

The Use of Social Media in Hiring Decisions: Tempting Fruit from a Poisonous Tree

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With unemployment in the United States hovering around 9.2%, human resources offices across the country are being bombarded with job applications like never before. The overworked employees of these often understaffed offices are charged with wading through a figurative sea of applications, all while dealing with the increasingly zany behavior of some applicants. According to CBS News, "[o]ne man sent a shoe to his prospective employer with a note that read, 'I want to get my foot in the door.' " Another "handed out personalized coffee cups, so no one would forget his name." In this high stress environment, some human resources professionals might see using social media as a quick and easy way of separating the wheat from the chaff – narrowing the field of possible applicants significantly in a short amount of time. But before signing into Facebook or pulling up your favorite search engine, keep in mind the immortal words of Clint Eastwood in Dirty Harry: "You feelin' lucky?"

Every human resources staff member knows that, especially when interviewing a potential new employee, some topics are strictly off limits. Asking one of these "off limits" questions can put your company at serious risk of being sued for discrimination. The trouble is, by resorting to the use of social media, this kind of "off limits" information can be collected from a potential employee even before his or her interview.

Imagine for a moment that you are the director of human resources for a mid-sized paper supply company. You receive around fifty resumes in response to a job posting to fill the position of "Assistant to the Regional Manager." One applicant – Alex Jackson – catches your eye as one of the top applicants for the job. According to Alex's resume, Alex has been working in the paper industry for around six years and has a bachelor's degree in management from a New York Ivy League school. Alex has been published in several trade magazines, is active in the community and has excellent references.

You decide to pull Alex's Facebook profile just to get a better feel for the applicant; what's the worst that could happen, right?

As you expected, what you find is fairly innocuous – Alex is a 42 year old Caucasian female who is very active in the Catholic church. She has recently married and has a one year old son. Two of her recent wall posts read, "Going out to happy hour for the

fourth night in a row! Can't stop, won't stop!" and "Please pray for my mother as she recovers from her most recent bout with cancer." Eventually, your organization decides to go in another direction and Alex is not interviewed or hired for the job.

So again, what's the worst that could happen?

By reviewing the social media site, while getting almost no information relevant to the applicant, you have unwittingly exposed your organization to many different discrimination claims. Had you never pulled up Alex's Facebook profile, you would have never discovered information about her that would clearly be "off limits" in an interview.

Now, however, Alex will have a much higher likelihood of success if she decides to sue your company for discrimination. She could sue your company under Title VII of the Civil Rights Act of 1964 (based on race, religion, and gender), the Americans with Disabilities Act (based on her possible alcoholism), the Age Discrimination in Employment Act (based on her age), and the Genetic Information Non-Discrimination Act of 2008 (based on her family medical history). Again, had you abstained from using social media in your hiring process, you would have never known any "off limits" information about Alex and, consequently, she would have no case!

It is true that social media can be a great way to determine if an applicant is a good "fit" for your organization. However, like the potentially deadly fugu fish that is eaten as a delicacy in Japan, the use of social media in hiring should only be enjoyed when prepared properly. If your firm currently uses social media in its hiring process or plans to do so in the future, McNees Wallace & Nurick's Labor and Employment Group can provide guidance on developing appropriate policies and procedures to help your organization use social media in a manner that will help overcome claims of discrimination.

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