

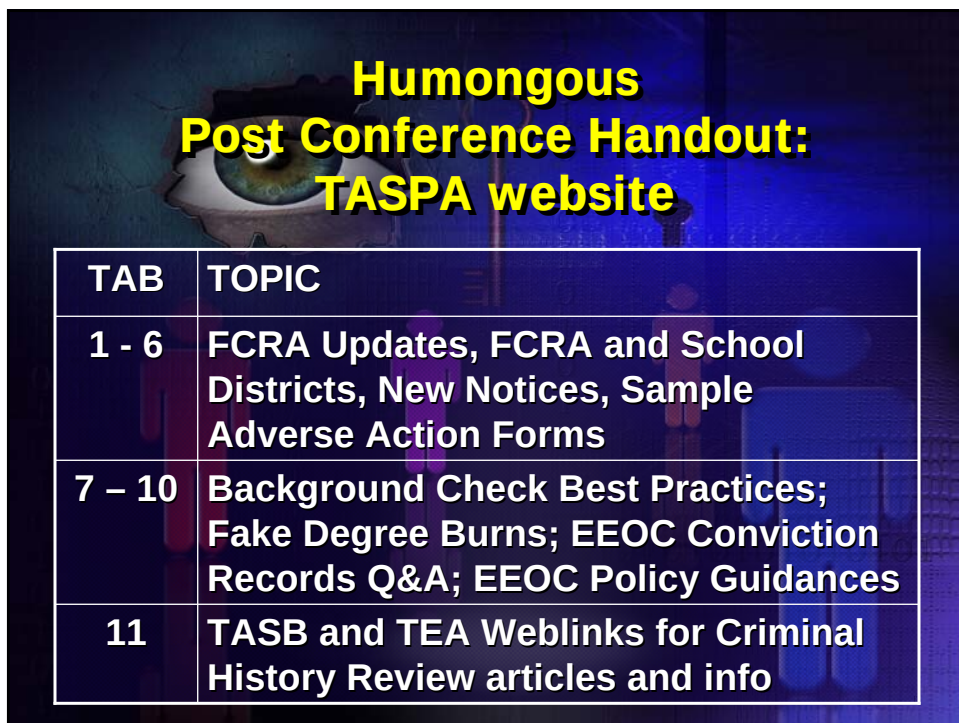
TASPA 2012 Winter Conference
Background Checks, Social Media and Other Arresting Developments
Katrina Grider



**Background Checks, Social Media,
and Other Arresting Developments**

Katrina Grider
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Board Certified in Labor and Employment Law
Texas Board of Legal Specialization
Texas SuperLawyer, 2003 – 2006, 2011, 2012



**Humongous
Post Conference Handout:
TASPA website**

TAB	TOPIC
1 - 6	FCRA Updates, FCRA and School Districts, New Notices, Sample Adverse Action Forms
7 – 10	Background Check Best Practices; Fake Degree Burns; EEOC Conviction Records Q&A; EEOC Policy Guidances
11	TASB and TEA Weblinks for Criminal History Review articles and info

Humongous Post Conference Handout: TASPA website

TAB	TOPIC
12	<i>Can I Google Applicants? <u>NO</u></i>
13	<i>The FCRA and Social Media - What Businesses Should Know (FTC)</i>
14	<i>Texting and Facebook: Minimizing Employer Liability (Tex. Workforce Comm.)</i>
15	<i>A Look at the Employment Law Risks of Social Media (EEOC Houston District Office)</i>
16	Weblinks Index to TASB Social Media Policies and Best Practices

Good Websites

www.eeoc.gov

www.consumer.ftc.gov

www.business.ftc.gov

EEOC Policy Guidances Tabs 9 and 10

- ✓ GINA (05/12/09)
 - ✓ Job Applicants and the ADA (03/21/05)
 - ✓ Consideration of Conviction Records (04/29/12)
 - ✓ Preemployment Inquiries (2002)
-
- **EEOC Hearings on Unemployment (Spring 2011)**



FCRA Bottom Line: Direct Quotes from FTC Website

- ◆ An employer must get your permission before asking for a report about you from a credit reporting company or **any other company that provides background information**.
- ◆ If you don't give your okay, your application for employment may not get a second look. That's up to you.
- ◆ But if you don't get the job because of information in your report, the employer has some legal obligations:
 - ❖ First, the employer must show you the report;
 - ❖ Second, the employer must tell you how to get your own copy. The report is free if you ask for it within 60 days of learning the bad news.

The Fair Credit Reporting Act and School Districts (Tabs 2, 13)

Does **NOT** apply to :

- ✖ Criminal history checks run through DPS and FACT
- ✖ Reference checks by district personnel (contacting personal references listed on resume or application)
- ✖ References from previous employers about applicant's job performance
- ✖ Background investigations conducted by district employees

The Fair Credit Reporting Act and School Districts (Tabs 2, 13)

DOES apply to:

- ALL applicant searches, snoops and background checks on social media sites and internet search engines
 - Google, Twitter, Facebook, MySpace, Bing, Safari,
 - ChoicePoint, Intelius, LexisNexis Accurant, online background check companies
- Investigations by private investigators hired by the district

Consumer vs. Investigative Reports

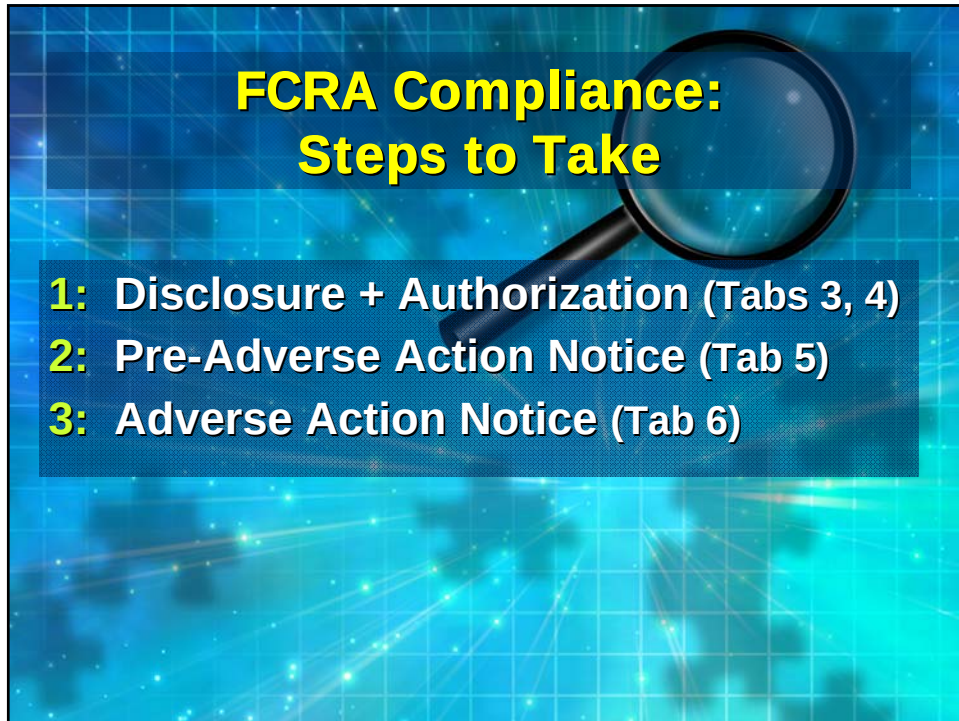
- What is a “Consumer Report”?
 - Any info from a CRA bearing on a consumer’s credit worthiness, credit standing, credit capacity, **character**, **general reputation**, **personal characteristics** or **mode of living**, including criminal history.

Consumer vs. Investigative Reports

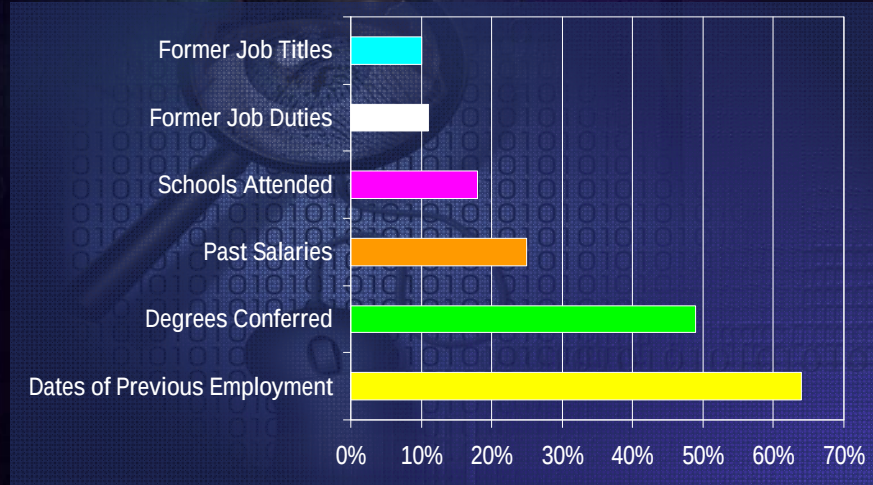
- What is an “Investigative Report”?
 - A consumer report or portion thereof in which information on a consumer’s **character, general reputation, personal characteristics or mode of living** is obtained through personal interviews with neighbors, friends or associates of the consumer reported on.

FCRA Scope

- Reports obtained through **3rd party** background checks on applicants and employees = **consumer reports**
 - ✓ Equifax, Experian, Transunion
- When **3rd party** background checks involve interview to assess character, reputation, etc., = **investigative reports**
 - ✓ Google, Facebook, ChoicePoint, Intelius, LexisNexis Accurint, online background check companies
- Both require strict compliance with FCRA!



Inaccuracies Uncovered



**Psychologists:
Lying Online May
Be The Norm**

TRUTH

LIES

*Abstract, Liar, Liar, Hard
Drive on Fire: How Media
Context Affects Lying
Behavior, 41 J. Applied Psych.
2492 (2011).*

- ☒ People who communicate online lie more in those interactions than they do during face-to-face encounters.
- ☒ The most lies were in e-mail, followed by instant messaging, and lastly face-to-face talks.
- ☒ Conclusion: it may be normal to distort reality online.

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AS SEEN ON  
 

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Jobs Within 60 Days
or we'll refund your money
PLUS \$50 extra!

No other job reference service on EARTH is willing to put their money where their pen is! If you are not HIRED within 60 days of receiving your new professional references, we'll refund your money. PAY you \$50, AND continue to help re-work your references!

Interviews within 30 days or we'll revise your references –no extra fee!

75.3% of our clients are called for interviews within just 10.2 days of

CareerExcuse Now Hiring!

Earn \$50 providing professional job references in ONE ten-minute phone call!
([Click here for more details](#) -)

Bad Reference? Resume Weak? Fired?

WE CAN HELP!

We will act as your past employer and have our operators standing by to give you that "great" reference that you need to any inquirer's. Join now and you will be able to create a career with a work history and pay range as you see fit. To find out more, [click here](#).

Our Process

- Step 1:** Choose a plan. Basic/Professional plan uses our established virtual companies. Or, you can create your very own company with our premium plan.
- Step 2:** Complete our submission form, we will contact with you via email to assess your materials and recommend one of our virtual companies according to your career needs or confirm we can create your desired company and provide exact references requested.
- Step 3:** Upon reviewing your new references, you will be given subscription directions where you will receive your new company.

Our Commitment



We will act as your very own human resource department and supervisor using one of ours/or your virtual company. Verifying your name, job title, job description, work dates and answer any questions with a positive reference in a professional, business like manner.



Dramatically increase your response rate
Quality references can dramatically increase

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http://www.fakeyourjob.com/faq

Fake Your Job Fake job references & fake landlord references

Login | Register

Toll free 1.888.908.8289

HOME SERVICES RATES & PACKAGES FAQ BLOG ABOUT US CONTACT US

FakeYourJob.com » FAQ

Frequently Asked Questions

Below are a list of frequently asked questions. Should you have further questions unanswered in this FAQ, feel free to contact us. You may contact us via our contact page, or pick up the phone and call.

Is what you are doing legal?

In short, yes. Although people may find this type of act to be unethical, it is legal as long as you are not trying to defraud or fabricate yourself to your local, state, or federal government.

Can I go to jail or get arrested for this?

If you're doing this for employment or for renting a place to live, no. However, if you are trying to deceive any government agency, you very well can get fined and thrown in jail. This is why we only offer this service for personal endurance. Any place that is not government run is eligible.

Can I get a mortgage with this service?

We will not provide employment references or help in any way to get you a home. That is illegal.

How real does my "previous employment" look when you're all done?

When we get done with your project, you will have a very professional website, and business contact that no one will be able to tell apart. Don't worry.

How long does it take once we get started?

Typically, the process takes about 3-5 business days depending on which package you choose and how involved we get.

Should I get a toll free number or a local number?

It's your choice, but we'd probably recommend a local number in your area code for a more authentic presence. But, it depends on the business and industry.

of 3 8/2/2012 8:03 AM

Dealing with Convictions: Employment Ineligibility

1. Felony offenses against persons;
2. Offenses requiring sex offender registration;
3. Equivalent offense under the federal law or laws of another state; and
4. At the time of offense, the victim was a minor or student

➤ Exception: offenses older than 30 yrs and person satisfied terms of court order entered on conviction

Optional Employment Termination

- Employee fails to disclose to SBEC or District:
 - Felony conviction
 - Misdemeanor conviction involving moral turpitude
- TWC: misconduct connected with work

TASB Model DH (Local) Policy

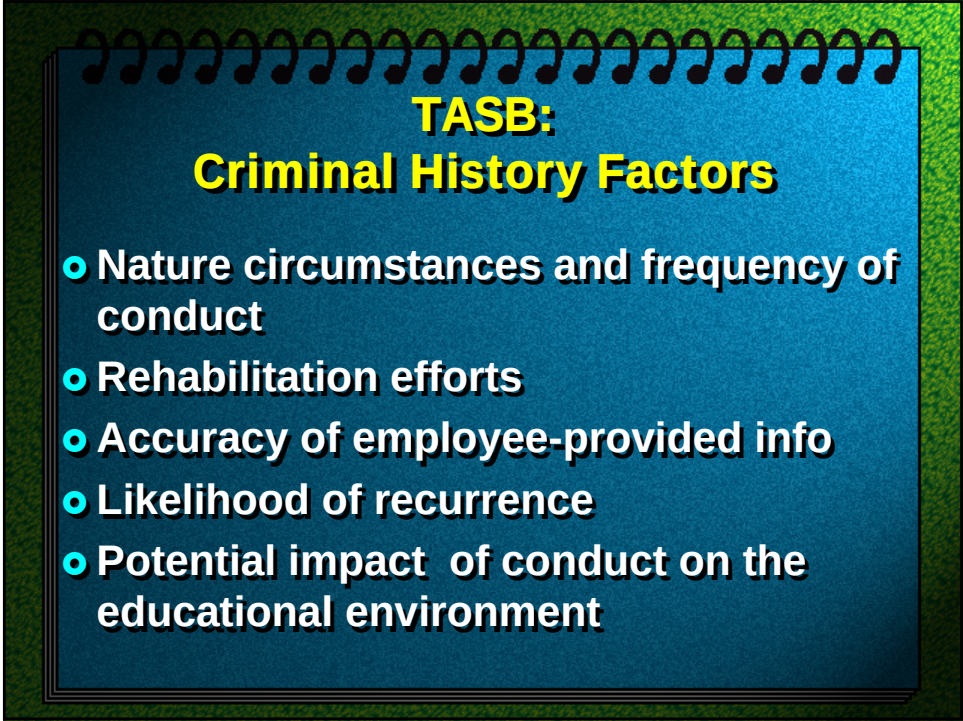
- Employees must notify supervisor within 3 calendar days:
 - Arrests
 - Indictments
 - Convictions
 - No contest or guilty plea
- Felony
- Misdemeanor involving moral turpitude
- Other Listed Offenses

Listed Offenses Requiring Notification

- Crimes involving school property or funds
- Fraudulently obtaining or altering any educator certificate or permit
- Crimes occurring wholly or in part on school property
- Moral turpitude

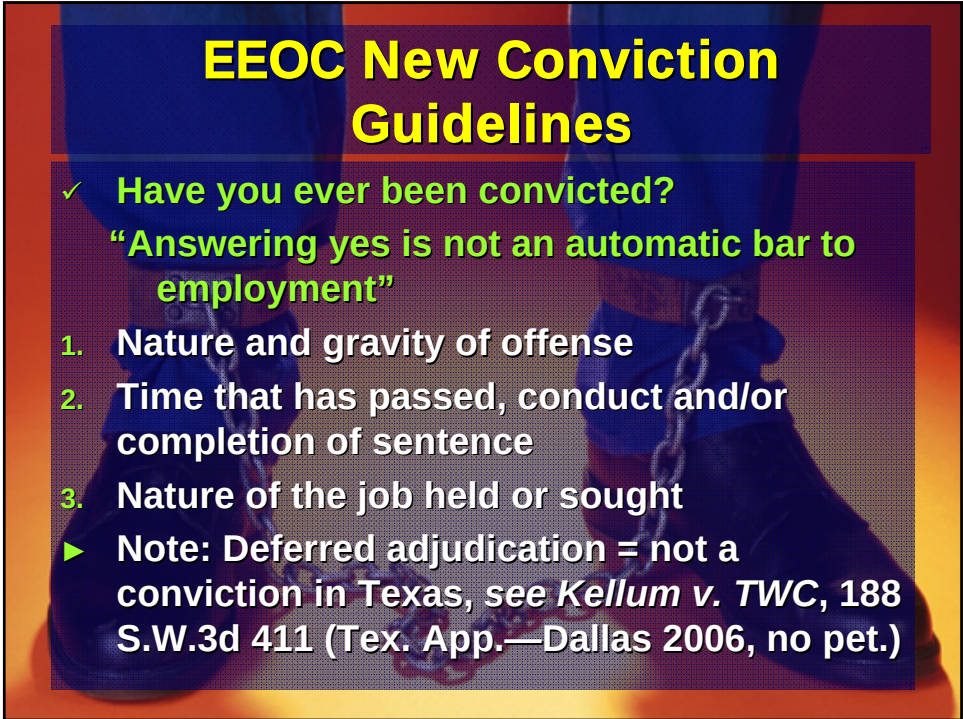
What is Moral Turpitude?

- | | |
|---|---|
| • Dishonesty, fraud, deceit, theft, misrepresentation | • Public Intoxication - 2x w/in 12 mos. |
| • Base, vile, or depraved acts that are intended to arouse or gratify sexual desire | • DUI - 2x w/in 12 mos. |
| • Felony possession, transfer, sale, distribution of controlled substance | • Disorderly conduct – 2x w/in 12 mos. |
| | • Child abuse |
| | • Deliberate violence |



TASB: Criminal History Factors

- Nature circumstances and frequency of conduct
- Rehabilitation efforts
- Accuracy of employee-provided info
- Likelihood of recurrence
- Potential impact of conduct on the educational environment



EEOC New Conviction Guidelines

- ✓ Have you ever been convicted?
“Answering yes is not an automatic bar to employment”
- 1. Nature and gravity of offense
- 2. Time that has passed, conduct and/or completion of sentence
- 3. Nature of the job held or sought
- ▶ Note: Deferred adjudication = not a conviction in Texas, see *Kellum v. TWC*, 188 S.W.3d 411 (Tex. App.—Dallas 2006, no pet.)

EEOC's New Conviction Policy: Individualized Assessment

- ✓ Facts, circumstances and number of offenses
- ✓ Older age at the time of conviction, or release from prison
- ✓ Length and consistency of job history (before and after conviction)
- ✓ Rehab efforts (training, education)
- ✓ Employment or character references
- ✓ Whether the person is bonded
- ✓ Evidence that person did same type of work on previous jobs with no problems

EEOC Arrests: Not OK

- ▶ Have you ever been arrested?
- ▶ Have you ever been arrested for a misdemeanor?
- ▶ Have you ever been locked up?
- ▶ Have they picked you up before?
- ▶ Ever had to spend a night in jail?

Texas: Deferred Adjudication (D.A.)

- D.A. is **NOT** a conviction
- Special form of judge-ordered community supervision
- Accept responsibility for a crime without the consequences of a formal finding of guilt
- Judge “defers” a decision on guilt, places the defendant on a period of supervision

Texas: Deferred Adjudication (D.A.)

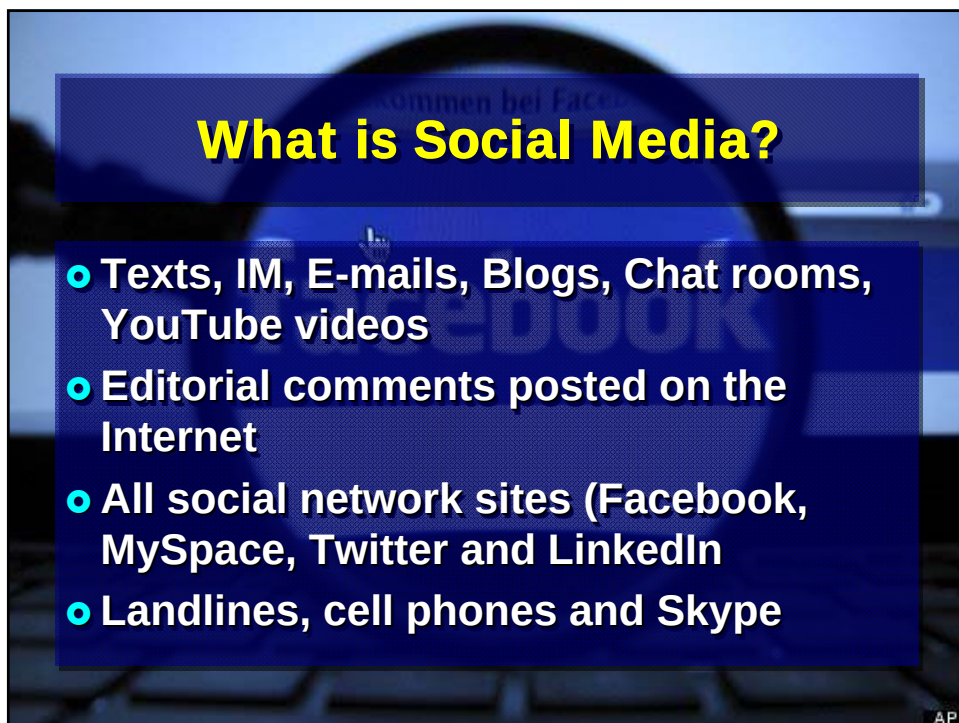
Regular Probation	Deferred Adjudication
Requires finding of guilt (conviction)	Avoids conviction or sentence – judge delays finding of guilt
Specific punishment of confinement and/or fine (sentence that is suspended)	As long as defendant successfully complies with conditions of supervision

Who is Eligible for Deferred Adjudication?

- Misdemeanor crimes *other than* driving/flying/boating while intoxicated
- Felony crimes *other than*:
 - driving/flying/boating while intoxicated
 - Intoxication assault
 - Intoxication manslaughter
 - Repeat drug offense enhanced with drug-free zone finding; and
 - A repeat sex offense (indecentcy with a child, sexual assault, or aggravated sexual assault)

How Long Is Deferred Adjudication?

Crime	Supervision
Class C Misdemeanor	180 days
Class A, B Misdemeanor	2 years
Felony	10 years
Felony sex offenses	Not less than 5 years



Can You Google an Employee or Applicant on Social Media?

- ❖ Over 24 million Facebook users leave their profiles public
- ❖ www.openbook.org (shut down 07/12)
- ❖ 73% of social media profiles can be found through a public search engine
- ❖ 77% of social network users do not restrict access to their photos

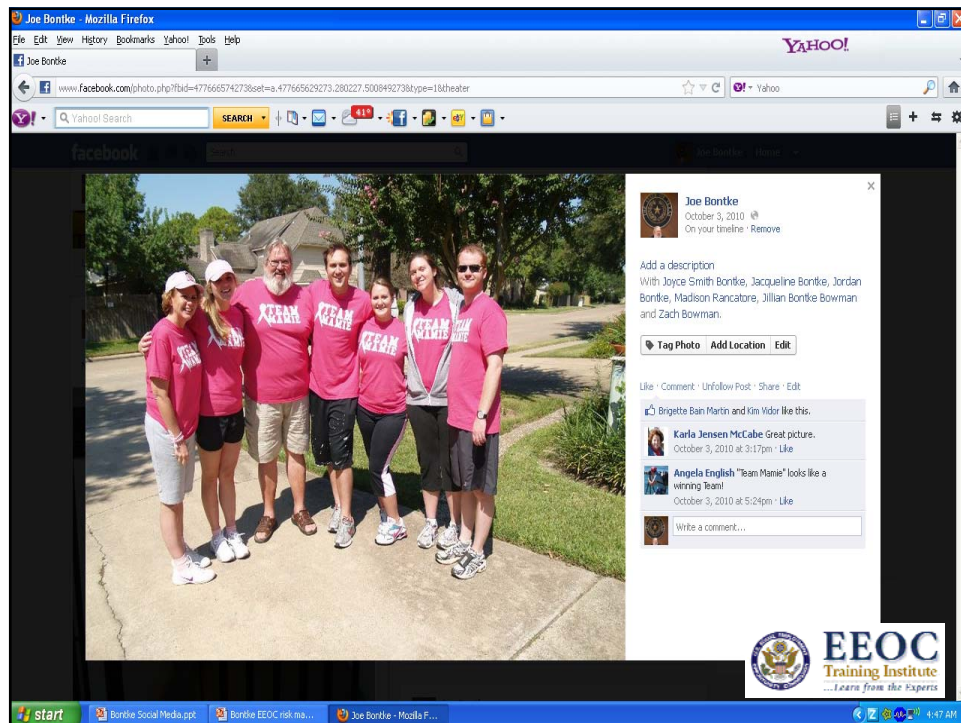
Can You Google an Employee or Applicant on Social Media?

- ❖ 35% employers have at least once decided to not offer a job to an applicant based on the content posted
- ❖ Over 50% of the decisions based on:
 - ✗ Provocative photos
 - ✗ References to drinking and drug use or
 - ✗ Bad-mouthing of previous employers and colleagues

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Workplace Online Snooping: Social Media Best Practices

- ❖ Beware of obtaining information and retaliating against that employee
- ❖ Sites may contain information regarding age, race, national origin, disabilities, sexual orientation, religion, and other protected characteristics.
- ❖ An employer's viewing of an applicant's personal information on social networking/blogging site triggers protections of EEO and other privacy laws.



Workplace Online Snooping: Social Media Best Practices

- Difficult for employer to prove it did not rely upon the personal information discovered on the site.
- Once you know the personal information, you can't "unring the bell."
- Avoid circumventing a potential employee's privacy settings by pretending to be someone else in order to gain access to a restricted network.
- Understand that information you find on the Internet may be inaccurate, misleading, or flat-out wrong.

AP

PhoneGangster.com

- ❖ Allow you to fake the caller id when calling another party
- ❖ Upon calling a person, you get to choose what number appears
- ❖ Phone records of party called displays the altered number
- ❖ Can change gender of voice
- ❖ "Our service is not only fun and useful, but it is legal as well"

Texas Online Impersonation Statute (Tex. Penal Code §33.07)

- ✘ **3rd degree felony** if a person uses the name or persona of another person to:
 1. Create a web page on a social media site or other Internet website; or
 2. Post or send one or more messages on or through a social media site

Texas Online Impersonation Statute (Tex. Penal Code §33.07)

- ✘ **3rd degree felony** if a person sends an email, IM, text, tweet referring to another person:
 1. Without obtaining the other person's consent
 2. Intending to cause a recipient to believe that the message was sent by that person
 3. Intending to harm or defraud the person

Regulating Employee Speech

1. The district's interest in determining the appropriate operation of the workplace **outweighs** the employee's interest, as a citizen (1st Amendment), in commenting on a **matter of public concern**.

Connick v. Myers, 461 U.S. 138 (1983)

Regulating Employee Speech

2. Employee's speech is made **during the course of performing job duties**:
 - **Employee is not operating as a private citizen and thus has no 1st amendment protection**
 - Activities undertaken in the course of performing one's job, *even if unauthorized*, are conducted pursuant to official duties and are not protected speech
 - Internal job related complaints are made pursuant to one's duties and are not protected speech

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

Two Legal Tests: “Matters of Public Concern”

1. Those which can be fairly considered as relating to any matter of political, social, or other concern to the community
2. Whether the employee spoke primarily in his role as a citizen rather than as an employee addressing matters of only personal concern

Rule of Thumb: What IS “A Matter of Public Concern”

- Political elections, school bond, tax and finance issues, staffing shortages
- Issues that affect the public and community at large
- Allegations of discrimination, harassment or retaliation
- Unlawful conduct by public officials
- Misbehavior of public officials

Constitutional Privacy

- *Quon* – review of officer's text messages sent during working hours was reasonable; did not decide whether officer had a protectable privacy with respect to those text messages
- *NASA* – reference questions regarding drug use, drug treatment, honesty, financial integrity, mental stability were reasonable; did not decide whether right to informational privacy exists

Quon v. City of Ontario, 130 S. Ct. 2619 (2010); *NASA v. Nelson*, 131 S. Ct. 746 (2011).

Rule of Thumb: What is NOT "A Matter of Public Concern"

- **Purely personal views** (religious, political, gossip, etc.)
- Speech that is on the employee's own time, equipment, and not on district property
- Facebook, Tweets and Blogs about personal behavior (what I did on Friday night)
- **Inappropriate and unprofessional conduct that disrupts the campus and interferes with job duties**
- Matters completely unrelated to employment or job duties

General Guidelines

- Being professional on social media is no different than being professional in person
- District's interest in regulating speech is highest when:
 - Employees are at work
 - Performing job duties
 - Using district equipment
- Examples:
 - Can ban employees from using district computers to update Facebook
 - Can ban cell phones during instructional time

Questions to Analyze

- Has the social media posting interfered with the employee's ability to perform his or her job effectively?
- Has the off-campus speech has some on-campus impact? How much or how little?
- Did the comment impair discipline by supervisors?
- Did the posting disrupt harmony among co-workers
- Did the posting have a detrimental effect on close working relationships for which personal loyalty and confidence are necessary?

Questions to Analyze

- Was it personal use that was strictly private?
- Did the employee use privacy settings?
- Was it public use?
 - Posting an editorial comment on the Houston Chronicle website defending disciplinary action against a student would be prohibited
- Did the employee follow the district's policy on electronic media?
- Was it true or a fake posting by someone other than the employee?



A&M Student Loses Campus Internship, Fired from Research Position, and Faces Disciplinary Hearing

Snyder v. Millersville Univ. (2008)

- Student teacher Stacy Snyder
- District told Snyder not to post any content about students on her personal MySpace
- Snyder posted a MySpace photo entitled “drunken pirate”
- Snyder invited students to her MySpace page and posted info directed to students
- District barred her campus; unable to complete student-teaching and could not get degree



AP

Snyder v. Millersville Univ. (2008)

- Public employee’s purely personal speech (typically found on social media sites) is **NOT** protected by 1st Amendment
- Snyder’s postings and photos did not touch on a matter of public concern
- Snyder was more like a public employee/teacher than a student

AP

How to Act Right on Social Media

- Do not Facebook friend anyone who you supervise directly or indirectly. Period
- Do not use any form of social media to contact any student at any time for any reason on personal sites.
- Do not divulge confidential student information via social media
- Maintain strict privacy settings
- Do not give your passwords out to anyone

How to Act Right on Social Media

- Do not make negative comments about other employees, teachers, colleagues or supervisors via social media.
- Do not disclose health, personnel or other confidential district records via social media
- Do not record others with your cell phone without their permission.

Look in the Mirror: Check Your Social Media Self

1. Do you “friend” students?
2. Do you have photos of yourself in compromising places?
 - ✖ Drunk? Stoned? Naked? Having sex?
 - ✖ Making offensive statements (blackface, Nazi uniform, holding a gun to someone’s head)
3. Are you tagged in photos on someone else’s page?
 - ✖ Are you in embarrassing situations in those photos?

Facebook,
MySpace
Classmates,
Friendster
Fubar,
UrbanChat
Orkut, Yahoo
CafeMom, Yuku
Hi5, Bebo
BlackPlanet
Tagged,
PerfSpot
Zorpia

Look in the Mirror: Check Your Social Media Self

4. Do your security settings allow students or friends-of-friends to see your photos or postings?
 - Do you actually *know* all of your “friends”
5. Do you have postings that reflect unfavorably on the district, campus, coworkers or students?
6. Do your wall posts (or those of your friends) contain inappropriate language?

Facebook,
MySpace
Classmates,
Friendster
Fubar,
UrbanChat
Orkut, Yahoo
CafeMom, Yuku
Hi5, Bebo
BlackPlanet
Tagged,
PerfSpot
Zorpia

Look in the Mirror: Check Your Social Media Self

7. Do your blogs, tweets, or IMs contain inappropriate language for parents or students to see?
8. Are the blogs and net journals you belong to visible to anyone?
 - Is the stuff there suitable for parents, students, coworkers to see?
 - Is the language in pages linked to your page (and accessible to students) appropriate?

Twitter
Xanga
LiveJournal
Typepad
Blogger
Foursquare

Look in the Mirror: Check Your Social Media Self

9. Are the photos and videos you post appropriate for students, parents and coworkers to see?
10. Are you doing stupid and reckless stuff in the videos?
 - ✗ Drunk driving, car surfing
 - ✗ Smoking pot, doing drugs, having sex, taking nude self-portraits, mooning people

YouTube
Flicker
Metacafe
Break
Google
Video
Ipad Apps
Ipod Apps

Look in the Mirror: Check Your Social Media Self

11. Are the comments about your photos/videos visible for anyone to see?

YouTube

Flicker

Metacafe

12. Are students in your photos/videos?

Break

13. Did you use district property or resources to make the photos/videos?

Google

Video

Ipad Apps

Ipod Apps

Social Media and Politics

- School employees have the right to participate in political activities and express their opinions on matters of public concern (school board or bond elections).
- Political activities cannot disrupt the workplace

Social Media and Politics

- Districts can:
 - ✓ Limit political activities to nonwork hours
- Districts cannot:
 - ✗ Retaliate against employees because of political activities
 - ✗ Pressure employees to vote a certain way
 - ✗ Require employees to say how or if they voted

4 Ways to Regulate Student Speech

1. Lewd, vulgar or profane language on school property
 - *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)
2. Speech would reasonably be viewed as the school's own speech on the basis of any legitimate educational concern
 - *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988)

4 Ways to Regulate Student Speech

**3. Pro-drug speech at a school activity
(regardless of whether a disruption
occurs)**

➤ *Morse v. Frederick*, 127 S. Ct. 2618 (2007)

4. The Catchall = speech that:

- ✓ Materially disrupts class work
- ✓ Involves substantial disorder
- ✓ Interferes with the rights of others

➤ *Tinker v. Des Moines ISD*, 393 U.S. 503 (1969)

Bottom Line: Off Campus Student Speech

- ✓ Can be restricted if it poses a true threat to students and staff
- ✓ Can be restricted if it causes a material and substantial disruption of the educational process

What is a “True Threat”?

- Objective standard:
 - Whether a reasonable person would interpret the purported threat as a serious expression of intent to cause a present or future harm
- Key factors:
 - Speaker’s intent
 - Reaction of victim
 - Whether communicated directly to the victim
 - Whether speaker had propensity to commit violence

What is a “Material Disruption”?

- *Tinker*: “when it is foreseeable that the off-campus expression might also reach campus.”
- Some courts:
 - Not required to prove material disruption actually occurred--only that a material disruption is reasonably foreseeable
- Less disruption required when discipline for expression is related to extracurricular activities

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Board Certified in Labor and Employment Law, Tex. Bd. of Legal Specialization
Former Partner, Labor and Employment Law Section, Bracewell & Giuliani, L.L.P.
Former Trial Attorney, Civil Rights Division, U.S. Department of Justice

State Bar of Texas: State Bar College; Continuing Legal Education Committee (2001-2003, 2006-2008); District 41 Bar Grievance Committee (1993-95); *Texas Bar Journal* Committee; Texas Mentor Program Committee; Past Chairperson and Newsletter Editor- Concerns of the African American Lawyers Section; Past Council Member, Labor and Employment Law Section. *Texas Young Lawyers Association:* Board of Directors (1994-95); Legislative Committee; Women in the Profession Committee; Opportunities for Minorities in the Legal Profession Committee; TYLA Section of the *Texas Bar Journal*. *Other:* State Bar of Oklahoma; Hospice Volunteer and Interfaith Chaplain.

RECOGNITION AND HONORS:

Best of 2011 CLE Presentations, *Employment Law Update: U.S. Supreme Court, Fifth Circuit and More*, 2011 Annual Litigation Update Course, TexasBarCLE; **Best of UT Law Online 2011: Employment Law, School Law, Immigration, and Ethics**, *Advanced Leave Issues: FMLA, ADA/ADAAA, USERRA and WC Stuff*, 2011 U.T. Labor and Employment Law Conference, UT CLE; **Best of 2010 CLE Presentations**, *Employment Law Update: U.S. Supreme Court, Fifth Circuit and More*, 2010 State Bar College Summer School, TexasBarCLE; **2009 Standing Ovation Award**, Outstanding Volunteer, TexasBarCLE; **Best of 2009 CLE Presentations**, *The Art of Smart Hiring and Lawful Firing*, 2009 Advanced In-House Counsel Course, TexasBarCLE.

Texas SuperLawyer® 2003 - 2006, 2011, 2012; Houston's Best Lawyers for the People, HOUS. MAG., Jan. 2006. Ruth E. Pillar, *Houston Lawyers are Houston's Leaders*, 39 HOUS. B. J. 29 (2002).

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