

Socially Awkward: Social Media for Hiring, Firing and Everything In Between

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Hiring: The New Frontier



- “Like it or not, as a general proposition employers are free to make unfair, stupid, arbitrary, and wrongheaded hiring and termination decisions, even based on false information, as long as in doing so they do not violate some specific law.”
 - George Lenard, *originator of “George’s Employment Blawg”*



Fun Facts About Social Media

- According to Brandwatch.com:
- Worldwide population is [7.6 billion](#) (October 2017)
- The internet has [3.5 billion users](#)
- There are [3.03 billion active](#) social media users
- Internet users have an average of [7.6 social media accounts](#)
- Social media users [grew by 121 million](#) between Q2 2017 and Q3 2017.
- That works out at a new social media user every 15 seconds.

According to Pew and Zephora, Internet Marketing

- People spend over 700 billion minutes per month on Facebook
- There are over 900 million objects that people interact with (pages, groups, events and community pages)
- Average user is connected to 80 community pages, groups and events
- Average user creates 90 pieces of content each month
- More than 30 billion pieces of content (web links, news stories, blog posts, notes, photo albums, etc.) shared each month

If Facebook Were a Country

- 1. China
- 2. India
- **3. FACEBOOK**
- 4. United States
- 5. Indonesia
- 6. Brazil
- 7. Pakistan
- 8. Bangladesh

And We All Know It's Used at Work



Two Main Reasons Used

- Background Checking



- Identifying Potential Applicants for positions

Social Media and Hiring (from 2013 HireRight survey)

- 61 percent of employers use or plan to use social media for candidate recruiting
- 21 percent use or plan to use social media for background check
- Slight drop from 24 percent for background

The Great Debate

- Is What's Public really "Public?"
- When does your personal life reflect your professional life?



Background Checking Tool

- Less Expensive?
- Verify Information?
- Get an “accurate” idea of personality of applicant – perhaps more than in an interview?
- It’s “social” networking — does it belong in background checks?

What are the Legal Issues?

- Discrimination Claims
 - Race, religion, national origin, etc.
 - What about information learned from blogs?
 - Disability and Benefits discrimination (“I am a cancer survivor.”)
- State law issues also
 - Spare time pursuits
 - Anti-smoking statute?
 - Underage drinking



The Trouble Begins

- Ability to track visitors to site
 - I interviewed on Monday, you looked at blog on Tuesday, you rejected me on Wednesday?



PageTrack - Track MySpace Visitors

Track visitors to your MySpace Profile. Find out:

- IP Address
- Location (with **Google Maps with Satellite Imagery!**)
- Host Name
- Time and Date
- Total hits
- Log size of 150

To get the tracker code to embed in your page, enter the necessary info below, and click "Get Code !!!"

Other Legal Issues



- **Fair Credit Reporting Act?** (if third party background investigator obtains information or if conducting own)
- **Violate terms of service of Website?**
- **Federal Computer Fraud and Abuse Act** (if exceeded scope of authority?)



A different way of looking at the issue . . .

- EEOC guidelines re: screening tests —each test in screening process should be “relevant” to the job being filled and analyzed for any adverse impact
- Compare with questions you would ask in an interview —
slippery slope

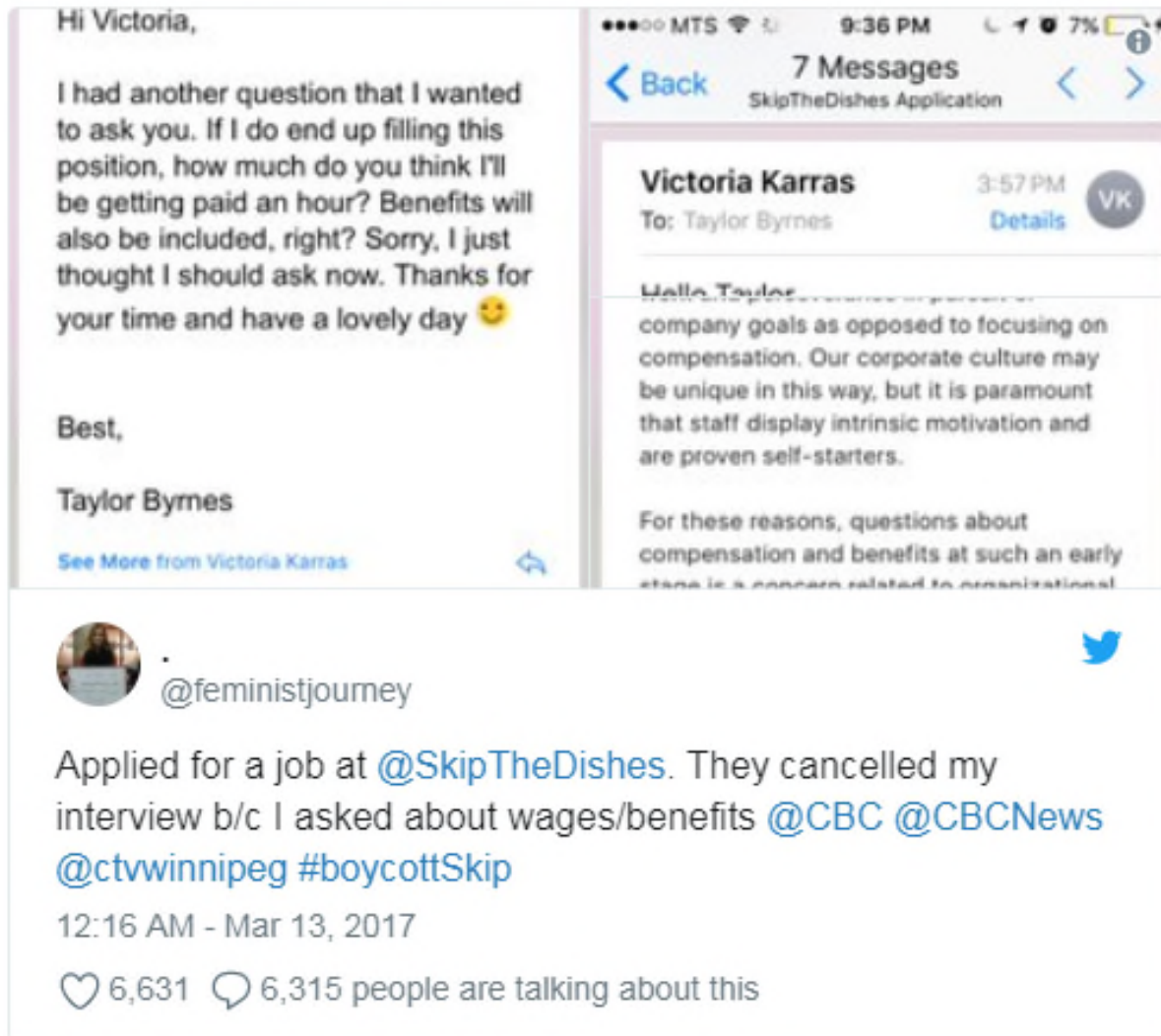


Forget the Law - **Let's be Practical**



- Public Relations Nightmare
- Applicant logs on to public website — names your company or . . .
- On applicant's Facebook page says "I interviewed at XYZ Company and the company did not hire me after they visited my blog"

Ripped from the Headlines



Hi Victoria,

I had another question that I wanted to ask you. If I do end up filling this position, how much do you think I'll be getting paid an hour? Benefits will also be included, right? Sorry, I just thought I should ask now. Thanks for your time and have a lovely day 😊

Best,

Taylor Byrnes

[See More from Victoria Karras](#)

MTS 9:36 PM 7% 7 Messages SkipTheDishes Application


Victoria Karras 3:57 PM VK

To: Taylor Byrnes [Details](#)

Hello Taylor,

company goals as opposed to focusing on compensation. Our corporate culture may be unique in this way, but it is paramount that staff display intrinsic motivation and are proven self-starters.

For these reasons, questions about compensation and benefits at such an early stage is a concern related to organizational

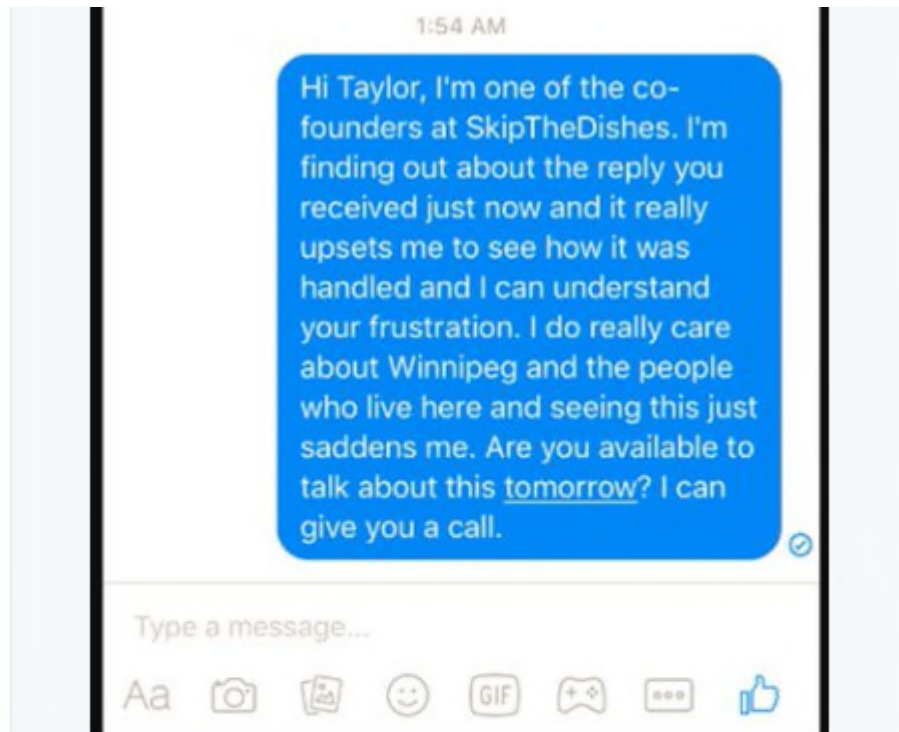
 @feministjourney

Applied for a job at [@SkipTheDishes](#). They cancelled my interview b/c I asked about wages/benefits [@CBC](#) [@CBCNews](#) [@ctwinnipeg](#) [#boycottSkip](#)

12:16 AM - Mar 13, 2017

6,631 likes 6,315 people are talking about this

The Company's Follow Up



SkipTheDishes
@SkipTheDishes

(1/2) The email to Taylor does not represent #SkipTheDishes team values. We have followed up to offer heartfelt apologies & a 2nd interview.

11:52 PM - Mar 13, 2017

👍 239 💬 511 people are talking about this



SkipTheDishes
@SkipTheDishes

(2/2) We do share compensation & it's OK to ask. We are coaching internally to ensure this doesn't happen again. @CBC @CBCNews @CTVWinnipeg

11:52 PM - Mar 13, 2017

👍 247 💬 293 people are talking about this

It Happens Stateside Too



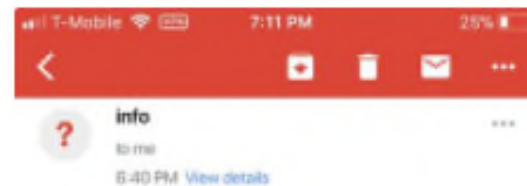
The Internet Responded

- Retweeted more than 16,600 times
- Liked by over 35,000 Twitter users

So the Company Responded

 **Emily Huynh** 
@stale0000 

BEST UPDATE: HE GOT FIRED YALL!! I LOVE EVERYONE WHO SHARED THIS, LIKED THIS, READ THIS ARTICLE ETC. WE NO LONGER HAVE TO DEAL WITH THIS TRASH ❤️🙄
pic.twitter.com/tA1PzenuPx
10:13 PM - Jan 23, 2018



Dear Mr. Huynh and Emily:

As the employer of Mr. Peterson, please accept my sincere apologies for the communication sent by Mr. Peterson to you. Mr. Peterson's communication was inappropriate and inconsistent with our company's values. Our company is an equal opportunity employer and it is proud of its diverse workforce. Indeed, the majority of the employees performing the work for which you applied speak English as a second language and they represent a wide range of backgrounds and nationalities. While it is true that communicating effectively in English is an important part of the job in question, the manner in which Mr. Peterson communicated with you was highly inappropriate and following our investigation he is no longer employed with the company. Thank you for bringing this to our attention and I hope you will accept my sincere apology.

Sincerely,

Kevin Bus

Company Culture?

- If hiring employees in sales, public relations, customer service — your employees reflect on you — don't want to be embarrassed
- Information speaks to character of applicant — is there a conflict with “philosophy” or “mission” of organization?

“But, it’s Public. . . .”

- Terms of use of Facebook and MySpace talk about non-commercial use
- Can set privacy limits
- Is a blog different?
- “cyberslamming”



So, What's an Employer to Do?

- Talk to the applicant if you find something “questionable”
- Recognize that history repeats itself — just no internet before
- Tell people initially — give them time to correct



Some Practical Tips

- Written authorizations
- After conditional job offer
- Centralize who is performing the check
- Written policies
- Is the information I am going to learn a valid predictor of job performance?
 - what is your demographic?
 - what are job duties?



What About Firing?



Justine Sacco

@JustineSacco



 Follow

Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!

 Reply  Retweet  Favorite  More

4
RETWEETS

2
FAVORITES



10:19 AM - 20 Dec 13  from Hillingdon, London

What is Section 7?

- Section 7 provides that “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . *And to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*”



Decisions are Fact Specific

- *Hispanics United of Buffalo, Inc.* (Sept. 2, 2011)
- Employees could not be fired for posting on wall of co-worker who complained about her co-workers' performance
- Posts by co-workers protected because deal with job performance

But, hot dogs?



- BMW dealership employees complain online and post pictures where owners serve hot dogs, cookies and snacks from a warehouse club
- Sarcastic comments re: owner going all-out
- Vocalizing sentiments of co-workers, so concerted activity

Triple D, LLC, 361 NLRB No. 31 (August 2014)

- NLRB Decision where Board unanimously finds that Company unlawfully discharged two employees for participating in Facebook discussion regarding perceived errors in employers tax withholding calculations

What the Board Said

- Triple Play Sports Bar and Grille fires two workers after learning of a discussion on Facebook regarding tax withholdings between several employees
- “They can’t do calculations”
“Now I owe money . . .
Wtf”
- One employee “likes” the status
- Employer argues that they are “defamatory and disparaging remarks” so lose NLRA protection
- NLRB says comments (including “like”) are concerted activity and policy was effort to chill speech

New Standard from the NLRB?

- Prior decisions, memos, and other NLRB guidance struck down many policies that were not meant to impact NLRA rights.
- Example: civility codes
- Decision in December 2017 announced a new standard for facially neutral policies:
 - (1) The nature and extent of the potential impact on NLRA rights.
 - (2) The employer's legitimate justifications associated with the rule.

Fair Game to Prohibit:

- Improper use of Company's intellectual property
- Revealing confidential information
- Discriminating or harassing language

Title VII Example

- Plaintiff claimed heterosexual bias and retaliation after she was fired for posting an anti-LGBTQ post on social media
- Plaintiff claimed her supervisor was part of the LGBTQ community

Take Away

- No right to freedom of expression because company was private
- If the content of the statement constitutes protected activity under Title VII, the termination could be retaliatory
 - NOTE: This court held that sexual orientation was not covered under Title VII, so Plaintiff could not have a reverse discrimination retaliation claim. Some courts have held sexual orientation is covered under Title VII.

Questions?

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