Social Media Law Update BLOG
Highlighting Legal Issues Regarding Social Media
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# Social Media Law Update

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## Social Media Research + Employment Decisions: May Be a Recipe for Litigation

*By Michelle Sherman*

We are the Google generation. We meet someone interesting, and then search the Internet to learn more about them. There is nothing wrong with doing this in the context of networking, making new friends, or pitching for business. However, searching the Internet for information about someone who is trying to get a job with your company is another matter entirely. This is not to say you cannot Google them. In fact, it is estimated that 45% of companies research a job candidate on the Internet. In a December 2009 survey commissioned by Microsoft, 70 percent of the 275 U.S. recruiters, human resources professionals and hiring managers who responded said they have rejected candidates based on information found online. Thirty-five percent of those employers said they rejected applicants based on membership in certain groups.

You might be thinking, "what could possibly be wrong with finding public information that the job candidate has freely shared on the Internet?" "Having shared that information, the company should be able to ask him about it. After all, the job applicant is not making a secret of it."

Protected Classes Under Federal and State Law

Now, step back and think for a moment. There are subjects that are considered off limits for employers to ask job applicants about. Under federal law, Title VII of the Civil Rights Act prohibits discrimination when making employment related decisions. A company cannot make hiring, discipline and termination decisions based on any of the following protected factors: race, color, national origin, religion and gender. The Age Discrimination in Employment Act (ADEA) adds to the list with a prohibition on discrimination against individuals who are 40 years or older. And, finally, the Americans With Disabilities Act of 1990 prohibits discrimination against "qualified disabled" individuals. Employment decisions are defined broadly and include promotion, demotion, compensation, and transfers.

Many states add additional areas that are off limits for making employment decisions. For example, California also gives protected status to: sexual orientation, marital status, pregnancy, cancer, political affiliation, genetic characteristics, and gender identity.

It is very easy to see how someone with a Facebook page may post about these protected factors. Thus, the challenge for employers who are researching job applicants, or monitoring the social media activity of their employees, is not to let this protected status information bleed into their employment decisions. Under federal and state law, employers should not make employment decisions that are "motivated by" a person's membership in a protected class.

Lawsuit Filed After Internet Search Resulted in Religious Inquiry of Job Candidate

This lesson was learned the hard way by the University of Kentucky ("University"). The University is being sued for religious discrimination under Title VII of the Civil Rights Act. The case, *Gaskell v. University of Kentucky*, has been covered in the news media as a rare example of a lawsuit by a scientist for religious persecution.

*Gaskell* also demonstrates that there are legal risks to looking at a prospective or current employee's social media activity. In an order denying the University's motion to dismiss in late November 2010, the federal district court for Kentucky summarized the facts of the case.

In 2007, the University established a search committee to find a director for the University observatory. The Committee included members of the Physics and Astronomy Department, including the Chair of the Department, Dr. Michael Cavagnero, and staff member Sally Shafer. The Committee was considering 7 applicants with Dr. C. Martin Gaskell ranked as the number one candidate.

> "There is no doubt that based on his application, Gaskell was a leading candidate for the position. In fact, Dr. Cavagnero wrote to the [Search] committee that 'Martin Gaskell is clearly the most experienced..." and pointed out that 'Keith [MacAdam] and I visited him last year to learn how to build an observatory on a parking structure.". A few weeks later, Troland [Chair of the Search Committee] wrote the committee that Gaskell 'has already done everything we could possibly want the observatory director to do.'"

During the search process, Committee member Shafer decided to research Dr. Gaskell on the Internet. Shafer found his University of Nebraska-Lincoln ("UNL") website which linked to Dr. Gaskell's personal website. This website contained an article entitled "Modern Astronomy, the Bible, and Creation."

Shafer circulated the article to the Search Committee. The Committee also found notes on Dr. Gaskell's personal website from a lecture he gave at the University in 1997 on "Modern Astronomy, the Bible, and Creation." The Committee showed these notes to members of the University's biology department because the notes discussed biological principles. The biologists expressed concern about Gaskell's "creationist" views and the impact of these views on the University. The biologists warned that the Biology Department would refuse to cooperate with the Physics and Astronomy Department on the building of an "outreach science team" if the Department hired one of "these types of individuals."

In his complaint, Dr. Gaskell alleges that Dr. Cavagnero asked about his religious beliefs, and allegedly said that Dr. Gaskell's religious beliefs and his "expression of them would be a matter of concern" to the dean.

Days before the Search Committee recommended someone else for the position, Professor Thomas Troland, Chair of the Committee sent an email with the subject line, "The Gaskell Affair":

> It has become clear to me that there is virtually no way Gaskell will be offered the job despite his qualifications that stand above those of any other applicant. Other reasons will be given for this choice when we meet Tuesday. In the end, however, the real reason why we will not offer him the job is because of his religious beliefs in matters that that are unrelated to astronomy or to any of the duties specified for this position (For example, the job does not involve outreach in biology.)... If Martin were not so superbly qualified, so breathtakingly above the other applicants in background and experience, then our decision would be much simpler. We could easily choose another applicant, and we could content ourselves with the idea that Martin's religious beliefs played little role in our decision. However, this is not the case. As it is, no objective observer could possibly believe that we excluded Martin on any basis other than religious....."

The University managed to avoid the Court granting Gaskell's motion for partial summary judgment based on the "mixed motives" provision of Title VII. In mixed motives cases, the plaintiff can still win by showing that the defendant's consideration of a protected characteristic "was a motivating factor for the employment practice, even though other factors also motivated the practice." 42 U.S.C. S 2000e-2(m).

At trial, which is presently scheduled for February 2011, the University is expected to argue that its hiring decision was based on legitimate concerns that Dr. Gaskell would violate University policy by linking the University website to his personal website as he did at UNL. Further, that the University's decision was not motivated by concerns over his religious beliefs, but with his public comments that there were scientific problems with the theory of evolution. According to the University, these views would impair his ability to serve as the Observatory Director.

Suggested Guidelines for HR Departments and Managers

Whatever the outcome of this litigation, it has been costly and perhaps damaging to the reputation of the University. Some lessons to be learned from the case are: (1) HR department training on interview skills and managing employees should include the ways in which information taken from social media and Internet searches can possibly give rise to allegations of employment discrimination; and (2) Internet searches of job applicants or employees should be done ideally by people who are removed from making employment decisions so they can filter out information that are protected factors before the search results are forwarded to the company employees who are giving performance reviews or making recommendations on hiring, promotions, or downsizing. Alternatively, if the information is considered relevant to a bona fide occupational qualification ("BFOQ"), and shared, then it should be communicated under the guidance of experienced legal counsel. The BFOQ is a narrow exception and applies to a limited number of cases.

For further information, please contact Michelle Sherman at (213) 617-5405. (Follow me on Twitter!)