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SOCIAL MEDIA: CREATING STUDENT AWARENESS OF ITS USE IN THE HIRING PROCESS

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Abstract

As the use of social media permeates our lives, it is important for business educators to promote the effective use of this technology to students for both their role as job seekers as well as potential hiring managers. This article will present current perceptions among business students on using social media in the job search process, primary research from recruiters in an attempt to understand employers' policies and practices with respect to the use of social media in the hiring process, key laws which students should be aware of with respect to the use of social media by employers, and practical guidance for students throughout their business school experience. In addition, a proposed teaching method will be presented on how to convey this practical guidance to students in a compelling and impactful manner.

Keywords: Social media, job search, business education, employment law

INTRODUCTION

Social media is ubiquitous and is now commonly being used in the job search and employee selection processes. Social media sites like Facebook, Twitter, Pinterest, and others were first used to connect people online to stay in touch and share ideas; however, this has changed as “companies are not only using social networks to market their companies and brands, but also are using social networks as a tool in their employee recruitment, screening, and selection processes.”¹ As the use of social media continues to permeate our lives, it is important for business educators to promote the effective use of this technology to students in preparation for both their role as job seekers as well as potential hiring managers.

The prevalence of the use of social media is apparent in a 2014 Jobvite survey, where 93% of recruiters stated they either currently use or plan to use social media in their recruitment efforts.² The most common site used by businesses is LinkedIn.³ According to recruiters, LinkedIn is used for searching for candidates (95%), contacting candidates (95%), and vetting candidates before an interview (93%).⁴ Additionally, Jobvite reports that more than 90% of organizations use LinkedIn to monitor potential job candidates (93%) or post jobs (92%).⁵

There are numerous benefits derived from organizations using social media for employee recruitment purposes. Social media provides quick access to a large amount of unfiltered information on candidates. Using social media, recruiters can examine an applicant’s professional experience, tenure, hard skills, cultural fit, and interaction in the industry through the applicant’s posts.⁶ According to Jobvite, 55% of companies have reconsidered a job candidate based on what they saw online about the candidate.⁷ This online information can help employers to better engage with their target audience and identify individuals who would be a good fit with the organization.⁸ Social media sites also build brand awareness, which can be influential in the recruitment process.⁹ In addition, social media can aid in diversity efforts by allowing the company to share information about itself to a broad audience to attract a more diverse applicant pool.¹⁰ Such efforts can also help attract passive candidates who are not actively seeking new employment but might be open to new opportunities.¹¹

¹ Teri Root & Sandra McKay, *Student Awareness of the use of Social Media Screening by Prospective Employers*, 89 J. EDUC. FOR BUS. 202, 202 (2014).

² *Social Recruiting Survey Results*, JOBVITE, http://1u7p3g2igrbh4643ym2ty7va.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/Jobvite_SocialProfilesHelpKFFINAL33.png (last visited Feb. 9, 2016).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See *Social Recruiting Survey Results*, *supra* note 2.

⁷ *Id.*

⁸ See Irina Nagy, *The Benefits of Social Media Recruiting*, ONREC: THE ONLINE RECRUITMENT RESOURCE (Aug. 29, 2013), <http://www.onrec.com/news/news-archive/the-benefits-of-social-media-recruiting.I>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, see also Laura Sewell, *Passive Candidates: Who They Are and How to Find Them*, NET-TEMPS, <http://www.net-temps.com/recruiters/recart/printer.htm?id=27> (last visited Feb. 9, 2016) (“A passive candidate is someone who is not looking for a job, but would be open to taking one if the right opportunity came along.”).

While it is evident that organizations use social media for recruitment and selection of job candidates on a regular basis, organizations' use of social media must comply with various employment laws.¹² Technological and societal development frequently outpace that of the law, and thus it is not always clear how existing employment laws apply to the use of social media.¹³ A critical legal and ethical issue with respect to the use of social media in the hiring and employment process is when its use will violate employment discrimination laws.¹⁴ As more and more of our lives are lived out online, employers find themselves with access to more information on job candidates and employees than ever before, much of which could potentially be used in a discriminatory manner.¹⁵

As anti-discrimination laws are designed to protect both current employees as well as applicants, it is imperative that business instructors across multiple disciplines teach students not only how to use social media responsibly and ethically (as future business professionals), but also about their own legal rights with respect to the use of their social media profiles in the employment process. However, this can be difficult, as students' perceptions of what information about them is available online as well as how employers may use this information can differ widely from that of employers. Thus, students need to be taught not only what the black letter law in this area is, but also the practical realities of how their social media use can affect them now and in the future.

This article will address this problem in four parts. First, studies on the current perceptions among business students on using social media in the job search process will be discussed. In part two, original research conducted by the authors with on-campus student recruiters as well as other large companies in an attempt to ascertain employers' policies and practices with respect to the use of social media in the hiring process will be covered. In part three, key laws which students should be aware of with respect to the use of social media by employers will be explained. Part four will conclude with practical guidance which needs to be provided to students throughout their business school experience in order to help them cope with the potential impact their online presence can have on their search for employment and future careers. This section will also propose a teaching method for how to convey this practical guidance to students in a compelling and impactful manner.

I. STUDENT PERCEPTIONS OF SOCIAL MEDIA USE IN THE EMPLOYMENT PROCESS

One would assume that today's students, who are heavy users of social media, would expect to use these same tools in their future job search. However, an informal poll conducted in

¹² See Jordan M. Odo, 19-MAR HAW. B.J. 6, 7 (2015) (discussing how social media in the hiring process interacts with employment discrimination laws).

¹³ *Id.* at 6-7 ("As will be discussed below, social media's expansion of the workplace has greatly exacerbated issues of privacy, discrimination, harassment, and bullying. Meanwhile, the law in these areas is largely underdeveloped and ambiguous, leaving employees and employers uncertain about their rights and obligations.").

¹⁴ See Scott Brutocao, *Issue Spotting: The Multitude of Ways Social Media Impacts Employment Law and Litigation*, 60 THE ADVOC. (TEXAS) 8, 8 (2012) ("Employers, meanwhile, must be just as cautious of using social media during the employment process; an employer's knowledge of an employee's information available on social media sites provides fertile ground for potential plaintiffs to support discrimination, retaliation, and other employment related claims.").

¹⁵ *Id.* ("Although the employer may gain useful information about the candidate that informs the hiring decision, what would otherwise be a manager's innocent search could uncover information about a candidate's race, religion, or other protected class that employers are barred from using in the hiring process.").

a university-level business communications class by one of this article's authors found that students were unsure if they would use it in their future job searches. In this poll, 35% of students stated they probably would use social media, whereas 35% stated they would not use it. In contrast, when the same students were asked if they thought potential employers would look at their social media sites when considering them for a job, 82% responded affirmatively. Anecdotally at least, there seems to be a disconnect in how students perceive the role of social media in the job search process.

More formal studies support this informal evidence. One study of university students that investigated their perspectives on what potential employers looked for on social media sites indicated that students believed employers were likely to check Facebook profiles.¹⁶ The students stated they were not likely to post anything on personal sites they would not like an employer to view.¹⁷ However, the findings from the study indicated students did not fully understand the impact of less direct information available about them on social media.¹⁸ The study suggested that students were not likely to understand the importance of written communication skills outside of classroom assignments, and thus would not be aware that employers might interpret writings found on social media sites as indicative of their communication skills.¹⁹ Students were also unaware that their associations with groups and other individuals on social media may be used as part of the assessment of a candidate for the position.²⁰ Thus, Root and McKay recommended that the importance of an effective social presence needs to be conveyed to students early in their studies so that students will begin to establish a positive social media presence early and build on this throughout their college career.²¹

While students may have knowledge that prospective employers are likely to review their social media presence during the hiring process, another study indicates that students may not fully appreciate what employers believe they can learn about an applicant from their social media presence.²² In their study, the authors surveyed 435 college students regarding their social media use and awareness of employers' use of social media in the hiring process.²³ Of these students, 143 volunteered for a second phase of the research project, which involved having a team of human resource professionals review their Facebook pages.²⁴ The results of this research project revealed an interesting gap between student and employer perceptions of what could be learned about a candidate on social media.²⁵

¹⁶ See Root & McKay, *supra* note 1, at 204 (“Nearly 80% of the respondents felt that prospective employers were either likely or very likely to check Facebook for applicants’ profiles.”).

¹⁷ *Id.*

¹⁸ *Id.* at 205 (noting, for example, that students were unaware that “many hiring professionals consider which groups students belong to and what others post to their profiles to be important reflections of a candidate.”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 206 (discussing that social media presence “should be addressed early in a student’s academic career. For that matter, these issues should really be raised in K-12 concepts.”).

²² See Michael J. Curran, et. al., *College Students and HR Professionals: Conflicting Views on Information Available on Facebook*, 24 HUM. RESOURCE MGMT. J. 442, 450 (2014) (“There is a significant difference between what college students perceive someone could learn about them using social media and what HR professionals believe they actually do learn.”).

²³ *Id.* at 445.

²⁴ *Id.*

²⁵ *Id.* at 450.

A majority of the students displayed awareness of employer use of social media, as 60.3% answered that potential employers “probably” or “certainly” would use social media to screen applicants.²⁶ However, the survey respondents were also confident that their own Facebook page was not problematic in this regard, as 76.1% of the students responded that they were “fairly” or “completely” comfortable that a potential employer would use their Facebook page to screen for employment.²⁷ When asked specific survey questions about what an observer could learn about the student from their Facebook page in eleven areas, including political orientation, sexual orientation, drug and alcohol use, and unethical behaviors, students indicated that they believed employers could learn relatively little about them based upon what they had placed on Facebook.²⁸ The researchers used a 5 point scale ranging from 5 (“a substantial amount of information”) to 1 (“nothing”) for each item on the survey, and only three of the categories (sexual orientation, relationship status, and hobbies) had a mean score from the students of over 3.0.²⁹ Furthermore, in six of the categories (political affiliation, alcohol/drug use, economic status, religion, unethical behaviors, and work habits), the students reported a mean score of less than 2.0.³⁰ Thus, while the students appeared to be aware that their Facebook pages would be viewed by potential employers, their survey response indicated a general belief that the information these prospective employers could glean from their Facebook page was quite limited.

When the student Facebook pages were reviewed by a team of human resource professionals, the results were quite different. On each of the eleven categories, the human resource professionals rated the information they learned from Facebook higher than the students did.³¹ The researchers found that this difference was statistically significant for all of the categories except one – hobbies and leisure activities.³² Perhaps the most troubling aspect of these survey results was that for categories that employers most often cite as important (unethical behaviors, work habits, alcohol use, and communication skills), students tended to score the information available as relatively low while the human resource professionals tended to score the information available as relatively high.³³

This research indicates that there is a fundamental disconnect between students’ perception of how an employer would view them based upon social media and the impression actually being made on employers. Notably, the error could be attributable to either or both parties. It is possible, or even probable, that students do not fully understand the impact of the information they are sharing online. However, it is also possible, or even probable, the human resource professionals are overestimating their ability to ascertain information about a person simply from viewing his or her Facebook profile. For business school educators, this disconnect creates an important educational opportunity to prepare students as both job candidates and future hiring professionals.

II. EMPLOYER PRACTICES AND POLICIES WITH RESPECT TO SOCIAL MEDIA USE

²⁶ *Id.* at 446.

²⁷ *Id.*

²⁸ *Id.* at 450

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 451.

³² *Id.*

³³ *Id.* at 452.

As shown in the Curran study, students seem to lack understanding of how their online presence can impact their job search or how much information companies can glean from their social media presence.³⁴ In order to better determine how companies utilize social media in the hiring process, three of the authors of this article aimed to gather primary data from corporate recruiters involved in on-campus recruiting.

Two rounds of data collection were attempted. The first was conducted late in the fall 2014 semester and early in the spring 2015 semester. Approximately 200 companies that participated in career fairs at one regional university in the southern part of the United States were sent a survey link by the Career Services department as part of a follow-up email after the career fair. In the 2014 – 2015 year, there were three career fairs included in this study: one in October, another in December, and a final one in March. A total of twenty-five completed surveys were received. There was diversity in industry, but a majority of respondents (62%) were in the education sector. Other industries represented include finance and insurance (9%), professional, scientific and technical services (5%), healthcare and social assistance (5%), and other services (19%). In addition, there was diversity in the age and job titles of participants. Respondents reported ages from “under 30” (29%) to “60+” (12%). Managers, directors, and assistant directors/managers were included in this study as well.

When the participants were asked if their company had a policy about the use of social media or internet searches in the hiring process, 44% said no and 39% responded yes. Seventeen percent of the respondents were not sure if their company had such a policy. Half of the respondents (50%) reported that their company “sometimes” checked an applicant’s social media site(s), while 22% said their company “never” checked the sites. Six percent responded “rarely,” 17% indicated the sites were “often” checked, and 5% said social media sites were checked “very often.”

The survey also included a question to investigate the motivations behind checking an applicant’s social media presence. Responses included looking for cultural fit with the organization, “to determine if the applicant has tasteful and professional use of social media,” and to “learn more about the person outside of the professional interview setting.” Similarly, survey participants were asked about the benefits of using information that is available online (not limited to social media sites) in the hiring process. The easy availability of the information was highlighted. In addition, it was mentioned that doing so “gives a more complete picture of a candidate.” Another participant noted that using information that is available online allows for information to be gathered “...that otherwise would likely not be discovered in a standard interview process.”

While the benefits of reviewing social media sites, as well as information posted on the Internet, were highlighted, survey participants were also asked about the challenges of using such information in the hiring process. The accuracy of information was noted by respondents, as evidenced by the comments “information may not be accurate” and “unable to find the exact candidate.” In addition, another respondent noted “remaining objective and not crossing a discriminatory line” was a challenge of using the information online.

In an effort to obtain more survey responses, a second round of data collection was attempted late in the spring of 2015 by posting the survey link on recruitment and hiring groups on LinkedIn. However, only seven completed responses were received. Although it is unknown

³⁴ *Id.* at 452 (“This study demonstrated a strong disconnect between the perceptions of college students and those of HR professionals regarding the amount of information available when viewing a Facebook page.”).

why the response rate for this survey was so low, the authors question whether recruiters may be reluctant to disclose their use of social media. This may be because organizations do not have formal policies or that organizations are wary of establishing guidelines on social media's proper use because the legal landscape with respect to the use of social media in the workplace is still somewhat unclear.³⁵

If companies do not have clear guidelines on its use, it could be questionable about how social media is being used to screen applications within a particular company. One survey respondent commented "We do not have a formal policy outlining social media used in hiring. We do have policy regarding employees [*sic*] and company use of social media." Additionally, if the use of information available on social media varies from candidate to candidate within a company, there could be internal concerns about claims of discrimination. Regardless, students should be aware of the diverse use of social media in hiring decisions. They should also be presented with guidelines on standard things to avoid posting on social media. With a seeming lack of policies on its use, using social media in the hiring process brings into question what exactly job seekers should be concerned about. A primary concern that needs to be addressed is the risk for discrimination.

III. ONLINE INFORMATION AND EMPLOYMENT DISCRIMINATION

Since social media is commonly being used through the recruitment and hiring process, it is imperative that students are taught the legal and ethical implications of its use while in business school. This is important so they are aware of their rights as an employee when seeking employment and so that they use social media wisely before beginning the job search process. Additionally, since many business students will eventually be in the position of making hiring decisions in their business careers, they need to be aware of the law regarding the social media information that they can and cannot consider. While there are various legal issues which may arise with respect to the use of social media in the workplace, this section will focus on the key legal issue of anti-discrimination laws and their interaction with the use of social media in the employee recruitment and selection process.

Under Title VII of the Civil Rights Act of 1964, it is unlawful for employers to make employment decisions, including hiring decisions, based upon a person's membership in certain protected classes.³⁶ These federally protected classes are race, color, religion, sex, and national origin.³⁷ While age is not considered a protected class under the Civil Rights Act, the Age Discrimination in Employment Act also prohibits discrimination based upon age for workers that are forty years of age or older.³⁸ Additionally, the Americans with Disabilities Act prohibits employment discrimination against individuals with disabilities.³⁹

Some states have included additional classes of individuals which cannot be discriminated against. This includes so-called "lifestyle discrimination" statutes passed by some states which prevent employers from discriminating against employees based upon lifestyle

³⁵ See Odo, *supra* note 12, at 7 (noting how the law regarding some uses of social media in the workplace is still underdeveloped).

³⁶ 42 U.S.C. § 2000e-2 (2015).

³⁷ *Id.* § 2000e-2 (a) (1) & (2) (listing the classes protected against discrimination in employment as "race, color, religion, sex, or national origin").

³⁸ 29 U.S.C. § 623 & 631 (2015).

³⁹ 42 U.S.C. § 12112 (a) (2015).

choices, such as hobbies, as long as such lifestyle choices are lawful.⁴⁰ For example, the state of Colorado has an anti-discrimination statute which makes it illegal to discriminate in employment based upon “the employee’s engaging in any lawful activity off the premises of the employer during nonworking hours” unless the activity is restricted by the employer because it is related to the employee’s employment responsibilities or otherwise conflicts with employment.⁴¹ As an example of an application of this statute, a Colorado attorney was successfully able to sue for discrimination after he was discharged from his firm because he was a homosexual.⁴² The court reasoned that engaging in a homosexual relationship was a lawful activity which occurred off the premises of the employer, and thus could not be used as a basis for an employment decision under this Colorado law.⁴³ The state of New York has similar legislation which prevents discrimination based upon lawful political activities, legal use of consumable products, and legal recreational activities.⁴⁴ Statutes such as these cast a much broader net than federal anti-discrimination laws, and prevent employers from making employment decisions for information found on social media related to lawful activities such as alcohol use or personal relationships. While students and employers in these jurisdictions must be aware of these unique laws, because these statutory requirements can vary significantly by state this article will focus on federal anti-discrimination statutes applicable to all states.

Under federal anti-discrimination law, there are two broad legal theories under which a discrimination claim can be brought – disparate treatment and disparate impact.⁴⁵ Disparate treatment is the most blatant form of discrimination and is typically easily recognizable – it is intentional discrimination where the employer engages in some employment practice with the motive of discriminating based upon membership in a class that is legally protected.⁴⁶ The hallmark of disparate treatment discrimination is that it is intentional.⁴⁷ Thus, for example, simply intentionally refusing to promote women to certain managerial positions would be disparate treatment discrimination.

Disparate impact discrimination involves an employment policy that appears neutral and is implemented without the intent to discriminate, but nevertheless has a disproportionate effect on members of a protected class.⁴⁸ The quintessential example of such a policy is found in the

⁴⁰ See Stephen D. Sugarman, “Lifestyle” Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 431-33 (2003) (discussing legal protections that have been provided in some jurisdictions for so-called “lifestyle” discrimination).

⁴¹ COLO. REV. STAT. § 24-34-402.5 (2015).

⁴² See *Borquez v. Robert C. Ozer*, P.C. 923 P.2d 166, 171 (Colo. App., Div. 1 1995) (affirming the jury’s finding of wrongful discharge under the Colo. Rev. Stat. § 24-34-402.5 where the discharge was due to engaging in a homosexual relationship).

⁴³ *Id.* at 171 (“Next, we reject defendants’ assertion that the jury verdict was based upon Borquez’ *status* as a homosexual, rather than upon his conduct and, therefore, that there was no lawful *activity* in which Borquez was engaged during his off-work hours that could have been the basis for his discharge. The jury was presented with evidence that Ozer particularly object to Borquez’ sexual relationship during his off-work hours.”).

⁴⁴ N.Y. LAB. LAW § 201-d (2) (a) – (d) (McKinney 2015).

⁴⁵ See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1351 (2010) (discussing the two legal theories of disparate treatment and disparate impact discrimination)

⁴⁶ *Id.* (discussing disparate treatment discrimination and noting that it covers discrimination where there is an “illicit employer motive”).

⁴⁷ *Id.* (“The discrimination is intentional, and intentional discrimination is called ‘disparate treatment.’”) (internal footnote omitted).

⁴⁸ See Deborah A. Widiss, *Griggs at Midlife*, 113 MICH. L. REV. 993, 1010 (2015) (noting that disparate impact discrimination involves “a facially neutral policy that is implemented without any ‘intent’ to discriminate but that disproportionately excludes” minority candidates).

case of *Griggs v. Duke Power Company*.⁴⁹ In that case, Duke Power Company decided to require the passing of a standardized test and/or a high school education for certain jobs where no such educational or testing requirement was previously required.⁵⁰ Some of these requirements were added the day that discrimination became illegal under Title VII.⁵¹ These new educational and testing requirements had the effect of disqualifying black employees from jobs at a higher rate than white employees, and the jobs in question had previously been held only by white employees.⁵² Even though these new educational and testing requirements appeared on their face to be racially neutral, the Supreme Court held that they could nevertheless serve as the basis of a discrimination claim because they did not bear a demonstrable relationship to the performance of the jobs at issue and had a discriminatory impact on the black candidates.⁵³ The court expressly held that facially neutral employment screening procedures like testing and educational requirements may be utilized in the employment process, but such procedures must be “demonstrably a reasonable measure of job performance,” or else the procedures could be the basis of a discrimination claim if they disproportionately impact a protected class.⁵⁴

While these anti-discrimination laws have been in existence for some time, the growth of social media and its use in employment complicates their enforcement. Due to the large amount of information now easily available online, potential employers have access to more information regarding an applicant’s personal life than ever before.⁵⁵ For example, whereas determining an applicant’s religion might have previously been fairly difficult, now an employer is able to scour the internet for publicly available social media information that might make this determination quite easy.⁵⁶ If an employer utilized social media to screen out all applicants that appear to be Muslim, such an act would clearly be disparate treatment and illegal under anti-discrimination laws. Such uses of social media are quite simple to handle under the law. However, some potentially discriminatory uses of social media are not quite so obvious.

Under a disparate impact theory, some seemingly benign uses of social media and online information in the hiring process can result in charges of discrimination. In one case, an employee of the National Park Service alleged that she was being discriminated against based

⁴⁹ 401 U.S. 424 (1970).

⁵⁰ *Id.* at 427-28 (“To qualify for placement in any but the Labor Department, it become (sic) necessary to register satisfactory scores on two professionally prepared aptitude tests, as well as to have a high school education. Completion of a high school alone continued to render employees eligible for transfer to the four desirable departments from which Negroes had been excluded if the incumbent had been employed prior to the time of the new requirement.”).

⁵¹ *Id.* at 427 (“The Company added a further requirement for new employees on July 2, 1965, the date on which Title VII became effective.”).

⁵² *Id.* at 426 (noting of the new education and testing requirements “(a) neither standard is shown to be significantly related to job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.”).

⁵³ *Id.* at 431.

⁵⁴ *Id.* at 436.

⁵⁵ See Mark Bannister, et. al., *Striking Gold, Not Dynamite when Using Social Media in Employment Screening*, 32 HOFSTRA LAB. & EMP. L.J. 1, 1 (2014) (“Nearly one-half of the United States population is a member of a social media site. Such sites are rich with personal information.”) (internal footnotes omitted).

⁵⁶ See Jennifer Delarosa, Note, *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, 263-63 (2015) (discussing how the large amount of information on social media websites can make it easy to uncover information related to a protected class and use it for discriminatory purposes).

upon her age.⁵⁷ One of her claims was that the National Park Service's use of Facebook to recruit new employees had a disparate impact on older applicants who may not use social media as frequently.⁵⁸ The Equal Employment Opportunity Commission ("EEOC") ultimately dismissed her claim, but notably it dismissed it on factual grounds, not because it was a legally invalid theory.⁵⁹ The EEOC noted that the employee did not produce any evidence that Facebook was the only means of recruitment nor did she produce any statistical evidence that the policy of using social media was excluding older applicants.⁶⁰ Thus, even though this claim was not successful, the implication is that if an employee could produce evidence that an employer was solely using social media to recruit new employees and such a policy lead to older applicants being excluded disproportionately, a disparate impact discrimination claim could potentially be successful.

Indeed, utilization of technology in general has become a hot topic for age discrimination cases. A recent article noted that many media, advertising, and technology companies are listing "digital native" as a desired attribute in employment advertisements.⁶¹ While the use of such a term may seem innocuous enough, depending upon how the term is defined it carries the connotation of someone born in the digital age, and thus someone younger.⁶² As such, some employment attorneys have argued that this is merely a veiled form of age discrimination.⁶³ This example illustrates how in the modern work, claims of discrimination can arise simply from fairly innocuous terminology used in a job listing.

This article provides only an overview of discrimination law, and there are certainly many additional technical aspects to this area. However, the focus on this article is not the various technicalities of employment law, but rather how to illustrate to students the basic practical application of anti-discrimination law in the digital world. As the above cases illustrate, the treasure trove of information available about applicants online, largely due to social media use, makes complying with the law much more difficult than it might seem at first.⁶⁴ Additionally, as the previously discussed study by Curran, et. al. found, there is a fundamental disconnect between what students believe they are putting online and what employers feel they can learn about potential candidates online.⁶⁵ Accordingly, it is incumbent on business educators to fully and effectively explain to students the practical aspects of navigating this area.

First, it is important for students to understand that information they post online can lawfully be used to make employment decisions if the information used is not related to an individual's status as a member of a protected class. For example, under federal law an employer could lawfully make employment decisions based upon an applicant's posting of information

⁵⁷ See *Reese v. Salazar*, EEOC DOC 0120122339, 1 (2012), 2012 WL 5901116.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 4.

⁶⁰ *Id.*

⁶¹ See Vivian Giang, *This is the Latest Way Employers Mask Age Bias, Lawyers Say*, FORTUNE (May 4, 2015), <http://fortune.com/2015/05/04/digital-native-employers-bias/>.

⁶² *Id.* (noting that Marc Prensky, credited with coining the term "digital native," defined it as someone born during after the digital word began, which would necessarily mean the term applies to younger employees).

⁶³ *Id.* (quoting Ingrid Freeden, an attorney, as saying "The term 'digital natives' makes me cringe . . . This is a very risky area because we're using the term that has connotations associated with it that are very age-based. It's kind of a loaded term.")

⁶⁴ See Bannister, et. al., *supra* note 55, at 22 (discussing the difficulty that the massive amounts of information available online can create with respect to employment discrimination law, even when an employer is not intending to discriminate).

⁶⁵ See Curran, et. al., *supra* note 22, at 450.

related to engaging in illegal or unprofessional behavior, such as drug use, as long as that behavior is not related to membership in a protected class.⁶⁶ Thus, students need to be aware that information that they post online that is publicly available is not legally off-limits from consideration in the hiring process.

However, it also important to explain to students that determining what social media practices might lead to potential discrimination based upon membership in a protected class can be very difficult, particularly under a disparate impact theory.⁶⁷ This is critical knowledge for students not only as employment applicants, but as potential future managers making hiring decisions. For example, Kluemper, Rosen, and Mossholder conducted a study to determine whether the “Big Five” personality traits (conscientiousness, emotional stability, agreeableness, extraversion, and openness to experience) could be reliably assessed from users’ Facebook information.⁶⁸ Based upon an analysis of 274 undergraduate participants, the researchers concluded that their research results “suggest that evaluators trained to assess participant profiles can provide reasonably reliable estimates of Big Five personality traits from SNWs (social networks).”⁶⁹ The methodology utilized and the validity of these results are unimportant for the purposes of this article. Simply suppose that a company believes in the validity of this study and begins to use applicants’ available social media information to conduct personality evaluations for hiring decisions. This on its face would be a legal, non-discriminatory practice. However, just like the educational requirements in *Griggs*, if such a process results in a discriminatory impact on a protected class, unless the personality profile can be shown to be demonstrably related to job performance, it could be a violation of anti-discrimination law.⁷⁰ Such a result may not be intuitive to students or even many human resource professionals, but can lead to a well-meaning employment practice resulting in discriminatory outcomes and/or legal action.

In addition to the legal considerations in this area, there are important ethical and managerial considerations. It is important for those making hiring decisions to consider whether it is fair to applicants to utilize their social media information to try to make strong judgments about them. Part of the argument for the previously mentioned “lifestyle” discrimination statutes is that some believe employees should have basic privacy rights to be able to engage in lawful activities outside of work free from their employer’s judgment.⁷¹ Employees may feel that their personal autonomy is being unethically invaded if an employer makes employment decisions about them based upon their personal conduct outside of work.⁷² However, it is understandable that employers would want to utilize some of this information in employment decisions.

⁶⁶ See Odo, *supra* note 12, at 7 (noting that employers could make employment decisions regarding things like “current drug abuse, negative comments about past employers, or discriminatory comments related to race, sex, or religion” without running afoul of anti-discrimination laws).

⁶⁷ See Bannister, et. al., *supra* note 55, at 22 (“An organization’s social media-informed employment decisions may disparately impact a protected class candidate. For example, an employer disapproving of or disliking ‘rap music’ may tend to assign low rating to or pass over applicants with ‘Likes’ and links to ‘gangsta rap’ artists. These candidates may disproportionately represent African American men.”).

⁶⁸ See Donald H. Kluemper, et. al., *Social Networking Websites, Personality Ratings, and the Organizational Context: More Than Meets the Eye?*, 42 J. APPLIED SOC. PSYCHOL. 1143, 1145 (2012).

⁶⁹ *Id.* at 1162.

⁷⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

⁷¹ See Sugarman, *supra* note 40, at 402-408 (discussing the employee privacy interests asserted by advocates for lifestyle discrimination laws).

⁷² *Id.* at 406 (discussing assertions of employee personal autonomy privacy rights and noting “The underlying claim is that the employer is not treating me as a person and is showing no respect or concern for me as an individual. Instead, the employer is treating me like a statistic, as part of a group to which I have been involuntarily assigned.”).

Activities that employees engage in on their own time can have a negative impact on the employer's business through a diminished reputation or through decreased employee performance while at work.⁷³ The ethical issues here are complex, as they commonly are when conflicting rights are at stake.

An additional ethical issue is whether information obtained about a candidate online can ever be viewed without bias. A relatively recent trend in the study of business ethics is the psychological phenomenon of "bounded ethicality" – that our capacity to act upon our own stated moral values is compromised by our own psychology.⁷⁴ Some research in this area involves the concept of "implicit discrimination" – that people can discriminate unconsciously or sub-consciously based upon unconscious mental associations they may have regarding gender or race.⁷⁵ For example, one study found that resumes with "white sounding" names received a fifty percent higher call back rate than resumes with "African-American sounding" names, controlling for credentials and quality of the resumes.⁷⁶ While some of this discrepancy may be due to intentional racism, further studies in this area have revealed that at least some of this discrimination can be attributed to implicit, unconscious associations.⁷⁷

This implicit bias clearly can, and does, occur outside the use of social media. However, due to the increased amount of information social media makes available to companies that may trigger implicit biases, these studies raise profound ethical implications with respect to utilizing social media information in evaluating candidates. This research tells us that evaluating online information objectively may be difficult, if not impossible. While implicit discrimination can occur at any level, it is arguably exacerbated when the hiring individual is viewing information online, perhaps without the proper context. A reviewer could unconsciously be looking at fairly innocuous information so as to validate existing stereotypes based upon race, gender, religion, or national origin. Even the most well-intentioned reviewer may find themselves making incorrect implicit assumptions about a candidate that would not be borne out upon actually meeting them. At best, human resource professionals should use caution regarding the veracity of the conclusions they may draw about a candidate from online information. However, as some of the previous studies discussed show, some feel that they can make strong determinations about an individual's qualification based upon the information they place online.⁷⁸

With these legal and ethical issues as a backdrop, it is argued that educating students about the legal use of social media in the hiring process, both as a candidate as well as a hiring manager, requires more than just imparting information about the law, management, and ethics. Rather, to challenge students' own biases and assumptions, it is important to engage the students in exercises that simulate reviewing online information in the hiring process. In the next section,

⁷³ *Id.* at 383 (discussing employers' interest in employees' off duty behavior).

⁷⁴ See Tae Wan Kim, et. al., *Bounded Ethicality and The Principle That "Ought" Implies "Can"*, 25 BUS. ETHICS Q. 341, 341-42 (describing bounded ethicality).

⁷⁵ See Marianne Bertrand, et. al., *Implicit Discrimination*, 95 AMER. ECON. REV. 94, 94 (2005) ("Motivated by a growing body of psychological evidence . . . Sometimes, we argue, discrimination may be *unintentional* and outside the discriminator's awareness.").

⁷⁶ See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991, 992 (2004) ("We find large racial differences in callback rates. Applicants with White names need to send about 10 resumes to get one callback whereas applicants with African-American names need to send about 15 resumes.").

⁷⁷ See Kim, et. al., *supra* note 75, at 342-43 (discussing further research into implicit bias).

⁷⁸ See Curran, et. al., *supra* note 22, at 451 (discussing HR professionals' belief that they can draw strong conclusions about candidates from social media); see also Kluemper, et. al., *supra* note 68, at 1162 (suggesting that evaluators can reach reliable conclusions about personality from Facebook information).

a classroom exercise that can help illustrate to students how they may need to modify their own social media use as a job candidate is proposed. The exercise also involves considering the ethical and legal dimensions of reviewing social media information from the perspective of a hiring professional.

IV. SOCIAL MEDIA CLASS EXERCISE AND PRACTICAL GUIDANCE TO STUDENTS ON SOCIAL MEDIA USE

To bridge the gap between knowledge of employment discrimination law and social media and its practical implementation, this article proposes an interactive classroom exercise to illustrate some of the difficulties in utilizing social media in the hiring process. First, the instructor should create example social media pages for hypothetical, fictional job candidates. Each of these fictional candidates' social media pages should reveal information (both openly and subtly) that reveals the candidate's gender, race, ethnicity, religious background, etc. A key to this exercise being successful is including information on these sample pages that students might have on their own page but may not realize could create a negative impression of them as a candidate or could potentially be used in a discriminatory manner. Examples of this type of information could include:

1. References to lyrics from popular music that could be perceived as offensive or misogynistic (for example, using vulgar language);
2. Subtle or overt references to religion;
3. Subtle or overt references to controversial political or societal issues (abortion, racial issues, sexual orientation discrimination issues, marijuana legalization, etc.);
4. Pictures or references to alcohol use, drug use, or partying in general;
5. Pictures of the candidate in provocative dress or that otherwise may be considered to be of a sexual nature;
6. Dates for when the candidate graduated from schools, or other references that might indicate age; or
7. Names that could commonly indicate nationality or race.

The overarching point is for the instructor to be creative and to create realistic profiles that could mirror those of the students, as well as the type of profiles that the students might see as hiring professionals. The profiles need to have a good mix of information that would obviously lead to a discriminatory hiring decision if considered (e.g., a clear statement of the candidate's religion) as well as more subtle information that may reveal information about a protected class, but does not do so explicitly (for example, religious references such as "being blessed" or enjoying certain music). Armed with these hypothetical profiles, the instructor and the students can then engage in various roleplaying exercises that can help illustrate some of the issues both employers and job candidates face with respect to social media.

A useful exercise that the students could engage in would be to look at a group of candidates for a position, and then have the instructor simply ask the students "Based upon just the information in these profiles, which candidates would you hire or call in for an interview?" The students could be asked to give their choices either out loud in class, or could be asked to do so in anonymous writing on notecards if that would facilitate more honest answers. Once the

responses are tabulated to determine the top candidate(s), the class could then discuss the results. The instructor should encourage open discussion of the candidates' attributes that members of the class considered to be appealing and those viewed as unappealing for the candidates who were not chosen.

Engaging in this exercise in a class of any substantial size is likely to elicit interesting discussion about selecting candidates in the digital age. It is likely that some information the students consider could be discriminatory. Additionally, some students may have to confront some implicit or explicit biases they may have. Additionally, there is likely to be a strong divergence of opinion regarding whether an employer should consider private lifestyle information, even if it is not discriminatory under federal law. Discussing the importance of privacy rights with respect to employment in the digital age is a critical discussion for students to have.

Another question which could be asked is "Imagine you are a human resource employee evaluating these profiles. What information in these profiles would you consider to convey unprofessionalism?" Again, the responses could be either oral or written, but discussing the responses is very important. If at all possible, a practicing human resources professional could be engaged to also give their opinion about the profiles. Engaging in this exercise with students can help reveal to them the difference of opinion shown in the Curran, et. al. study – students' perception of what online information is unprofessional or unappealing to employers can vary greatly from the opinions of the employers.⁷⁹ For example, many students' opinion about pictures and posts showing partying and alcohol use is likely to be significantly different than that of many human resource professionals. Many students may genuinely not understand how negatively employers view such information. Simply telling students that they need to be careful about what they post online will likely not have nearly the impact of actually reviewing profiles and discussing what is appropriate or inappropriate online material for a professional.

This question about professionalism also gives the class the opportunity to discuss the ethics of personal privacy and employers' use of social media.⁸⁰ Students and the instructor can have a robust discussion regarding the ethics of employers using information on the sample profiles that is not necessarily discriminatory but that the employer may still find undesirable. It is important that students understand the potential negative impacts on employment opportunities, whether lawful or unlawful, that posting controversial information or opinions online can have. However, it is equally important that we treat students as future potential employers, and make sure they are thinking now about whether using such information, even when it is legal, is good management or is ethical. The dividing line between our public and private lives is becoming more and more unclear as we live more of our lives in the digital world. Students benefit from grappling with the ethical and managerial ramifications of this reality early and often.

Numerous other student questions and exercises utilizing these hypothetical social media profiles can surely be imagined by the creative instructor. The overall pedagogical point is that students need to interact with the issue of discrimination and online information at the practical implementation level, not simply through learning the law in a vacuum. The more students are exposed in the classroom to the practical realities of this topic, the greater the likelihood they will make better choices in their professional and pre-professional lives.

⁷⁹ See Curran, et. al. *supra* note 22, at 450.

⁸⁰ See Sugarman, *supra* note 40, at 402-413 (discussing employee privacy objections to employer monitoring of off-duty behaviors).

A useful aspect of the recommended teaching approach is that it can be utilized before, during, or after the students are exposed to the substantive law of this area. For example, students could be guided through these exercises and then after the experience be debriefed on the law in order to better understand whether the employment choices they made were potentially a violation of anti-discrimination law. Alternatively, these exercises can be used as illustrations while the substantive law is being taught. Finally, the exercises can be used after the students have been taught the substantive law to help them better understand and apply the law.

After completing these exercises to illustrate to students some of the practical realities of social media use, practical tips for how they can improve their own use should be provided. While it may be enticing to simply recommend that students refrain from having a social media presence, an absence of an online presence can actually be a disadvantage for an applicant.⁸¹ The reality of the modern world is that more and more of our lives are lived digitally.⁸² Students must be prepared to exist in this new environment of diminished privacy, where personal information placed online can jeopardize your career prospects for years to come.⁸³

One of these practical tips is understanding that recruiters frequently use social media not to evaluate an applicant's hard skills or abilities to do the job, but to determine if a candidate will fit into the company's culture.⁸⁴ Thus, social media is a great way for potential candidates to build their own personal brand that conveys their unique personality, expertise, and style to a potential employer.⁸⁵ Students need to be advised that everything they put online is potentially visible to others and helps build this brand. While privacy settings are important for shielding personal information, recruiters now commonly expect candidates to have a social media presence. Thus, privacy settings should be used strategically to allow public access to selected content that is consistent with this professional brand. Additionally, each site should be reviewed to ensure a consistent professional image is portrayed and that information online is consistent with information provided in print form, such as on resumes.

⁸¹ See Dan Schawbel, *How Recruiters Use Social Networks to Make Hiring Decisions Now*, TIME (July 9, 2012), <http://business.time.com/2012/07/09/how-recruiters-use-social-networks-to-make-hiring-decisions-now/> (“First off, it’s important that you have profiles on LinkedIn, Facebook and Twitter. If you don’t, you won’t seem as relevant and companies might think that you’re hiding something.”); see also Jacquelyn Smith, *How Social Media Can Help (or Hurt) You in Your Job Search*, FORBES (Apr. 16, 2013), <http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search/#efb1dc924fdb> (quoting Greg Simpson, a senior vice president, “Job seekers who are silent or invisible online may be at a disadvantage. They need to engage on social networking sites to increase their visibility and searchability with prospective employers.”).

⁸² See Susie Poppick, *10 Social Media Blunders That Cost a Millennial a Job – or Worse*, MONEY (Sept. 5, 2014), <http://time.com/money/3019899/10-facebook-twitter-mistakes-lost-job-millennials-viral/> (quoting hiring manager Alison Green “Social media is now so woven into the fabric of young people’s lives that they forget not everything is suitable to put out there.”).

⁸³ *Id.* (“As managers grow savvy (and Facebook privacy settings grow meaningless) it is increasingly foolish to assume that those years-old photos of you double-fisting shots won’t come back to haunt you – and maybe even wreak havoc on your career.”).

⁸⁴ See Schawbel, *supra* note 81 (noting that “companies are inspecting social profiles to weed out candidates and get a sense of whether a particular applicant is likely to fit into the culture or not.”).

⁸⁵ See *Finding a Job Using Social Media: Intro*, COLUMBIA UNIVERSITY CENTER FOR CAREER EDUCATION, <https://www.careereducation.columbia.edu/resources/tipsheets/finding-job-using-social-media-intro> (last visited Feb. 9, 2016).

Additionally, since recruiters use social media to screen for negative characteristics, students need to understand the typical “red flags.” A recent survey of hiring managers in the U.S. found that items that were most likely to hurt a job candidate included:

- Provocative/inappropriate pictures
- Evidence of drinking or drug use
- Negative communication about a previous employer
- Poor communication skills
- Discriminatory language.⁸⁶

CONCLUSION

Whatever the pedagogical method employed, it is incumbent upon business school instructors to convey to students how to use social media effectively. This includes training in social media use both as student job candidates as well as future managers. A professional online presence is the new normal in the modern business world, and thus students must be prepared to cope with this reality. Understanding what a professional online presence looks like, as well as the legal and ethical ramifications of using social media in the hiring process, is a critical part of professional development. The exercise proposed in this article provides an experiential, tangible method for conveying this information to students.

⁸⁶ *More Employers Finding Reasons not to Hire Candidates on Social Media, Finds CareerBuilder Survey*, CAREERBUILDER, <http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.asp> (last visited Feb. 9, 2016).