
SHOULD EMPLOYERS “LIKE” SOCIAL MEDIA SCREENINGS? THE PROS AND CONS OF SOCIAL MEDIA SCREENINGS IN HIRING

ABSTRACT

Social media is a dominating pervasive force in our society. Various platform profiles contain a wide variety of information about users' personalities, hobbies, and interests. Thus, people can learn a lot about each other through social media. Employers, in particular, can learn much about job applicants by screening their social media profiles to determine if they have the requisite professional skills for the open position. Employers can also protect themselves from potential liability by making sure their future hires do not pose a risk of harming others. But failing to do so may subject employers to a negligent hiring claim and civil damages.

This Note explores how employers can use social media screenings to vet job applicants and insulate themselves from civil liability. It also discusses best practices employers should use when screening applicants' social media profiles to avoid potential privacy and discrimination claims.

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I. INTRODUCTION

Negligent hiring is a claim brought against employers when their employees harm or commit tortious conduct against another individual. Generally, employers are expected to diligently screen applicants to ensure they do not pose a risk to other employees or third parties. How diligently they screen applicants depends on the nature of the job and how much interaction the applicant will have with others. When screening applicants, employers should look for any information indicating a potential for harmful or tortious conduct by the employee.

Employers who fail to recognize such indicators can face liability later if the hired applicant ends up hurting someone. To help protect against this possibility many employers have started screening applicants' social media accounts. Social media offers employers a candid and encompassing profile on applicants. Some of the revelations from applicants' accounts undoubtedly assist employers in determining if an applicant poses a potential risk to others. However, while social media screening may insulate employers from negligent hiring liability, employers checking applicants' posts and shares may find themselves facing other types of liability. This Note will explore the pros and cons of social media screenings in hiring decisions.

II. PREVALENCE OF SOCIAL MEDIA CHECKS IN HIRING DECISIONS

Social media plays a dominant role in today's society. To characterize it, social media encompasses a "special class of websites designed to meet three specific criteria": one, that users generate the majority of the content on the site; two, that users engage in a high level of interaction and communication with other users; and three, that the site may be incorporated easily with other sites.¹

There are about 200 major active social networking sites, 10 of which have at least 100 million registered users.² Some of the most popular sites include Facebook, Twitter, YouTube, Instagram, and LinkedIn.³ Facebook

1. Rachel E. Lusk, Comment, *Facebook's Newest Friend-Employers: Use of Social Networking in Hiring Challenges U.S. Privacy Constructs*, 42 CAP. U. L. REV. 709, 713 (2014) (quoting *History of Communication from Cave Drawings to the Web*, CREATIVE DISPLAYS NOW!, <https://www.creativedisplaysnow.com/articles/history-of-communication-from-cave-drawings-to-the-web/> [https://perma.cc/AL2E-44K9]).

2. Nichelle Levy & Julian Wright, *Employers Accessing Digital Dirt: Some Things to Consider*, 25 WESTLAW J. EMP., no. 10, Dec. 14, 2010, at 1, 1.

3. Lusk, *supra* note 1, at 714.

has the most users, recording 1.01 billion monthly active users in 2012 with an increase of about 26 percent each year.⁴

Individuals between 18 and 29 years of age are the most frequent users of social media networking sites.⁵ In fact, 75 percent of individuals in this age range have an active social media account.⁶ Other age groups also have significant social media use. For example, “nearly twenty percent of individuals between ages forty-five and fifty-four” have a social media account.⁷

People in the above age groups also comprise the majority of job applicants.⁸ With such prevalent social media use, employers would be remiss if they simply ignored the opportunity to review their job applicants’ social media accounts.⁹ Employers who review job applicants’ social media accounts may learn pertinent information to aid them in determining whether applicants have skills and traits compatible with the position they seek.¹⁰

A. Prevalence of Employers Using Social Media to Screen Applicants

Many employers use social media to screen applicants during hiring and monitor employees during employment.¹¹ Studies show approximately 70 percent of employers screen applicants through their social media accounts during the hiring process, and about 43 percent of employers use social media to check up on current employees.¹² The reason for such substantial use is social media screenings give employers an easily accessible, cost-effective method to find information about job applicants.

Social media screenings give employers glimpses into applicants they

4. *Id.* at 714–15.

5. Jordan M. Odo, *OMG! Social Media’s Impact on the Workplace*, HAW. BAR J., Mar. 2015, at 6, 6.

6. Sherry D. Sanders, *Privacy Is Dead: The Birth of Social Media Background Checks*, 39 S.U. L. REV. 243, 245 (2012).

7. *Id.*

8. *See* Odo, *supra* note 5, at 6.

9. *See id.*

10. For example, people often share their work history and skills on social media. Additionally, employers can figure out job applicants’ interests and passions from the posts they interact with or share. *See id.* at 9.

11. *Id.* at 8.

12. Saige Driver, *Keep It Clean: Social Media Screenings Gain in Popularity*, BUS. NEWS DAILY (Oct. 7, 2018), <https://www.businessnewsdaily.com/2377-social-media-hiring.html> [<https://perma.cc/UQ9Q-RY4F>].

would otherwise not get from an interview—and at virtually no cost to them.¹³ All an employer needs to do to find information on an applicant is type their name into a search engine.¹⁴ In fact, one of the most prevalent methods employers use to screen applicants is a standard Google search.¹⁵ If the applicant has any social media accounts, such as Facebook, they will likely show up in the results of the search.¹⁶ From there, employers can look at the publicly viewable information on the applicants' accounts.¹⁷

Another method employers use to access applicant profiles is creating their own social media profile, such as a Facebook profile.¹⁸ With their own profile, employers are granted broader access to the applicants' information than is available from a Google search.¹⁹ If an employer were to “friend” or connect with an applicant, they would get access to even more information that the applicant shares with their connected network.²⁰

Regardless of what methods employers use to access applicants' social media accounts, employers most commonly look at applicants' Facebook accounts to screen for red flags.²¹ An applicant's Facebook profile contains many clues about their personality, work history, and hobbies.²² Thus,

13. *Id.*

14. Most social media sites have default settings that enable the user's profile to be viewed through search engines. This setting can be changed by the user. *See* Lusk, *supra* note 1, at 723.

15. *Id.*

16. *See id.*

17. *See id.*

18. *Id.*

19. Most social media sites require someone to be a registered user in order to view a user's full profile. Of course, to be able to see an applicant's full profile, the employer would have to “friend” or connect with them. *See id.*; Dave Roos, *How Social Networking Works*, HOW STUFF WORKS, <https://money.howstuffworks.com/business-communications/how-social-networks-work.htm> [<https://perma.cc/QGA9-FQTA>].

20. Many social media sites have settings that allow users to only share their information with their accepted contacts, or “friends.” *See* Lusk, *supra* note 1, at 722.

21. Nicky Jatana, Cynthia Sandoval & Leslie Glycer, *Advising Employers on the Use of Social Media in the Workplace*, 34 L.A. LAW., Feb. 2012, at 12, 13. It is likely that LinkedIn is growing as a contender to Facebook because it is a professional site and is geared toward employment. *See* Dave Johnson, ‘What Is LinkedIn?': A Beginner's Guide to the Popular Professional Networking and Career Development Site, BUS. INSIDER (Sept. 6, 2019), <https://www.businessinsider.com/what-is-linkedin> [<https://perma.cc/76SN-PTJV>].

22. Carolyn Elephant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 13 (2011); Daniel Nations, *What Is Facebook?*, LIFEWIRE (Dec. 19, 2019), <https://www.lifewire.com/what-is-facebook->

employers who look into applicants' social media accounts can determine if they would make a good fit professionally and look for red flags in the applicants' accounts that would indicate the opposite.²³

B. How Employers Use Social Media to Screen Applicants

When combing through an applicant's Facebook posts, over 50 percent of surveyed employers reported they decided not to hire applicants if they found red flags such as provocative photos, references to drinking and drug use, or disparaging remarks about previous employers and colleagues.²⁴ Consequently, many job applicants are cautioned by career advisors to "clean up" their social media accounts before they apply for new jobs.²⁵

"Cleaning up" a social media account does not mean deleting the account completely.²⁶ Employers not only check applicants' social media presence to vet for negative or offensive content that would make them undesirable employees but also to see if they have an online presence at all.²⁷ About half of surveyed employers said they would not offer an interview to a candidate if they could not find them online.²⁸ This is because, at least in part, employers reasonably expect almost everyone to have an online presence of some kind, and not having one at all might indicate the applicant is either unfamiliar with how social media sites operate or is trying to hide

3486391 [<https://perma.cc/78EF-WF5V>].

23. See Driver, *supra* note 12.

24. See Jatana et al., *supra* note 21, at 13.

25. "Cleaning up" in this sense usually means using various privacy settings on the social media sites to ensure a user's content is not viewable to the public without their authorization and hiding or deleting provocative or inappropriate posts. Essentially, the user sanitizes their profile of any unprofessional conduct. See *id.*; see also Lily Herman, *How to Clean Up Your Social Media During the Job Search*, THE MUSE, <https://www.themuse.com/advice/how-to-clean-up-your-social-media-during-the-job-search> [<https://perma.cc/79X8-T6J6>]; *How to Clean Up Your Social Media for a Job Search*, ADECCO (Apr. 12, 2019), <https://www.adeccousa.com/resources/how-to-clean-social-media-for-job-search> [<https://perma.cc/5YY6-QFE2>]; Lauren McAdams, *How to "Clean Up" Your Social Media Presence Before a Job Search*, LADDERS (May 8, 2018), <https://www.theladders.com/career-advice/how-to-clean-up-your-social-media-presence-before-a-job-search> [<https://perma.cc/KR4N-GYPQ>].

26. See McAdams, *supra* note 25.

27. It is important for many job positions—and sometimes even essential—for applicants to be knowledgeable about social media. See Jatana et al., *supra* note 21, at 13; see also Jennifer Parris, *Why No Social Media Presence Is Bad for Job Seekers*, FLEX JOBS (Jan. 20, 2015), <https://www.flexjobs.com/blog/post/no-social-media-presence-is-bad-for-job-seekers/> [<https://perma.cc/9R75-UH3N>].

28. Driver, *supra* note 12.

something.²⁹

Furthermore, social media is so prevalent today because it allows people to connect with each other and share their views.³⁰ If someone has no online presence whatsoever, it might be a sign the applicant is not personable or does not work well with others.³¹ Employers who cannot find any social media accounts for an applicant will likely become suspicious and conclude the applicant would not be a good employee.³² Therefore, while applicants should be cognizant of what they post on their accounts, they may actually hurt their chances of employment by deleting their social media accounts all together.³³

Through a simple online search of an applicant, employers can quickly gather a plethora of information on a potential future employee.³⁴ And as social media provides an efficient way for employers to verify the suitability of a candidate and check in on current employees, it can also protect employers from incurring liability.³⁵

III. NEGLIGENT HIRING

Social media screenings can insulate employers from civil liability for negligent hiring claims.³⁶ Negligent hiring occurs when an employer owes a duty to an individual who was harmed by an employee, and the harm was a foreseeable risk of hiring the employee.³⁷ Employers can be liable when their employees commit violence against a third party,³⁸ such as a customer, or another employee.³⁹ Violence occurring against other employees is

29. *Id.*

30. *See* Jatana et al., *supra* note 21, at 13.

31. Parris, *supra* note 27.

32. *See* Driver, *supra* note 12.

33. *See id.*

34. *See id.*

35. Melissa A. Salimbene & Lindsay Dischley, *Things to ‘Like’ and ‘Unlike’ About Social Media*, N.J. LAW., Apr. 2019, at 49, 50.

36. Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 8 (2011).

37. *See id.*

38. This Note will primarily focus on harm against third parties because a more robust body of case law on these scenarios offers greater insights. But it is also useful to understand workplace violence and employers’ potential liability.

39. Diane Krebs & Jamie Haar, *From the Office to Cyberspace: Workplace Violence in the Twenty-First Century*, 59 DRI: FOR DEF. 51, Jan. 2017, at 51, 54–55.

commonly referred to as workplace violence.⁴⁰

The Occupational Safety and Health Administration (OSHA) defines workplace violence as “violence or threat of violence against workers that can occur inside or outside the workplace and can range from threats and verbal abuse to physical assaults.”⁴¹ Workplace violence is a major concern for employers.⁴²

According to a workplace bullying survey, more than 65 million U.S. workers are affected by bullying.⁴³ A general duty is recognized for employers to protect their employees from workplace violence or people with dangerous propensities.⁴⁴ When an employer breaches this duty, employees can bring negligence claims alleging the employer was negligent in hiring, supervising, or retaining the offending employee.⁴⁵

Employers can also be held negligent for their employees’ actions against third parties.⁴⁶ For example, in *Ponticas v. K.M.S. Investments*, an investment company that owned an apartment complex was ordered to pay damages for negligent hiring after a tenant was sexually assaulted by the apartment complex manager.⁴⁷

In *Ponticas*, the Minnesota Supreme Court held there was sufficient evidence to find the company failed to conduct a thorough investigation when the manager applied for the job.⁴⁸ The court found if the employer had conducted such an investigation, they would have discovered the manager posed a danger to others and should not have been hired.⁴⁹

As the plaintiff did in *Ponticas*, to prevail on a negligent hiring claim, the harmed third party must show that the employer should have been aware that the hired employee posed a risk to others.⁵⁰ In Iowa, employers will be

40. *Id.* at 51–52.

41. *Id.*

42. *Id.*

43. *Id.* at 52.

44. *Id.* at 53.

45. *Id.* at 52.

46. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910 (Minn. 1983); Eric D. Bentley, *The Pitfalls of Using Social Media Screening for Job Applicants*, 29 A.B.A. J. LAB. & EMP. L. 1, 10 (2013).

47. *Ponticas*, 331 N.W.2d at 910; Bentley, *supra* note 46, at 10.

48. *Ponticas*, 331 N.W.2d at 910; Bentley, *supra* note 46, at 10.

49. In this case, the perpetrator had a history of violent crimes such as burglary and armed robbery. *Ponticas*, 331 N.W.2d at 909; Bentley, *supra* note 46, at 10.

50. *Ponticas*, 331 N.W.2d at 910–11; Bentley, *supra* note 46, at 10.

held liable for negligent hiring if it is shown that they were:

[N]egligent or reckless: [(a)] in the employment of improper persons or instrumentalities in work involving risk of harm to others[:]; [(b)] in the supervision of the activity; or [(c)] in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.⁵¹

When offering evidence to prove a negligent hiring claim, an employee must show the injury was caused by someone in an employment relationship to the employer, and the harm caused was foreseeable.⁵²

A. Foreseeability of the Risk

The primary issue of liability in negligent hiring suits is the reasonableness of hiring an employee despite them having dangerous proclivities or tendencies the employer knew or should have known about when they hired the employee.⁵³ Most negligent hiring claims turn on two issues: (1) the foreseeability of the risk the employee will harm someone, and (2) the degree of the risk associated with the employment.⁵⁴

Jobs that require the employees to have a lot of contact with the public or enter homes carry greater risks than jobs where employees have little contact with others.⁵⁵ For example, an employee hired to perform outdoor landscaping work has very little contact with the public.⁵⁶ Thus, the employer hiring the landscaper would have less of a duty to investigate the employee's background than if the position involved more extensive contact with others.⁵⁷

An employee hired to give childcare, on the other hand, will have

51. *Godar v. Edwards*, 588 N.W.2d 701, 708 (Iowa 1999) (quoting RESTATEMENT (SECOND) OF AGENCY § 213 (AM. L. INST. 1957)).

52. *See id.* at 709.

53. *See* Matt Boyer, *Tiptoeing the Minefield: Avoiding the Pitfalls of Background Checks, Negligent Hiring, and "Ban the Box" Legislation*, 10 DRI: IN-HOUSE DEF. Q. 6, Spring 2015; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1, at 718; Salimbene & Dischley, *supra* note 35, at 50.

54. *See generally* Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1; Salimbene & Dischley, *supra* note 35, at 51.

55. *See generally* Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1; Salimbene & Dischley, *supra* note 35, at 51.

56. Sprague, *supra* note 36, at 8.

57. *Id.*

substantial contact with children. It is incredibly important in these instances that employers thoroughly vet applicants and look for any signs that may indicate a foreseeable risk of future harm.⁵⁸

When examining how foreseeable the employee's tortious conduct was, courts generally consider whether the employee committed similar tortious acts in the past and how discoverable the employee's dangerous disposition was to the employer.⁵⁹ If there is readily available information about an applicant's criminal or tortious behavior, the employer has a duty to look for it and determine if hiring the applicant would pose a risk to third parties.⁶⁰ One tool employers commonly use to find records of past tortious or criminal acts is a background check.⁶¹

B. Using Background Checks to Screen Applicants

Traditionally, employers have screened applicants through formal background checks and references which provide information about applicants' criminal, educational, and credit history.⁶² Once only used for government jobs, background checks are now used by more than 90 percent of U.S. employers.⁶³ Some common companies employers use for background checks include GoodHire,⁶⁴ HireRight,⁶⁵ and IntelliCorp.⁶⁶ These companies conduct searches on applicants and find information about their identity, educational degrees, past employment, and criminal history.⁶⁷ Employers can also request more intensive investigations that produce information about applicants' professional licenses, credit reports, civil records, workers' compensation history, and drug testing history.⁶⁸ The

58. *See id.*

59. Boyer, *supra* note 53.

60. *See Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910 (Minn. 1983); Bentley, *supra* note 46.

61. Boyer, *supra* note 53.

62. *Id.*

63. *Id.*

64. *See* GOODHIRE, <https://www.goodhire.com/>.

65. *See Why Choose HireRight for Background Checks*, HIRERIGHT, <https://www.hireright.com/why-hireright> [<https://perma.cc/NVX9-VPW2>].

66. *See A Background Check Company You Can Rely On*, INTELLICORP, <https://www.intellicorp.net/marketing/Landing-pages/BackgroundCheckCompany> [<https://perma.cc/3Z8R-HR27>].

67. Skye Schooley, *The Best Background Check Companies of 2020*, BUSINESS.COM (Oct. 13, 2020), <https://www.business.com/categories/background-check-companies/> [<https://perma.cc/R74-2A62>].

68. *Id.*

prevalence of background checks, however, does not ensure their accuracy.⁶⁹

Roughly 50 percent of FBI criminal records are incomplete or inaccurate due to applicants supplying false identifying information, such as someone else's social security number or date of birth.⁷⁰ Another reason for inaccurate background checks is providers not using the right sources, i.e., court records from every jurisdiction that applicant has lived in and current records showing all convictions in that jurisdiction.⁷¹

Additionally, since tortious conduct is not criminal, many candidates' dangerous propensities for tortious acts are not revealed through a criminal background check.⁷² Similarly, many dangerous people have not been previously "caught," e.g., arrested or charged, so relying purely on a background check will not always accurately put an employer on notice of a candidate's propensity to do harm.⁷³

Thus, blind reliance on a criminal background check will not fully insulate employers from liability for their employees' actions.⁷⁴ Indeed, traditional methods of screening have not proven very successful.⁷⁵ Some reports estimate that employers lose 75 percent of negligent hiring cases, resulting in average settlement costs of \$1 million.⁷⁶

Due to the significant risk of negligent hiring claims, many employers have recognized the need to utilize other tools to gather information about applicants that will enable them to better assess the foreseeability of potential harm.⁷⁷ Enter social media.

69. See Boyer, *supra* note 53.

70. *Id.*; Robyn Kunz, *How Accurate Is Your Current Background Check Provider?*, TRUSTED EMP. (Nov. 30, 2018), <https://www.trustedemployees.com/learning-center/articles-news/how-accurate-is-your-background-check-provider/> [<https://perma.cc/9X5H-45CK>].

71. Kunz, *supra* note 70 ("For example, an audit of a state database used for background checks found that a third of the dispositions for criminal charges were missing. Using incomplete sources results in an incomplete background check.").

72. Boyer, *supra* note 53.

73. *Id.*

74. *Id.* at 1; Kunz, *supra* note 70.

75. Boyer, *supra* note 53; Kunz, *supra* note 70.

76. Boyer, *supra* note 53; *Industry Fast Facts*, HIRERIGHT, <https://www.hireright.com/resources/industry-fast-facts> [<https://perma.cc/39YZ-MQRY>]; Kunz, *supra* note 70.

77. Boyer, *supra* note 53; *Industry Fast Facts*, *supra* note 76; Kunz, *supra* note 70.

C. Is Social Media Screening More Reliable than Background Checks?

Unlike background checks, resumes, and interviews, social media offers employers a more thorough and candid glimpse into an applicant's life.⁷⁸ Employers can use social media to glean information about an applicant's interests, values, and how they conduct themselves online.⁷⁹ Since the nature of social media is exposition and exhibition, employers are able to discover some of the same red flags about candidates that would be discovered through a traditional hiring processes.⁸⁰

While traditional methods, such as background checks, can take up to five business days to get back⁸¹ and cost as much as \$80,⁸² employers can scroll through an applicant's social media accounts in minutes—for free. Social media searches allow employers to uncover more as well. Employers are able to search an applicant's social media accounts for signs of dangerous or unsavory conduct that would not show up in a traditional background check, and that could open them up to liability in the future.⁸³

For instance, an applicant who posts disparaging comments about women on a public online platform likely poses a risk of mistreating or harassing their female coworkers.⁸⁴ Employers who hire the applicant despite seeing this information would be liable for the harm befalling the harassed coworkers in the future;⁸⁵ additionally, if the employer neglected to check the candidate's social media accounts and discover the warning signs, they could be liable for negligent hiring if the harm was foreseeable.⁸⁶

In fact, the U.S. District Court of New Jersey considered that very situation when an employer failed to research a job applicant's social media

78. See Odo, *supra* note 5, at 8–9.

79. Boyer, *supra* note 53.

80. *Id.*

81. Amelia Keiser, *How Long Does a Background Check Take?*, BRAND YOURSELF (Feb. 23, 2018), <https://brandyourself.com/blog/guide/how-long-does-an-employment-background-check-take/> [<https://perma.cc/L7AS-TGUR>].

82. Schooley, *supra* note 67.

83. See Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1; Odo, *supra* note 5, at 6–9; Salimbene & Dischley, *supra* note 35, at 51.

84. See Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1; Odo, *supra* note 5, at 6–9; Salimbene & Dischley, *supra* note 35, at 51.

85. See Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1; Odo, *supra* note 5, at 6–9; Salimbene & Dischley, *supra* note 35, at 51.

86. See Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Lusk, *supra* note 1; Odo, *supra* note 5, at 6–9; Salimbene & Dischley, *supra* note 35, at 51.

presence before hiring the individual.⁸⁷ In *E.K. v. Massaro*, the plaintiff was a public school student who had an illegal sexual relationship with a student teacher.⁸⁸ The plaintiff claimed the board of education's hiring of the student teacher was negligent in part because the board failed to review the teacher's social media accounts.⁸⁹ The court did not have the opportunity to fully consider the plaintiff's assertion, as they failed to show that anything in the teacher's accounts was sexually inappropriate or would have led the defendants to question the teacher's suitability for the job.⁹⁰

Consequently, the court dismissed the plaintiff's social media-based negligent hiring claim but left open the possibility that such a claim could be successful, provided there was evidence on the teacher's social media accounts that would put the employer on notice of their propensity for inappropriate conduct.⁹¹

Therefore, employers should use all the resources at their disposal to thoroughly screen their applicants before hiring them because failing to do so can subject them to liability for negligent hiring claims and damages for injuries befalling the applicant's victims.⁹² Employers should take caution, however, with how they conduct social media screenings.⁹³ Looking into applicants' social media accounts presents several dangers for employers.⁹⁴

IV. DANGERS OF USING SOCIAL MEDIA FOR APPLICANT SCREENING

Employers who use social media to screen candidates for hire can insulate themselves from liability for negligent hiring claims, but if they are

87. *E.K. v. Massaro*, Civ. No. 12-2464 (ES), 2013 WL 5539357, at *7 (D.N.J. Oct. 7, 2013).

88. *Id.* at *2.

89. *Id.* at *7.

90. *Id.*

91. *See id.* Information that would have led the board to question the student teacher's suitability might include inappropriate photos, comments, or posts regarding children.

92. *See Boyer, supra* note 53; Jatana et al., *supra* note 21, at 13; Krebs & Haar, *supra* note 39, at 54; Levy & Wright, *supra* note 2, at 1, 5; Lusk, *supra* note 1, at 718; Odo, *supra* note 5, at 8-9; Salimbene & Dischley, *supra* note 35, at 50, 51.

93. *See Boyer, supra* note 53; Jatana et al., *supra* note 21, at 13; Levy & Wright, *supra* note 2, at 1, 5; Lusk, *supra* note 1, at 718; Odo, *supra* note 5, at 6, 7-9; Salimbene & Dischley, *supra* note 35, at 51.

94. *See Boyer, supra* note 53; Jatana et al., *supra* note 21, at 13; Levy & Wright, *supra* note 2, at 1, 5; Lusk, *supra* note 1, at 718; Odo, *supra* note 5, at 6; Salimbene & Dischley, *supra* note 35, at 51.

not careful, they may open themselves up to liability for other claims.⁹⁵ For instance, employment law prohibits employers from making employment decisions based upon an individual's protected characteristics.⁹⁶

A. Discrimination and Failure to Hire Claims

Federal law and most state laws prohibit employers from even considering protected characteristics when making hiring decisions.⁹⁷ For example, Title VII of the Civil Rights Act of 1964 prohibits employers from making employment decisions on the basis of a person's race, color, religion, sex, or national origin.⁹⁸

Social media often reveals information about the abovementioned statutorily protected characteristics, as well as others such as age, gender, gender identity, religion, disability, and familial status of applicants.⁹⁹ Thus, employers who research an applicant's social media and decide not to hire them could face a discrimination claim if their profile reveals protected characteristics that were not disclosed during the rest of the hiring process.¹⁰⁰

In *Gaskell v. University of Kentucky*, the university faced a Title VII claim after it failed to hire an individual for a position as director of the university observatory.¹⁰¹ The applicant had more education and experience than the person who was hired but was still passed up for not having the

95. See Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Levy & Wright, *supra* note 2, at 1, 5; Lusk, *supra* note 1, at 718; Odo, *supra* note 5, at 6–9; Salimbene & Dischley, *supra* note 35, at 51.

96. See Boyer, *supra* note 53; Jatana et al., *supra* note 21, at 13; Levy & Wright, *supra* note 2, at 1, 5; Lusk, *supra* note 1; Odo, *supra* note 5, at 6–7; Salimbene & Dischley, *supra* note 35, at 51.

97. 42 U.S.C. § 2000e-2(a) (2006); *see also* 29 C.F.R. § 1604.7 (1972) (regulating pre-employment inquiries as to sex); 29 C.F.R. § 1605.3 (2009) (regulating selection practices that discriminate on the basis of religion); 29 C.F.R. § 1606.6 (1980) (regulating selection practices that discriminate on the basis of national origin); Levy & Wright, *supra* note 2, at 1, 5.

98. 42 U.S.C. § 2000e-2(a); *see also* 29 C.F.R. § 1604.7 (regulating pre-employment inquiries as to sex); *id.* § 1605.3 (regulating selection practices that discriminate on the basis of religion); *id.* § 1606.6 (regulating selection practices that discriminate on the basis of national origin); Levy & Wright, *supra* note 2, at 1, 5.

99. These protected characteristics can be discovered from the user's profile picture and information they provide about themselves. Salimbene & Dischley, *supra* note 35, at 51.

100. *Id.*

101. *Gaskell v. Univ. of Ky.*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572, at *1 (E.D. Ky. Nov. 23, 2010).

“qualities” the university wanted.¹⁰² The applicant believed the employer’s reason for not hiring him was pretextual, and he was actually not hired because of his religious beliefs that were displayed on his social media account.¹⁰³

The applicant was right to be suspicious. In fact, the hiring committee expressed concerns over some content he posted about his views and reviewed them at length with other university personnel.¹⁰⁴ The case was ultimately settled but left open the possibility that employers could be liable for failure to hire or wrongful termination claims if they consider a candidate or employee’s protected characteristic that was revealed on their social media.¹⁰⁵

Therefore, employers must understand the pitfalls of using social media to screen applicants during the hiring process.¹⁰⁶ Social media screening can be an incredibly useful tool to discover information about applicants, but employers should limit their screening only to information that is relevant to the applicant’s employability.¹⁰⁷

*B. Policies Employers Should Follow When Screening Applicants’
Social Media Accounts*

It is important for employers who use social media in the hiring process to create policies that protect them from employment discrimination claims.¹⁰⁸ Some general practices employers should follow include providing a general disclosure to applicants that social media sites may be reviewed as part of the hiring process and limiting the information obtained from applicants’ social media to only what informs them about employment qualifications.¹⁰⁹

Additionally, employers should consider implementing the following policies to insulate themselves from liability arising from social media

102. *Id.*

103. *Id.* at *4, *6.

104. *Id.*

105. *See id.*

106. *See* Bentley, *supra* note 46; Boyer, *supra* note 53, at 6; Jatana et al., *supra* note 21, at 13; Levy & Wright, *supra* note 2, at 1, 5; Lusk, *supra* note 1, at 718; Odo, *supra* note 5, at 6–9; Salimbene & Dischley, *supra* note 35, at 51.

107. Jennifer Delarosa, *From Due Diligence to Discrimination: Employer Use of Social Media Vetting in the Hiring Process and Potential Liabilities*, 35 LOY. L.A. ENT. L. REV. 249, 276 (2015); *see* Levy & Wright, *supra* note 2, at 1, 3–4.

108. Delarosa, *supra* note 107; *see* Levy & Wright, *supra* note 2, at 1, 3–4.

109. *See* Delarosa, *supra* note 107; Levy & Wright, *supra* note 2, at 1, 3–4.

screenings: conduct searches only after in-person interviews; appoint an individual without hiring power to conduct the social media screenings; conduct searches for all applicants and use the same procedure for each one; and never require an applicant to provide their login and password information for social media websites.¹¹⁰

Following these policies will prevent employers from making hiring decisions solely based on information obtained through social media because they will have already met with the applicant in person.¹¹¹ Additionally, having a non-decision-making individual conduct the searches and report their findings about the applicant's employment qualifications will lessen the chance for bias playing a role in the hiring process.¹¹² Lastly, conducting the screenings consistently will help prevent discriminatory decisions, and refusing to ask for login information will insulate employers from potential liability arising from privacy violations.¹¹³

Alternatively, employers can hire third-party agencies to conduct social media screenings similar to how background checks are performed.¹¹⁴ For example, Social Intelligence Corporation is a third-party company employers hire to perform social media screenings of job applicants.¹¹⁵ Companies, like Social Intelligence Corporation, conduct social media screenings and issue reports about applicants.¹¹⁶

The reports contain information relevant to the applicants' job qualifications but does not include information about their race, age, disability, sexual orientation, or veteran status.¹¹⁷ Thus, employers get information that will assist them in determining whether to hire an applicant, but they do not receive information that could potentially open them up to discrimination or failure to hire claims.

V. CONCLUSION

This Note has explored the benefits of social media screening during the hiring process. Screening job applicants' social media is an effective and

110. Tara Z. Hall, *To Check or Not to Check Social Media During Hiring: That Is the Question*, 23 IOWA EMP. L. LETTER, no. 5, Sept. 2016, at 5.

111. *Id.*

112. *Id.*

113. *Id.*

114. Delarosa, *supra* note 107, at 227.

115. Lusk, *supra* note 1, at 723, 725.

116. *Id.*

117. *Id.*

inexpensive way to determine whether they would make a good fit professionally. Social media screenings can also protect employers from negligent hiring claims.¹¹⁸

Employers who screen applicants' social media will often be able to spot red flags indicative of a potential for future criminal or tortious conduct.¹¹⁹ Employers must then determine how foreseeable it is for an applicant to harm someone in the future and whether they are willing to risk hiring the applicant.

Employers who avail themselves of social media screenings, however, need to do so cautiously.¹²⁰ Being privy to all the information that social media provides can have negative consequences, such as discrimination and failure to hire claims.¹²¹ Thus, employers should carefully craft policies to ensure their social media screening is minimally invasive and limited to finding information about the applicants' character and fitness for employment.¹²² In a world dominated by social media, employers are among the many groups trying to navigate ways to utilize—but not fall victim to—the online world.

*Kara Jo Eischen**

118. *See supra* Part III.

119. *See supra* Part II.A.

120. *See supra* Part IV.

121. *See supra* Part IV.A.

122. *See supra* Part IV.B.

* B.A., Simpson College, 2017; J.D. Candidate, Drake University Law School, 2021.