself show her in social situations; many appear to have been taken at parties. One picture in particular bothers Mary. It shows Emily in a pirate hat swigging a bottle of gin and bears the caption "Drunken Pirate."

May the city reject Emily's application just because she drinks like a pirate? The answer to that question is not entirely clear. Alcohol is a lawful product in North Carolina for those over the age of twenty-one, which Emily is. Just as the town cannot refuse to hire Ben because he is a smoker, so too it cannot refuse to hire Emily because she drinks alcohol. Imagine that neither Mary, the finance director, nor the town manager object to the consumption of alcohol as a general matter. What bothers them is the caption that identifies Emily as "drunken." A person with a position in the town finance office, they feel, ought to present herself to the world as serious and dependable, not as a drunken pirate, with all of the connotations of lack of control that such a description implies.¹²

Would a decision not to hire Emily on the basis of the drunken pirate photograph be the same as a decision not to hire Ben because he is shown smoking cigarettes in his pictures? Arguably, these decisions would be different. The decision not to hire Ben would be unlawful because it was made on the basis of Ben's lawful, off-the-job use of a lawful product. The decision not to hire Emily would be lawful because it is based on her perceived immaturity and lack of judgment in portraying herself to the world as someone who drinks to the point of being "drunk" and on the employer's desire to have the employees in their finance office portray themselves as responsible at all times. The distinction between the decision not to hire Ben because he smokes and Emily because she is a "drunken pirate" is a fine one. Nevertheless, it seems likely that the city would prevail if Emily claimed unlawful discrimination, especially if it consistently enforced standards related to employee behavior both on and off the job. To date, there are no judicial opinions interpreting or applying G.S. 95-28.2.

Depictions of Alcohol Use and the ADA

The city of Paradise may face a more serious risk of a claim of disability discrimination. Emily may claim that the city refused to hire her because it perceived her as an alcoholic based on her Facebook posting. Alcoholism is a covered disability under the ADA,¹³ which prohibits employers from discriminating against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.¹⁴ Although there is nothing on Emily's Facebook page that asserts or implies that she is an alcoholic, the ADA also protects applicants and employees whom an employer regards as having a disability even

12. For the story of the real drunken pirate, see *Snyder v. Millersville Univ.*, 2008 WL 5093140 (E.D.Pa. 2008).

13. See 42 U.S.C. § 12114(c). See also *Daft v. Sierra Pacific Power Co.*, 251 F. App'x 480 (9th Cir. 2007); *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469 (6th Cir. 2005); *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110 (1st Cir. 2004); *Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002); *Miners v. Cargill Commc'ns, Inc.*, 113 F.3d 820, 823 n.5 (8th Cir. 1997).

14. See 42 U.S.C. § 12112(a).

when they do not. The statute defines the term “disability” as including “being regarded as having such an impairment.”¹⁵ It explains that the requirement “being regarded as having such an impairment” is met “if the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”¹⁶

In other words, Emily could claim that the city did not offer her an interview because decision makers thought she was an alcoholic and discriminated against her on that basis. Under the standard framework for proving intentional employment discrimination cases, Emily would establish a *prima facie* case of discrimination, the first hurdle in proving her case, by showing (1) that the employer regards her as having an ADA-qualifying disability, (2) that she is qualified to perform the essential functions of the position, and (3) that she suffered an adverse action—rejection of her application for employment—because of a perceived disability.¹⁷ Once Emily makes that showing, the burden would shift to the city to produce a legitimate, nondiscriminatory reason for the adverse employment action. If the city offers a legitimate, nondiscriminatory reason for its actions (Emily’s lack of judgment in posting unprofessional pictures of herself as a drunken pirate), then the burden shifts back to Emily to show that the stated reason is a pretext for discrimination. While the burden would be on Emily to prove that the city denied her the job because it regarded her as an alcoholic, a jury might not understand the distinction that the city disapproved of Emily’s portrayal of herself as “drunk” but did not regard her as an alcoholic. And the city, like all employers, would still have to incur the costs of defending itself in court, even if ultimately it was successful.

Internet Search Reveals Applicant’s Medical Information

Say an employer learns from an Internet search that an applicant named Maggie suffers from depression and is the organizer of a depression support group. The employer might be violating the ADA. So could the employer that rejects Roy’s application for employment after learning from his blog that Roy has suffered workers’ compensation injuries three times in the past five years. If an employer learns from Jeff’s MySpace page that his father has cancer, it will have acquired information about Jeff’s family medical history, and the Genetic Information Nondiscrimination Act (GINA) prohibits employers from making employment decisions on the basis of individual and family genetic and medical information.

These statutes, each in a different way, prohibit employers from making employment decisions on the basis of an individual’s medical history, just as Title VII prohibits decision making on the basis of race, color, gender, religion, and national origin and the ADEA prohibits employers from making decisions on the basis of age. Like Title VII and the ADEA, GINA does not penalize employers for unintentionally learning medical information through an Internet

15. See 42 U.S.C. § 12102(1)(C).

16. See 42 U.S.C. § 12102(3)(A). See also *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 384–86 (4th Cir. 2008) (evidence established that employer regarded employee with Parkinson’s Disease as being substantially limited in performance of major life activity).

17. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50–54 (2003). See also *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Ennis v. Nat’l Ass’n of Bus. & Educ. Radio*, 53 F.3d 55, 58 (4th Cir. 1995). And see *E.E.O.C. v. Wal-Mart Stores, Inc.*, 477 F.3d 561 (8th Cir. 2007) (*McDonnell–Douglas* *prima facie* case applied to applicant; EEOC showed that applicant with cerebral palsy was able to perform essential functions of greeter position).

search. But the ADA is much more problematic. Restrictions that it puts on the acquisition of medical information make the use of Internet background searches much riskier.

The ADA

Employers cannot know in advance what information an Internet search will reveal. This means that employers face a significant risk of violating the ADA when conducting an Internet background search at any point prior to a conditional offer of employment. In contrast to Title VII, the ADA explicitly prohibits employers from making certain preemployment inquiries. An employer may not ask whether or not an applicant has a disability or inquire into the nature or severity of a disability until after it has made a conditional offer of employment.¹⁸ In its Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations, the EEOC explains that for the purposes of the ADA's prohibitions on preemployment inquiries into disabilities, a "disability-related question" is one that is "*likely to elicit* information about a disability."¹⁹ An employer may ask about an applicant's ability to perform essential job functions but cannot ask whether applicants can perform major life activities, such as standing, lifting, or walking.²⁰ An employer may not ask applicants about job-related injuries or workers' compensation history precisely because these questions relate directly to the severity of an applicant's impairments and would therefore be likely to elicit information about a disability.²¹ Thus, the ADA effectively prohibits all preemployment medical questions, since almost any medical question is likely to elicit information about a disability.

Neither the text of the ADA itself nor the EEOC's ADA regulations nor case law interpreting the ADA address the question of whether an Internet search that uncovers information relevant to the existence of a disability violates the ADA's prohibition on preemployment medical inquiries. In its Enforcement Guidance on Preemployment Medical Inquiries, however, the EEOC explains that "an employer may not ask a third party (such as a service that provides information about workers' compensation claims, a state agency, or an applicant's friends, family, or former employers) any question that it could not directly ask the applicant."²² It is reasonable, therefore, to interpret the ADA to prohibit an employer from doing an Internet search designed to elicit information about disabilities.

But what if the employer is not purposefully searching for information about possible disabilities? Suppose the employer is searching for any information that is inconsistent with what an applicant said on the employment application or in an interview. In the course of that search, the employer happens upon information that reveals the existence of a disability. This situation is similar to that in which an applicant voluntarily or spontaneously discloses disability-related information in response to a lawful question that does not seek medical information. In the latter case, the EEOC advises, even though the employer "has not asked an unlawful question, it still cannot refuse to hire an applicant based on disability unless the reason is 'job-related and consistent with business necessity.'"²³ In a perfect world, an employer who "stumbles" over disability-related information in an otherwise lawful Internet search would be able to

18. See 29 C.F.R. §§ 1630.13(a) and 1630.14(a) and (b).

19. U.S. EEOC, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations 4 (Oct. 1995), at www.eeoc.gov/policy/docs/medfin5.pdf.

20. EEOC, ADA Enforcement Guidance on Preemployment Disability-Related Question at 9.

21. EEOC, ADA Enforcement Guidance on Preemployment Disability-Related Question at 9.

22. EEOC, ADA Enforcement Guidance on Preemployment Disability-Related Question at 12.

23. EEOC, ADA Enforcement Guidance on Preemployment Disability-Related Question at 4 n.6.

distinguish itself from the employer who intentionally sought unlawful information. In the real world, however, an employer who unintentionally acquires disability-related information may have a hard time showing that its purpose in conducting an Internet search did not include learning information about possible disabilities.

Should employers assume that any Internet search performed before it makes a conditional offer of employment is one that violates the ADA? Or is only the pre-offer search that results in disclosure of a disability a violation of the ADA? Or is it only a search that the employer conducts for the purpose of uncovering disabilities a violation of the ADA? Since an employer cannot know in advance what information the search will produce, it may be in practice a distinction without a difference. For this reason, no North Carolina public employer should conduct pre-offer Internet searches without first seeking the advice of its city, county, or agency attorney.

GINA

Title II of the Genetic Information Nondiscrimination Act (42 U.S.C. §§ 2000ff–2000ff-11) prohibits employers from using genetic information in hiring decisions and other employment matters. In the context of hiring, the term “genetic information” means information about the genetic tests of an applicant or an applicant’s family members as well as information about the “manifestation” of any disease or disorder in an applicant or an applicant’s family members.²⁴ Like the ADA, GINA not only prohibits employers from discriminating in hiring, it also prohibits employers from requesting or requiring medical or genetic information from an applicant.²⁵ Unlike the ADA, GINA does not allow for post-offer inquiries. Genetic information is off-limits to the employer at all times.

GINA contains certain exceptions to the rule that an employer may not seek genetic information—in contrast to the ADA. An employer does not violate GINA where it inadvertently obtains family medical history—this is the so-called “water cooler rule,” which recognizes the fact that sometimes employers overhear family medical information and sometimes employees volunteer family medical information in the course of more general conversations.²⁶ Similarly, an employer is not liable under GINA for obtaining information that is commercially or publicly available. The statute itself refers to newspapers, magazines, periodicals, and books as permissible public sources for genetic information about applicants and employees.²⁷ The EEOC’s proposed GINA regulations include genetic information obtained from publicly accessible electronic media, such as the Internet, television, and movies.²⁸

An employer would not, then, violate GINA when it does an Internet search on an applicant for employment, even if that search turned up genetic information available on a public website. Nevertheless, GINA prohibits employers from making decisions based on genetic information, however learned. Possession of genetic information may lend itself to the assumption that it was used to discriminate, and the wise employer will actively seek to avoid acquiring any such information.

24. See 42 U.S.C. § 2000ff(4)(A)(iii).

25. See 42 U.S.C. § 2000ff-1(b).

26. See 42 U.S.C. § 2000ff-1(b)(1).

27. See 42 U.S.C. § 2000ff-1(b)(4).

28. See 29 C.F.R. § 1635.8(b)(4).

Internet Search Reveals Sexually Explicit Material Related to the Applicant

Consider the following scenario:

As part of the Internet background check on Patricia, another applicant for the accountant position, Mary finds Patricia's personal Facebook page. The page has a number of photographs, including ones of Patricia with colleagues from her current job as well as two photographs of Patricia alone. The first of these solo shots is captioned "fresh out of the shower" and depicts Patricia posing bare-shouldered. The other is a hazy, seminude photograph of Patricia.

Mary advises the finance director that they have received an application from someone who meets the position's preferred qualifications but that an Internet background check has revealed semipornographic photographs of the applicant. In accordance with the city's personnel policy, which requires employees to refrain from behavior both on and off-duty that would reflect poorly on the city, Mary will not forward Patricia's application to the department and will send her a standard form rejection letter.

A friend of Patricia's, who works for the town, tells Patricia the reason the town has rejected her application. Patricia is outraged. She consults an attorney, complaining that the photographs and their captions are expressive statements and that the city of Paradise has violated her First Amendment right to freedom of speech and expression.

Has the city acted unlawfully by rejecting Patricia's application because of the photographs on her Facebook page? No. Electronic expression is no different from speech voiced out loud or from communication in the form of printed words or photographs in a newspaper. The same First Amendment tests apply to *all* public applicant and public employee speech and communication. Whether or not the city of Paradise can refuse to hire an applicant because of an Internet posting depends on the nature of the applicant's posting.

Only speech on matters of public concern is constitutionally protected.²⁹ The first question that must be asked about an applicant's speech, therefore, is whether it was expression related to a private matter or whether the applicant spoke or posted as a citizen on a matter of public concern.³⁰ What are matters of public concern? Matters of public concern usually involve

29. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977) (teacher's claim that he was not rehired because of his public criticisms of dress code was cognizable First Amendment retaliation claim; burden on school district to show that it would have reached the same decision even in the absence of the speech at issue); *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972) (First Amendment prohibited state college from not renewing a professor based on his public criticisms of the college administration). See also *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990) (hiring decisions based on party affiliation and support violate First Amendment rights to free speech and association). See also *Maniates v. Lake County Oregon*, 2009 WL 395159 (D. Ore. 2009) (applicant offered no evidence to prove that county's refusal to hire her was in retaliation for protected speech); *Ruscoe v. Hous. Auth. of the City of New Britain*, 259 F. Supp. 2d 160, 170 (D. Conn. 2003).

30. Although most First Amendment public employment cases arise in circumstances where a public employee has been terminated on the basis of his or her speech, the U.S. Supreme Court has made clear that the same protections and analysis apply in cases involving a failure to hire an applicant because of something that the applicant said or wrote. See *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972) (First Amendment prohibited state college from not renewing a professor based on his public criticisms of the college administration). See also *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79 (1990) (hiring

- charges of illegal action, abuse of authority or power, and fraud, corruption, or waste;³¹
- matters suitable for legislative attention;³²
- allegations of pervasive racial discrimination in a government agency;
- questions regarding public safety.³³

Whether or not the statements were made in a public forum is not the deciding factor—the test is whether the matter is one in which “free and open debate is vital to informed decision-making by the electorate.”³⁴

Here it is clear that the photographs on Patricia’s Facebook page are personal in nature and do not address matters of public concern. They are not, therefore, entitled to First Amendment protection. The U.S. Supreme Court’s decision in the case *City of San Diego, California v. Roe* is instructive in this regard. The *Roe* case involved a San Diego police officer who had been terminated for offering sexually explicit videos—featuring him in a generic “police” uniform—for sale online. Roe sued the city, claiming he was terminated for speech that was protected by the First Amendment. The Supreme Court held against Roe. Although it noted that the boundaries of what constitutes “public concern” are not well-defined, it nonetheless found that in the context of the First Amendment, public concern is “something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” Applying that definition, it found that there was “no difficulty” in concluding that Roe’s expression as made through his videos and online promotion and sale of them did not qualify as a matter of public concern and that his termination was not in violation of the First Amendment.³⁵ As in the *Roe* case, there is no basis for thinking that the photographs on Patricia’s Facebook page would be of general interest to the community.³⁶

Internet Search Reveals Applicant’s Complaints about Her Current Employer

Not all Internet speech is so clearly outside the protections of the First Amendment.

Sarah, another applicant for the accountant position, has been writing a blog for some time. Some of her postings are personal in nature and describe things that

decisions based on party affiliation and support violate First Amendment rights to free speech and association); *Hubbard v. Adm’r, Env’tl. Prot. Agency*, 735 F. Supp. 435, 437–38 (D.D.C. 1990) (evidence demonstrated that applicant was rejected for exercise of First Amendment rights). Where the speaker is an applicant and not an employee, the *Garcetti* prong of the First Amendment analysis—did the employee speak in the course of his or her official duties?—does not apply here. See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

31. *Hughes v. Bedsole*, 913 F. Supp. 420, 428 (E.D.N.C. 1994) (citing *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 871 (4th Cir. 1984)).

32. *Lewis v. Blackburn*, 734 F.2d 1000, 1004–05 (4th Cir. 1984).

33. *Cutts v. Peed*, 17 F. App’x 132, 2001 WL 963728 (4th Cir. 2001).

34. *Connick v. Myers*, 461 U.S. 138, 145 (1983).

35. *City of San Diego, California v. Roe*, 543 U.S. 77, 83–84 (2004).

36. *See also* *Marshall v. Mayor and Alderman of City of Savannah, Georgia*, 2010 WL 537852 (11th Cir. 2010) (not for publication in the Federal Reporter). Marshall was terminated from her position as a city firefighter after posting pictures of herself with the fire and rescue squad on the same page as pictures showing her bare-shouldered and with a bare backside. She challenged her termination as a violation of Title VII’s prohibition on gender discrimination and as a violation of her First Amendment rights. The district court found that her speech as displayed on her MySpace page was not entitled to First Amendment protection, a decision she did not appeal before the Eleventh Circuit.

have happened to her and trips she has taken. Others discuss current events on both the national and local level.

Sarah works for Nuttree, a neighboring town. One of Sarah's blog posts concerns what she perceives to be the town manager's favoritism of employees who play on the town's softball team. Her comments range from declarations that she plays softball well enough to be on the team to such rhetorical questions as "Who would want to spend more time with losers like these?" Sometimes she refers to the team as a bunch of "dumb jocks."

Sarah's posts would leave many prospective employers feeling uncomfortable. They seem mean-spirited. They also seem unwise—Sarah's blog is a public website, and her supervisors and colleagues could easily read what she has written. A prospective employer might well wonder how someone like Sarah would affect workplace morale. There is no question that a *private employer* could refuse to hire Sarah on the basis of her blog posts. *Private employers* have no duty to respect the free speech rights of their applicants and employees. Public employers also could likely refuse to hire Sarah since her remarks are not on a matter of public concern but instead address her personal views on her job prospects and her feelings about her individual work environment. The mere fact that her workplace is a government workplace is not enough to turn her complaints into matters of public concern.³⁷

But what if one of Sarah's blog posts concerns what Sarah perceives to be second-class treatment of Nuttree's female employees? Suppose that Sarah notes that relatively few women hold the position of department head and that she questions the recent promotions of several male employees into positions where one would have expected female colleagues to have been strong contenders. Or that, on her blog, Sarah muses about her own prospects on Nuttree's career ladder?

A blog post such as this also is likely to give employers pause. Sarah appears to be a disgruntled employee. Again, the fact that she has posted her concerns and speculations on a website that is open for all to read may lead a prospective employer to wonder whether Sarah is a troublemaker—the sort of employee who will stoke other employees' dissatisfactions and lower morale. As in the previous example, a prospective employer might question Sarah's judgment.

At first blush, it appears that Sarah's second blog post is much like the first—a complaint about individual work environment—and is not entitled to First Amendment protection because it does not address a matter of public concern. The courts, however, generally have made a distinction between employee speech that concerns discriminatory policies or practices by public employers and speech that concerns more generalized instances of alleged unfair workplace treatment of the speaker. The former generally is treated as protected speech, while the latter is not. Rejecting Sarah for the accountant position based on the second blog posting could be unlawful.

Discriminatory Employment Practices as Matters of Public Concern

Two cases from the Fourth Circuit Court of Appeals illustrate this distinction. The first case, *Love-Lane v. Martin*, involves employee speech that couples a claim of racially discriminatory treatment of an employee with one of racially discriminatory treatment of a school's African-

37. See *Connick*, 461 U.S. 138; *Hughes v. Bedsole*, 913 F. Supp. 420, 428 (E.D.N.C. 1994) (personal grievances concerning working conditions do not qualify as matters of public concern).

American students.³⁸ In the *Love-Lane* case, the county school board demoted the plaintiff, an African-American assistant principal, to a teaching position. The school board claimed it had demoted her because of her poor performance in an administrative capacity. Love-Lane alleged that she was demoted because of her race and because she repeatedly spoke out against specific disciplinary practices at her school that she viewed as discriminatory against African-American students. On appeal, a threshold issue before the Fourth Circuit was whether Love-Lane's speech was on a matter of public concern. The court said that it was. Discriminatory discipline within the school, the Fourth Circuit said, was a matter of public concern to many in the community, including teachers, parents, and students and was not related to a private issue between Love-Lane and her employer,³⁹ noting that as a matter of law, discrimination is generally held to be of public concern.

The Supreme Court has made it clear that statements about a “[s]chool [d]istrict’s allegedly racially discriminatory policies involve[] a matter of public concern.” . . . We, too, have repeatedly recognized that a public employee’s speech about racially discriminatory practices . . . involves a matter of public concern.⁴⁰

In the second case, *Campbell v. Galloway*, the Fourth Circuit acknowledged that not every statement about alleged discriminatory treatment of an individual employee involves a matter of public concern. It declined, however, to articulate a bright-line rule, as some other circuits have done.⁴¹ The Second, Seventh, and Eleventh Circuits, for example, have found a claim of discrimination against an individual employee to be a matter of personal and *not* public concern.⁴² In the *Campbell* case, by contrast, the Fourth Circuit identified the proper approach as “a case- and fact-specific inquiry” and found that a female police officer’s complaints about gender discrimination were a matter of public concern. Persuasive to the court in this case was the fact that the employee complained not only about the multiple instances of inappropriate conduct on the part of male supervisors toward her, but also about their repeated inappropriate conduct toward other female employees of the town as well as toward suspects and witnesses.⁴³

Even though the Fourth Circuit declined to articulate a bright-line rule with respect to speech involving claims of a public employer’s unlawful discrimination, the court’s tendency has been to find First Amendment protection in such cases. This is so even where the allegations are limited to discriminatory treatment of a single employee. In *Hensley v. Horne*, for example, the Fourth Circuit held that a town employee had a First Amendment right to speak to investigators inquiring into a co-worker’s claim that their supervisor had sexually harassed her.⁴⁴ The court

38. *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004).

39. *See Love-Lane*, 355 F.3d at 775–78.

40. *See Love-Lane*, 355 F.3d at 776 (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)), *Seemuller v. Fairfax County Sch. Bd.*, 878 F.2d 1578, 1582 (4th Cir. 1989), *Arvinger v. Mayor & City Council of Baltimore*, 862 F.2d 75, 78 (4th Cir. 1988).

41. *Campbell v. Galloway*, 483 F.3d 258, 268–69 (4th Cir. 2007).

42. *See, e.g., Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993); *Gray v. Lacke*, 885 F.2d 399, 411 (7th Cir. 1989); *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993).

43. *See Campbell*, 483 F.3d at 269–70.

44. *See Hensley v. Horne*, 297 F.3d 344, 347 (4th Cir. 2002) (qualified immunity defense denied as *Pickering* rule establishing public employee’s First Amendment right to speak on matters of public concern was clearly established at time of alleged retaliatory conduct). *See also Peters v. Jenney*, 327 F.3d

is not so likely to find First Amendment protection where the interests of a single employee are involved but unlawful discrimination is not at issue. In *Kirby v. City of Elizabeth City*, for example, the Fourth Circuit deemed that a police officer's testimony about the maintenance history of a particular police car in support of a fellow officer's personnel grievance was not a matter of public concern.⁴⁵

So, what about Sarah's blog posts about pervasive gender discrimination by the town of Nuttree? Fourth Circuit precedents suggest that because she has made claims of unlawful discrimination affecting both herself and female employees generally, her speech would be considered a matter of public concern. Does that mean that the city cannot reject Sarah? That it must hire her if she is otherwise the most qualified applicant? Not necessarily. As with any First Amendment employee or applicant free speech analysis, the answer to this question will be unclear until the interest of the public employer in providing government services efficiently is weighed against the free speech interests of the applicant.

Balancing the Interests of the Public Employer against the Applicant's Right to Free Speech

As discussed above, if the applicant's Internet posting or speech does not address a matter of public concern, then the communication is not entitled to First Amendment protection and the employer is free to reject the applicant on the basis of what he or she has said or written. If, however, the applicant's speech does address a matter of public concern—such as unlawful discrimination—the question of whether or not it may form the basis of a rejection is determined by application of what is known as the *Pickering* balancing test. The *Pickering* test (first set forth by the U.S. Supreme Court in the case *Pickering v. Board of Education*)⁴⁶ requires a court to weigh an applicant's interest in speaking out about a matter of public concern and the government employer's legitimate and substantial interests in providing public services efficiently.⁴⁷ Factors that the courts will consider include the effect of the applicant's speech on the employer's ability to maintain discipline and harmonious working relationships, whether the applicant's speech would adversely affect a working relationship in which personal loyalty and confidence were especially required, and whether the applicant's statements would impede the proper performance of his or her prospective duties or interfere with the regular operation of the employing agency.⁴⁸

In the hypothetical case of Sarah, it seems unlikely that the city of Paradise could make the case that her postings on gender discrimination at the town of Nuttree would interfere with her

307, 321–23 (4th Cir. 2003) (school administrator's allegations that she was not renewed because of her opposition to racially discriminatory practices in school district's gifted program stated cause of action for retaliation in violation of free speech rights); *Wyckoff v. Maryland*, 522 F. Supp. 2d 730, 738 (D. Md. 2007) (following *Campbell*, allegations of discriminatory promotional practices within police department are matter of public concern, even if allegations relate only to one officer's experience).

45. See *Kirby v. Elizabeth City*, North Carolina, 388 F.3d 440, 446–47 (4th Cir. 2004) (“the relative unreliability of a single police vehicle simply is not of sufficient significance to attract the public's interest”). Note that the court found that the officer's complaint that the police chief had retaliated against him for his testimony about the vehicle was itself a matter of public concern because retaliation for allegedly truthful speech could have a chilling effect on other officers.

46. 391 U.S. 563, 568 (1968).

47. See *Pickering*, 391 U.S. at 568; *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977).

48. See *Pickering*, 391 U.S. at 569–70.

duties in the Paradise finance department, were she hired. Neither prospective working relationships, personal loyalty, nor the regular operation of the finance department are likely to be compromised since none of the persons whom she accused of discrimination would work with her in Paradise. Could the city claim that her prospective supervisors and co-workers are likely to view her with suspicion and worry that she will accuse them of unlawful behavior? That sort of rationalization may simply be too speculative to withstand the court's scrutiny. It seems likely that a court would hold that it is unconstitutional for the city of Paradise to reject Sarah's application because she has said that the town of Nuttree discriminates against women.

Still, the city does not necessarily have to hire Sarah. Its obligation merely extends to considering her qualifications and comparing them to those of others. If she is not the best candidate for the job, the city may reject her. An employer may reject an applicant who has spoken on a matter of public concern if it would have reached the same decision in the absence of the protected speech.⁴⁹

Internet Searches and Privacy Considerations

Is an Internet background check an actionable invasion of an applicant's privacy? Suppose that Emily, the applicant who posted a picture of herself entitled "drunken pirate," learns that the city has conducted an Internet background check and is upset. To Emily, the city's look at her social media pages feels like a violation of her personal privacy, even though she herself took no steps to restrict access to her personal information. Tough. As a legal matter, Emily's subjective expectation of privacy is irrelevant.

Neither federal or state employment laws nor general privacy laws prohibit an employer from using an Internet search engine to find online information about a job applicant. An employer is as free to do so, as is any individual curious about a person in the news, a neighbor, a new acquaintance, or a possible romantic interest. Just as it is legal to view Google, Yahoo, Bing, or other search engine results about a job applicant, so too an employer may view information that is publicly posted on networking sites whether they are professional networking sites, like LinkedIn, or social networking sites, like Facebook, MySpace, or Buzz.

When someone posts information on a website, be it Facebook, MySpace, or an online photo gallery site like Snapfish, he or she assumes the risk that the posted information will be accessible to the public.⁵⁰ People posting such information often believe that their posts will not show up in search engine results. But social networking sites have been known to change their privacy policies faster than their users realize, and information or photographs that were "private" at the time of posting suddenly become public when the site's privacy policy changes.⁵¹ In no instance where information is public does the employer bear any liability for a violation of privacy rights.

49. See *Mt. Healthy*, 429 U.S. at 287. The nexus causation can be established either directly by evidence of retaliatory animus or indirectly by circumstantial evidence. See *Ziskie v. Mineta*, 547 F.3d 220, 229 (4th Cir. 2008) (plaintiff failed to show causal connection between plaintiff's action and adverse employment decision as is required in a retaliation case); *Gibson v. Fluor Daniel Servs. Corp.*, 218 F. App'x 177, 180 (4th Cir. 2008) (same); *Baqir v. Principi*, 434 F.3d 733, 748 (4th Cir. 2006) (same).

50. See, e.g., *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005) (plaintiffs who allowed themselves to be photographed and the photographs posted on Internet photo gallery site had no reasonable expectation of privacy under the California Constitution).

51. For example, Facebook recently changed the policy whereby it had allowed so-called third-party "apps" and websites access to its members' personal information and to that of individual members' "friends" without notifying the members in question. See Chris Conley, "Facebook Addresses Several

When an Employer Accesses Nonpublic Information

Consider the following scenario:

Over in Bad Mountain, where Mary's friend Rob is in charge of human resources, things have become tense. An exposé in the local newspaper about alleged wrongdoing by a town employee has put the town in a defensive position. Rob is under considerable pressure from the council to vet new hires more thoroughly. For this reason, Rob decides he must access not only the public part of applicants' Facebook pages, but also their private pages. He considers three options. His first option is to find out if there is a current employee who is a "friend" of the applicant with access to their private pages. If so, Rob can ask the employee to give Rob access. The second option is to ask his brother, a master hacker, to hack into the applicant's account. The third option is to ask each person called in for an interview to pull up their Facebook page while Rob looks over their shoulder.

Unauthorized Access to Stored Communications Is Illegal

Are any of these options lawful? The first two options that Rob considers are unlawful. Rob can neither use another employee's log-in information to access an applicant's Facebook page nor engage a hacker to view it without violating the federal Stored Communications Act, Title II of the Electronic Communications Privacy Act.

The Stored Communications Act (SCA) makes it illegal intentionally to access a network through which an electronic communication service is provided *without authorization* and to obtain access to wire or electronic communications while they are in electronic storage.⁵² Social media pages and communications fall within the act's definition of "electronic communication" as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce."⁵³ Thus, if Rob uses his brother to hack into the social media site or coerces another employee to access it for him, he will have violated the SCA and be subject to both criminal and civil liability and face a minimum fine of \$1,000 per violation and imprisonment for no more than one year.⁵⁴

What if the employee Rob asks to access an applicant's Facebook page agrees to do so? This is what happened in one New Jersey case. In *Pietrylo v. Hillstone Restaurant Group*, restaurant managers became concerned about what was being posted by members of a private MySpace chat group, all of whom were restaurant employees. The managers got access to the chat group by asking an employee who was an authorized user of the chat group to give them her log-in information. Although she had second thoughts about providing them with her log-in

Privacy Problems" (May 26, 2010), available on the "Issues" page of the American Civil Liberties Union of Northern California website at www.aclunc.org/issues/technology/blog/facebook_addresses_several_privacy_problems.shtml. See also *Boring v. Google Inc.*, 2010 WL 318281 *3-*4 (3d Cir. 2010) (plaintiffs claimed that Google had invaded their privacy by using a digital camera mounted on a vehicle to take a picture of their house and outlying property and to make that image available through its search engine; the court found that the plaintiffs had not been singled out or treated in an unusual fashion, and the intrusion was not one that a reasonable person would find highly offensive).

52. See 18 U.S.C. § 2701(a)(1).

53. See 18 U.S.C. § 2510(12).

54. See 18 U.S.C. § 2701(b)(2) for criminal penalties and § 2707(c) for civil penalties.

information, the employee did not feel she could say no to her managers. In a suit for civil damages brought by other employee users of the chat group (some of whom were fired on the basis of their posts), the court found that by coercing a subordinate to give them access to the chat group the managers had intentionally and knowingly accessed stored communications without authorization in violation of the SCA.⁵⁵

Rob should not ask another employee to help him access an applicant's Facebook page.

Asking Applicants to Display Their Social Media Pages and Posts

What about Rob's third option, asking applicants to pull up their private social media pages as part of the in-person interview process? If the applicant did not want to do so, he or she could withdraw (or be rejected) as an applicant. There are no reported cases addressing whether such a practice would violate the SCA. At first blush, though, it seems that asking an applicant to disclose the content of their private Internet postings would be as coercive as asking employees to give management access to the private Internet postings of applicants or other employees. In the Fourth Amendment drug-testing context, however, the courts have found that the threat of taking away a job that an employee already has is more coercive than the threat of not considering an applicant for a job absent the test. For example, asking a public employee to undergo drug testing in the absence of reasonable suspicion to believe that the employee is using illegal narcotics is a violation of the Fourth Amendment's protections against unreasonable searches and seizures, and the courts will reinstate any employee who refuses to take a drug test under these circumstances. But public employers routinely ask all job *applicants* to undergo drug testing regardless of whether there is reason to think that an individual applicant is under the influence of illegal drugs. No federal court of appeals has ever found such practices coercive or unconstitutional. As the law stands now, an applicant does not have any legitimate expectation that he or she will be offered a particular job, and any applicant who does not wish to submit to a drug test may withdraw from consideration without a public employer being found to have acted unconstitutionally. Under the Fourth Amendment, the same analysis would likely apply to applicants who are asked to disclose their private Internet postings. They too can walk away from the interview process. Whether the same standard will apply to the SCA as it does to public employment and privacy rights under the Fourth Amendment remains to be seen.

A Note about Negligent Hiring

One of the most frequent reasons employers cite for conducting Internet background searches, and social media searches in particular, is fear of a negligent hiring claim. North Carolina common law has recognized the tort of negligent hiring, whereby an employer is responsible for an injury caused by the negligent or intentional conduct of one its employees. In a negligent hiring case, the injured plaintiff must show that the employer knew or should have known that the employee was not fit to be hired for the particular job because it was foreseeable that the employee might harm someone like the plaintiff.

In North Carolina, claims of negligent hiring have rarely been successful. The North Carolina courts have consistently held that employers do not have a general duty to check the criminal history of an applicant or employee, even when the position requires the employee to go into

55. See *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. 2009).

other people's homes, where the chance for theft is great.⁵⁶ In a 1990 North Carolina Supreme Court case, the court did not directly address the issue of whether there is a general duty to obtain a criminal history of a job applicant, but it found that the defendant school system could not reasonably have foreseen a school principal's pedophilia absent any mention of inappropriate sexual behavior by his references.⁵⁷

As of the date of publication of this bulletin, no court in any U.S. jurisdiction has found a duty on the part of employers to perform an Internet search as part of a background check on prospective employees. Public employers should therefore rest assured that deciding not to conduct Internet searches on applicants or deciding to delay such searches until a conditional offer of employment has been made will in no way leave them open to liability for negligent hiring.

Internet Searches and the Uniform Guidelines on Employee Selection Procedures

The use of Internet background checks is a selection procedure governed by Title VII and the EEOC's Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines).⁵⁸ This means that North Carolina public employers who are doing Internet background checks must meet the record-keeping requirement of the Uniform Guidelines with respect to their Internet background searches and must ensure that their use of Internet searches does not result in disparate impact on Title VII-protected classes.

The employment regulations issued by the EEOC under the authority of Title VII include a requirement that employers maintain records that will disclose the impact that tests and other selection procedures have had on employment opportunities for persons of different races, genders, or ethnic groups:

Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B of this section, in order to determine compliance with these guidelines.⁵⁹

This record-keeping regulation was designed to provide a way of ensuring that no selection device disproportionately excludes (that is, has a disparate impact on) any particular protected class. The Uniform Guidelines record-keeping regulation is in addition to the more general requirement that employers keep for a period of one year "application forms submitted by applicants and other records having to do with hiring. . ."⁶⁰ (Note that for applicants who are hired, the Records Retention and Disposition Schedule for state and local government employers, issued by the Archives and Records Section of the North Carolina Department of Cultural

56. *See, for example*, *Westerhold v. Designer's Way, Inc.*, 167 N.C. App. 657, 657 (2004) (painting company); *Moricle v. Pilkington*, 120 N.C. App. 383, 387 (1996) (painting company). *See also* *Neal v. Elec. Data Sys. Corp.*, 1999 WL 1939976, *5 (E.D.N.C. 1999) (sexual harassment claim brought against data company).

57. *See* *Medlin v. Bass*, 327 N.C. 587, 592 (1990).

58. 29 C.F.R. § 1607.

59. *See* 29 C.F.R. § 1607.4(A).

60. *See* 29 C.F.R. § 1602.14.

Resources, requires employers to keep employee selection materials for a period of thirty years following separation from service.)⁶¹

The Uniform Guidelines record-keeping requirement is relevant for Internet background searches in two ways. This is the first way. The use of Internet background checks is clearly a “selection procedure” within the meaning of the Uniform Guidelines. 29 C.F.R. § 1607.16(Q) defines “selection procedure” as

Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

Although the regulation, issued in 1978, does not mention Internet searches for information, it is fair to say that if an application form is a type of selection device, then a procedure that solicits information to supplement an application, like an Internet search, also is a selection device. This means that an employer must keep records of the Internet searches it does. The employer must print out all of the information it accesses so that if the city’s overall selection processes result in a disproportionate number of applicants of a particular race, gender, religion, or ethnic group being excluded from employment, the role of the Internet search may be considered in analyzing the reasons for such disparate impact. Failure to maintain the required records is an independent violation of Title VII as well as a fact that works against an employer defending against disparate impact claims.⁶²

This is the second way in which the Uniform Guidelines record-keeping requirement is relevant to Internet background searches. Using social media sites as a selection device to eliminate applicants from further consideration, as the city of Paradise did in the above hypothetical, is unlikely to have an adverse impact on traditional minority groups, as they tend to be underrepresented on such sites. A recent study by a human resources consulting group reports that relative to their representation in the workforce, whites and Asians are overrepresented on Facebook and LinkedIn, while African-Americans and Latinos are underrepresented.⁶³

61. *See, for example*, N.C. Department of Cultural Resources, Records Retention and Disposition Schedule: Municipal, Standard 15: Personnel Records, at www.records.ncdcr.gov/local/municipal_2009.pdf.

62. *See* 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.14. *See also* U.S. Equal Employment Opportunity Comm’n v. Target Corp., 460 F.3d 946 (7th Cir. 2006); Equal Employment Opportunity Comm’n v. Cleveland Constr., Inc., 2006 WL 1806042 (W.D. Tenn. 2006); Branch v. County of Chesterfield, 2001 WL 1943878 (E.D. Va. 2001).

63. Stephanie R. Thomas, “Using Social Media for Recruiting? Beware Disparate Impact Claims,” Minimax Consulting Webinar (Feb. 9, 2010), at www.docstoc.com/docs/35535858/Webinar-Handout-Using-Social-Media-for-Recruiting-Beware-Disparate-Impact. More specifically, while 73 percent of the civilian labor force is white, whites make up 78 percent and 86 percent of the users of Facebook and LinkedIn, respectively. African-Americans, who constitute approximately 10 percent of the civilian labor force, represent 11 percent of Facebook members but only 3 percent of those using LinkedIn. Latinos represent 13 percent of the civilian labor force but only 5 percent of Facebook users and 2 percent of LinkedIn members. The age breakdown of the civilian labor pool compared to that of Facebook and LinkedIn users also is also skewed. Persons 18–24 years of age are overrepresented on Facebook and underrepresented on LinkedIn: they are 36 percent of the labor force and account for 45 percent of Facebook users but

If, however, an employer used searches of social networking sites in a way that increased the likelihood of an applicant's being hired, this practice could have a statistically significant adverse impact on minority representation in the workforce. For example, an employer might decide to consider offering interviews only to those applicants whose Internet postings showed superior writing ability. Because of their relative lack of representation on social media sites relative to their presence in the labor market, African-American and Latino applicants might be disproportionately excluded from those interviews—not because their writing skills are inferior but because their absence from Internet sites precludes their writing from being evaluated at all. An employer policy that eliminates from further consideration applicants who do not have an Internet presence on the grounds that the employer simply cannot learn enough about them could also have a disparate impact on minority candidates.

This is yet another reason why employers must carefully consider what information they are seeking from Internet and social media searches.

Conclusion

No law prohibits North Carolina public employers from using the Internet to conduct supplementary background checks on job applicants. But Internet searches have the potential to give employers information that could increase their risk of liability under federal laws that prohibit discrimination in hiring. A rejected applicant may use the employer's preinterview knowledge of the applicant's race, gender, religion, or membership in another protected class, or knowledge that the applicant has disability, as evidence that a hiring decision was discriminatory. In addition, the ADA's stringent prohibition against preemployment medical inquiries leaves an employer whose Internet search reveals medical information exposed to uncertain liability because of the absence of any regulatory guidance or applicable case law. Similarly, conducting an Internet search or visiting an applicant's social media pages may bring to an employer's attention facts about an applicant's lawful use of a product that is lawful but of which the decision maker disapproves. Misuse of social media sites poses yet another risk for employers in the form of a violation of the Stored Communications Act.

How might a North Carolina public employer best protect itself against the risks posed by Internet background searches? The best way would be to delay conducting Internet searches until the end of the hiring process—after a conditional offer of employment has been made. Wherever in the hiring process an Internet search is conducted, the employer should adopt a clear policy outlining what kinds of information may and may not be searched for and, in the case of information inadvertently acquired, what may and may not be considered. The employer should also make clear who is to conduct the search. Without exception, the best practice would be to have someone who is not involved in the evaluation and decision-making process (human resources, when the employer has such a department) conduct the Internet search and protect decision makers from information they should not have.

only 20 percent of LinkedIn users. Those in the 35–49 age group make up 35 percent of the labor force but only 21 percent of Facebook users. By contrast, they are overrepresented on LinkedIn, constituting 46 percent of users. Finally, people over fifty are only 29 percent of the civilian labor pool. Like their more middle-aged contemporaries, they are underrepresented on Facebook (13%) and overrepresented on LinkedIn (33%).

But given the pervasiveness of the Internet in daily life, it is almost certain that a department head, supervisor, or member of an interview panel will at some point Google an applicant's name before an offer has been made—probably on instinct, without even making a conscious choice to do so. The existence of a policy restricting Internet searches until after a conditional offer has been made, or limiting Internet searches in some other way, will be a poor defense against a claim of discrimination, real or perceived. An employer can and perhaps should discipline anyone involved in the hiring process who disregards its policies. But the way to avoid such mistakes in the first place is to aggressively and continuously educate management, supervisory level employees, and anyone who serves on an interview or assessment panel about the risks posed by using the Internet to supplement applicant information.

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