Hiring and Firing—A Dose of Caution for 2014

by Larry Lee and Dan Perkins



Since the beginning of the modern workplace, prospective employees have arrived at a job interview with the sole objective of presenting themselves as the best candidate for the position. Of course, there are exceptions. One client told us that an applicant for an accounts payable position with the city's finance department emphasized that she was more of a "people person," and less a "numbers person." Another client related an event in which the prospective H.R. specialist told the City Manager in his interview: "Seven handicapped parking spaces next to the front door? What, are you having a wheelchair convention or something?" When a public employer asked an I.T. applicant about details concerning certain programming language, the interviewee said, "I don't know, is it on my resume?" while simultaneously leaning over to get a peek at his own cv.

This odd behavior is not limited to conversation. A candidate at her final interview for the position of Administrative Assistant took a call on her cell phone during the meeting and then sent out a text while being asked a question. And an interviewee in the middle of the dialogue announced he hadn't yet had lunch and proceeded to consume a half-eaten sandwich in the interviewer's office.

There is no greater decision for an organization's potential success and failure than when an employer vets potential candidates for a job. This is as true in the governmental arena as in a private company: a productive workforce is critical to the entity's success and execution of its goals and policies. Exceptional employees are highly responsive, caring, ambitious, and ultimate team-players. Poor performers usually are inefficient, focused only on job security and income, and/or demonstrate a "me first" mentality.

I. Reducing Liability with Prospective Hiring

A public employer's decision to hire the wrong candidate can and will magnify the risk for potential and future liability. Due diligence, within legal boundaries, is critical to identify the best candidate for the job, while at the same time follow a fair and impartial process to reach the ultimate hiring objective. In order to avoid exposure to future "failure-to-hire" claims, the organization's goal should be to bullet-proof the selection process from any subjectivity when deciding whom to hire.

A. Often Overlooked Topics of Concern for Public Employers Looking to Hire

What are the legal boundaries when exercising due diligence in the hiring process? As we know, Title VII, the Americans With Disabilities in Employment Act (ADEA), and multiple other state and federal statutes prohibit employers from asking about such taboo subjects as an applicant's national origin, age, or whether the interviewee intends to start a family. In twenty-one states and the District of Columbia, it is illegal to base a hiring decision on the candidate's sexual orientation.

A surprising number of public employers are not aware of other, less obvious pitfalls. Despite their best intentions, they often expose their state or local government to significant risks of litigation over hiring decisions.

1. Recent EEOC Focus on Background Checks, Credit Checks and Pre-employment Screening Tests

For over three decades, Human Resource managers have used extensive pre-employment screening tools. In the 1990's and early 2000's, the Myers-Briggs psychological tests gained widespread popularity among private

employers, and police and fire organizations nationwide have employed physical skills testing for decades. While background and credit checks had been used sporadically in the past, their use has grown steadily over the last five years. In response, the EEOC has heightened its scrutiny of pre-employment screening methods; the indiscriminate use of such testing is no longer the "no-brainer" it once was.

The recently amended EEOC Guidelines regarding an employer's use of background checks and credit checks reveal the federal government's expectations. The Commission has placed all employers on notice that pre-employment screening methods, if not carefully administered, may implicate state and federal equal employment laws and expose the employer to increased risks of discrimination lawsuits.[1] Two recent district court decisions involving private companies highlight the dangers faced by all employers, including those in the public sector.

In one case, the EEOC filed a federal lawsuit against a private entity claiming that its use of background checks and credit checks caused the company to reject African Americans and Hispanics for employment at a significantly higher percentage than white applicants.[2] The company was able to prevail on summary judgment because it demonstrated to the federal judge that it maintained a well-run, multi-tiered process for conducting background checks, drug tests, and credit checks--as well as a solid database of information pertaining to those screening devices that ultimately disproved the EEOC's claims.[3]

In another federal lawsuit, a private employer escaped liability under the Americans with Disabilities Act (ADA) after a rejected applicant claimed the employer's requirement that applicants reveal any criminal history caused it to "regard him as disabled" based on his history of convictions for drug-related offenses.[4] The employer prevailed because of facts unrelated to the specifics of the background check policy and because it was able to use the plaintiff's criminal history as a legitimate, non-discriminatory reason for refusing to hire him, Further, the company was able to demonstrate that it consistently and fairly applied the procedure to all applicants, took great care to avoid asking for too much unnecessary information, and judged the criminal background reports on a case-by-case basis rather than instituting a blanket rule or practice that precluded the hiring of any applicant with a criminal conviction.

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These hot topics are likely to remain areas of focus in 2014. On July 24, 2013, nine state attorneys general[5] wrote a letter to the EEOC expressing disapproval of the federal agency's position, set forth in the Commission's Enforcement Guidance No. 915.002, that a bright-line use of criminal background checks violates Title VII's disparate impact provisions. On November 5, 2013, the State of Texas as plaintiff affirmatively filed a federal declaratory judgment action against the EEOC formally challenging the Commission's Enforcement Guidance on the ground that its policy exceeds its authority.[6] Though the issues are far from resolved, public employers must take notice that bright-line tests may subject them to continued EEOC scrutiny.

2. Constitutional Considerations. State, county and municipal employers face more legal risks than private employers because of their governmental status and the spectrum of federal claims which can be asserted against localities under 42 U.S.C. § 1983.[7] While some of these claims involve significant burdens of proof established by decades of litigation under Title VII and state anti-discrimination statutes,[8] many other potential claims (such as "due process" and First Amendment claims) are lurking in the government workplace. Likewise, the pool of potential defendants (including individual public servants) and the available remedies are often far broader, exposing public employers and their decision-makers to the prospects of uncapped compensatory and punitive damages. Therefore, public employers must be especially careful to minimize these additional risks when making hiring decisions.

Free speech retaliation and Section 1981 discrimination claims are some of the more "common" claims that expose public employers in failure-to-hire cases. Most public employers have enacted policies and hiring procedures to minimize the risks of these types of lawsuits by avoiding politically sensitive topics in applicant interviews and training management level employees to avoid making decisions using acquired data that could implicate discriminatory considerations.

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Still, many public employers overlook some of the less common pitfalls that could land them in the middle of a failure-to-hire lawsuit. These include:

Political Association: *Trujillo v. Huerfano Co. Bd. of County Comm'rs*, 349 Fed.Appx. 355 (10th Cir. 2009) (unpublished) – Plaintiffs claimed that the county board declined to hire them for two open foreman positions in part because of their political affiliation as Democrats. The Board of County Commissioners prevailed on summary judgment, but the case is a textbook example of how political allegiances can infiltrate the hiring process, and serves as a warning to public officials to guard against allowing political affiliation to color their hiring procedures.

It is easy for public employers to consider that political affiliation is a form of "freedom of association" protected by the First Amendment. While not as common as the typical free speech retaliation claim, freedom of association claims often arise after an election result in a "changing of the guard," or, as in the *Trujillo* case, when employees find themselves aligned with their boss's opponent. While some jobs may be politically sensitive and require a particular allegiance,[9] most such jobs do not, particularly at the local (county and municipal) level.[10]

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Right to Privacy: Although there is no substantial case law chronicling claims of failure-to-hire cases premised on a federal constitutional right of privacy (courts have generally left it to the states to protect privacy interests of that sort),[11] public employers must nonetheless consider pre-employment requests for information that might implicate state and federal privacy concerns.

For instance, many employers have begun requesting job applicants to provide social media (Facebook, Twitter) account login information, or have requested to review social media pages over the applicant's shoulder in an effort to gain valuable personal information that may be used in the hiring decision. Not only do such requests implicate state privacy laws, but in the case of public employers, may also implicate First Amendment free speech and Fourth Amendment search and seizure provisions.[12] Since March of 2012, several state legislators and two U.S. senators have introduced various forms of legislation to outlaw the practice. Presently, twelve states[13] have enacted social media privacy legislation prohibiting employers from requesting access to employee and applicant accounts, and in twenty or so others, legislation is already pending or will be introduced.[14]

3. Drug Testing for Prospective Employees

The U.S. Supreme Court has held that both blood and urine collection are minimally intrusive procedures that do not infringe upon the rights of job applicants when they are conducted in the context of an employment environment (such as where applicants must go to a doctor's office to provide a sample) without direct observation by the tester.[15] In many states, employers have the legal right to test job applicants for drugs or alcohol but only if the applicants are informed that the testing is part of the interview process for all employees, and in most cases, the testing cannot be conducted until the applicant has been offered a conditional position.

Most states require employers that are conducting pre-employment drug tests to utilize a state-certified laboratory to administer the tests, and require that all applicants for the same job be tested similarly. Public employers must take care to ensure a fair and impartial administration of drug test policies to avoid discrimination claims premised on Title VII, equal protection, and state constitutional grounds.

4. State Labor Laws

While the National Labor Relations Act did not traditionally apply to non-union employers, the NLRB has applied its decisions to cover all employees. It is good practice, even in states without such laws, for public employers to be aware of NLRB decisions and the impact they may have on your hiring decisions.

B. Best Practices for Avoiding Liability in Hiring Decisions

1. Do not ask a prospective employee about arrest records or include them in background checks. If your Human Resources department is going to conduct a criminal background check on an applicant, then limit the search only to convictions and deferred adjudications.
2. Never ask questions about political affiliations, religious persuasion, or other controversial subjects.
3. If possible, have someone other than the decision-maker conduct reference checks and gather background information; use the same process for every applicant.
4. Ensure that pre-employment tests and other selection procedures are properly validated for the positions and purposes for which they

are used, and ensure that they are administered without regard to any protected class, including race, color, national origin, sex, religion, age (40 or older), disability, and sexual orientation.

5. Always resist the temptation to ask about health issues or other such information that could give the appearance of discriminatory intent and implicate ADA or Genetic Information Non-discrimination Act ("GINA") issues.[16]
6. Be familiar with federal and your state's privacy laws, paying particular attention to constitutional provisions that guarantee any citizen's right to privacy.
7. Tailor background checks, applicant drug testing policies, and other privacy-impacting and pre-employment procedures narrowly to avoid overbreadth challenges and to reduce disparate impact claims. Doing so will provide a strong defense against an attack on your employment policies in court or to the EEOC if a future claim is based on discrimination.

II. Factors to Consider When Deciding to Terminate

Despite using best practices to hire the most qualified person with the greatest potential to succeed, any hired employee may still turn out to be a bad fit. No employment decision has more potential to land your public entity in court than the decision to terminate an employee. However, if handled correctly, even the most contentious of terminations can avoid a lawsuit or at the very least, vindicate your decision with a summary judgment or a defense verdict at trial. The key to litigation-proofing your agency's termination decisions is to do the legwork necessary *from the beginning of the hiring period to the time of the employee's discharge* that demonstrates that the employer 's termination was based on well-documented and legitimate organizational reasons which were not discriminatory or illegal.

In January 2013, the EEOC released its Charge of Discrimination statistics for fiscal year 2012.[17] Unsurprisingly, termination of employment cases topped the list—by a large margin—for adverse action most likely to result in the filing of a discrimination charge. Given this fact, it is imperative that public employers develop explicit, fair, and defensible termination practices and procedures, and follow them consistently from beginning to end for every employee. Doing so may not eliminate your exposure to charges of discrimination and lawsuits, but it can drastically reduce those claims and put you ahead of the game.

A. Issues All Public Employers Should Consider

1. The First Amendment

When making a termination decision, public employers must consider the implications of First Amendment free speech protections. While private employers enjoy broad rights to curtail unwanted speech in the workplace, governmental employers do not. Therefore, the astute decision-maker faced with a supervisor's proposal to terminate an employee will always assess or investigate potential disciplinary action with an eye toward figuring out whether the affected employee has engaged in protected speech. It is not be enough simply to document the existence of a legitimate reason for termination. Instead, good public managers will probe the relationship both inside and outside the workplace. For instance, social media conversations are becoming an increasing source of protected statements in First Amendment cases.

In *Shepherd v.* McGee, No. 03:12-cv-02216-HZ (D. Or. Nov. 7, 2013), a state entity won summary judgment against a former employee's claim that she had been fired for making statements of public concern in a Facebook rant: The Oregon Department of Human Services had terminated the child protective services worker after she complained on a social media site about clients she serviced and expressed her personal views on a variety of issues pertaining to child welfare. The federal district court assumed her comments were matters of public concern, but found that because the employee's comments reflected a bias the Department was required to avoid, it had a legitimate interest in terminating the plaintiff, despite the protected nature of her speech. *Shepherd* was a relatively easy call for the district court to make, but it illustrates the ever-increasing infiltration of public employees' personal lives, opinions, and speech into the daily activities of public employment and the potential liability that can exist when public entities do not carefully scrutinize their termination decisions.

2. Due Process Considerations

Although not as newsworthy recently as free speech lawsuits, due process claims (substantive and procedural) are often asserted by terminated public employees, particularly in states where the at-will nature of government employment has either been replaced by a "for cause" standard, or where public employees have been granted property or contractual rights by virtue of a handbook, collective bargaining agreement, or verbal assurances by the employing agency.[18] Typically, such claims are premised on the theory of "property interests" for continued employment. However, an increasing number of terminated employees have been eschewing traditional "property interest" considerations to argue the existence of a "liberty interest," which requires no legitimate expectation of continued employment.

A case in point is *Stallings v. City of Johnston City,* No. 13-cv-422-DRH-SCW (S.D. Ill. Nov. 4, 2013). Although the bar is high for plaintiffs seeking to assert a liberty interest claim,[19] in *Stallings* a former city employee survived a motion to dismiss by specifically alleging that her former supervisors at the City made defamatory statements about her in connection with her termination, thus implicating her federally-protected liberty interest in her reputation and right to work in the field of her choosing. Though the litigation is still in its early stages, the plaintiff cleared an early procedural hurdle and will have the opportunity to develop facts to support her liberty interest claim. Public employers should always guard against making potentially defamatory statements in the workplace, such as accusations of criminal conduct, bad faith, or ill motive without the facts to back them up. Failing to do so will open the door to potentially supportable due process claims.

3. Discrimination/Retaliation and

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policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.
Comment: This section is intended to define these terms for all purposes under a state's statutory code. The intent is to broaden the statutory definition so as to explicitly authorize innovation. Most states use these terms repeatedly across the code, not only in the Administrative Procedure Act, but also in statutes involving land use and transportation planning, the environment, utilities regulation, etc.

Section Two: Public Participation Policy
It is the policy of this state to encourage state agencies and municipal authorities to provide broad, inclusive, deliberative, participatory and meaningful public engagement in the policy process with the general public and stakeholders from the public, private, and nonprofit sectors, including state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders. This act should be construed broadly to promote the fullest opportunity permitted by law to participate meaningfully in governance and the policy process and to provide their Government with the benefits of their collective expertise and information.
Comment: This section establishes that this is a remedial statute to be construed broadly.

Section Three: Commitment to Agency or Municipal Authority Discretion
Each state agency shall and each municipal authority may develop a policy on public participation that will allow broad, inclusive, deliberative, participatory, and meaningful public engagement in the policy process. The choice of a particular form of engagement or sequence of opportunities for the public to participate is committed to agency or municipal authority discretion and not subject to judicial review, provided the agency or municipal authority provides some form of public participation, hearing, or comment as required by law.
Comment: This section is intended to shield agencies and municipal authorities from litigation over the choice of process model, for example, deliberative polling, deliberative town hall meeting, blog, etc.

Section Four: Public Participation Specialist
The head of each state agency shall designate a staff person to be the public participation specialist. This designation may be a collateral duty appointment. The public participation specialist shall be responsible for the implementation of the public participation policy and other provisions of this Act. Each agency shall provide for training on a regular basis for the public participation specialist of the agency and other employees involved in implementing the public participation policy of the agency. The public participation specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.
Comment: This section locates responsibility for public engagement expertise within an agency or municipal authority. The public engagement specialist can obtain training and expertise that he or she can share with other employees in the agency or municipal authority through in house continuing education. This pyramid structure for disseminating training is cost effective.

Section Five: Collaboration
State agencies, municipal authorities, and other public entities may initiate or participate in cooperative agreements with one another, tribes, nonprofit organizations, businesses, other nongovernmental stakeholders, and the general public in carrying out any of their public participation powers and duties under state law.
Comment: This section allows agencies and municipal authorities to collaborate with one another and the broadest public on anything that they could do independently.

Section Six: Public Participation Meetings
a) State agencies and municipal authorities may conduct meetings for the sole purpose of public participation provided these meetings are: (1) open to the general public; and (2) a notice stating in general terms the subject matter of the meeting is posted and/or published according to Open Meeting Law. Members of state agencies and municipal authorities, including a quorum, may attend these meetings and interact with the public, including responding to issues and ideas not specifically identified within the original agenda, provided these issues or ideas originate with the public. Members of public agencies and municipal authorities, including a quorum, shall not engage in decision making, or vote upon or take official action at a public participation meeting.
b) Public agencies and municipal authorities may consider and make use of information from public participation meetings in a subsequent public meeting at which they take official action, provided that records of the general content of the public participation meeting are made public within three (3) days after the meeting, and are public for a period of at least fourteen (14) days prior to official action.
Comment: This section carves out an exception to the Sunshine Act to permit public officials to attend public engagement meetings and participate in discussion, deliberation, or dialogue with members of the public that may inform their later participation and action on public business. ML

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Fair, Consistent Treatment
Traditional discrimination and retaliation issues (particularly under Title VII) remain a constant source of concern for any employer. In the public sector, these concerns are multiplied by the alternative theories of discrimination and retaliation available under civil rights statutes such as 42 U.S.C. §§ 1981 and 1983. In addition to providing a vehicle for state and local employees to bring suit to vindicate their free speech and due process claims, Section 1983 provides an alternative path and an additional weapon for terminated public employees to assert Fourteenth Amendment equal protection claims.[20] Section 1981 and 1983 claims have the added dangers of allowing longer statutes of limitations, no damages caps, no exhaustion requirements (as with Title VII), and the potential for personal liability for individual state officials named as defendants.

Public employers can reduce their exposure to liability under the Equal Protection clause by ensuring that dis-

cipline is fairly administered, work rules are consistently enforced, and all adverse employment decisions have a provable and rational justification. Although such considerations are a function of good management, they also guard against the application of "class of one" equal protection claims that are often alleged when the facts do not support a traditional class-based discrimination claim. *See, e.g.,* Warrington v. Board of County Comm'rs of Mineral Co., No. 12-cv-01193-RBJ (D. Colo. Nov. 5, 2013).

B. Best Practices Prior to Termination.

Although it may never be possible to completely avoid employment lawsuits or charges of discrimination, there are a number of key preventive measures that can be taken to reduce the likelihood of future claims being filed as a result of a termination decisions.

1. Track an employee's work performance in a standardized and consistent way. You don't necessarily have to rely solely upon objective performance measures, but you should always apply performance measures in the same manner for all employees to whom the measures apply.
2. Document performance deficiencies, policy violations, misconduct, and other behavior that may result in disciplinary action (including termination) at the time they occur, not weeks or months later when the termination decision is being made. Contemporary documentation, if done in a clear, concise manner, is credible. "Papering" the file after the fact is not. Such documentation should include the problem as well as the attempt at resolution. Finally, it is always a best practice to keep documented performance items in a safe place.
3. Consider using a flexible progressive discipline policy, and then apply it in a *consistent* manner. Flexibility in this regard means including a provision in your policy handbook noting that discipline may begin at any step on the progression ladder, and that steps may be skipped, depending on the severity of the infraction. When employing such a policy, be certain that deviations from the lockstep progression are justified and consistently applied. Failure to do so will assuredly result in charges of disparate treatment.
4. Avoid "zero tolerance" policies for all but the most egregious of situations (such as theft, assault/fighting, and so on). While these policies look good on paper, they invariably lead to results that can appear "unfair" and encourage affected employees to file charges or lawsuits.
5. Unless the employee has committed a serious misconduct or a violation of policy that unquestionably justifies termination, avoid limiting the reasons for termination to just one or two items. Usually, terminations occur because of a history of poor performance or bad behavior that is not corrected over time. In the termination notice, it is advisable to articulate the history of performance or behavior issues, attempts to correct that behavior or performance, and the failure of the employee to satisfactorily do so when articulating the reason(s) for termination. Of course, always cite the reason(s) for termination using the exact language out of the employee handbook or personnel policies.
6. Consider providing for post-termination appeals. Many municipal employers already require such appeals, particularly those in states with civil service unions, such as fire and police unions. However, in a good number of states, municipal employees other than fire and police personnel may not have union representation or unionization rights, and are often employed "at will." While these employees may or may not have the "expectation of continued employment" that "for cause" and unionized employees tend to have, the existence of a post-termination appeal, even if it consists primarily of a brief review of the reasons for the termination and the employee's rebuttal, will go a long way to reducing exposure to substantive and procedural due process claims.

Conclusion

Whether hiring or firing, municipal employers face numerous pitfalls when making important job-related decisions. In a society where litigation is ever-increasing and government employment (whether local, state, or federal) is seen as a guarantee, astute public employers must be vigilant and carefully scrutinize hiring and firing decisions to maximize the prospects of finding the best person for the job and reduce exposure to valid claims of unfair treatment. Utilizing common sense and taking the time to do thorough investigations of management decisions and fair, competent background checks and reference checks will significantly reduce municipal employers' risks--both of getting sued and being held liable.

Notes

1. In addition, if the applicant is turned down because of a background check or credit check, the Fair Credit Reporting Act continues to require employers (including government employers) to notify the applicant of the reason why, provide a copy of the report, and provide the name and address of the service that conducted the background or credit check and furnished the information to the employer.
2. EEOC v. Freeman, No. RWT 09-cv-2573 (D. Md. Aug. 9, 2013).
3. The EEOC appealed the district court's decision to the Fourth Circuit on November 7, 2013.
4. *See* Rocha v. Coastal Carolina Neuropsychiatry Crisis Serv's., No. 7:12-CV-2-D (E.D.N.C. Oct. 16, 2013).
5. Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah, and West Virginia.
6. State of Texas v. EEOC, et al., No. 5:13-cv-00255-C (N.D. Tex. Div.) (complaint filed Nov. 4 2013).
7. Many states have similar schemes permitting employees to sue to vindicate their state constitutional rights as well.
8. For instance, the burden of proof in a race discrimination claim brought under 42 U.S.C. § 1981 is essentially the same as the burden required under a Title VII claim.
9. *See, e.g.,* Kelley v. Davis, No. 1:11-cv-331-SEB-DML (S.D. Ind. Sept. 30, 2013) (holding that "under Indiana law, party affiliation and personal loyalty to the duly elected officer are appropriate requirements for the effective performance of the office of deputy county assessor").
10. Barry v. Moran, 661 F.3d 696, 703 (1st Cir. 2011) ("Under the First Amendment, nonpolicymaking public employees are protected from adverse employment decisions based on their political affiliation.").

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11. Katz v. United States, 389 U.S. 347, 350-51 (1967) ("[T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual [s]tates.")
12. In 2012, a district court in Minnesota held that Facebook messages and postings are covered by Fourth Amendment privacy protections against compelled disclosure in the context of public school students facing discipline for such postings. *See* R.S. v. Minnewaska Area Sch. Dist. No. 2149, 894 F. Supp.2d 1128, 1142 (D. Minn. 2012). Further, although in the context of constitutional claims, two other courts have held that employees enjoy an expectation of privacy in Facebook postings sufficient to give rise to a claim under the Stored Communications Act ("SCA"). Crispin v. Christian Audigier, Inc., 717 F.Supp.2d 965, 991 (C.D. Cal. 2010); Ehling v. Monmouth-Ocean Hospital Serv. Corp., No. 2:11-cv-03305, 2013 WL 4436539 (D. N.J. Aug. 23, 2013). The reasoning of these cases provides a strong argument to extend Fourth Amendment protections to applicants for public employment.
13. As of October 23, 2013, Arkansas, California, Colorado, Delaware, Illinois, Maryland, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont, and Washington had passed laws restricting employers from requesting social media passwords from employees and/or job applicants.
14. *See* National Conference of State Legislatures, http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx
15. Skinner v. Railway Labor Executive's Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
16. If an applicant volunteers information that implicates the ADA, or has an obvious disability, it is permissible to inquire about any reasonable accommodations that may be needed in order to assist the applicant if he/she is chosen for the position (just be sure that the applicant is not ruled out because of the disabling condition or the need for an accommodation, particularly if the applicant is highly qualified for the position).
17. Fiscal year 2013 statistics will be available in early 2014.
18. Typically, municipal charters and state statutes take precedence in determining whether employment of public employees at the local level is "at will" or not. *See, e.g.,* Gomez v. Town of West New York, Civ. No. 2:13-689 (D. N.J. Nov. 4, 2013). However, in states where "at will" employment has been preserved for public employees, promissory estoppel and other implied contract theories are gaining traction to help employees establish the necessary property right to survive dismissal of due process claims.
19. Deprivation of a liberty interest in the employment context may arise when, after an adverse employment action, a public employer stigmatizes the employee by making public comments impugning his [or her] good name, honor or reputation or imposes a stigma that forecloses other employment opportunities. Bd. of Regents v. Roth, 408 U.S. 564, 573-74 (1972).
20. "The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." Tri-Health, Inc. v. Board of Commissioners, 430 F.3d 783, 788 (6th Cir. 2005). ML

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the Eleventh Circuit held that Lane was acting pursuant to his official job duties when he testified and his speech, according to that court, was therefore not protected by the First Amendment.[23] The Eleventh Circuit explained that an employee's speech is not protected under the First Amendment simply by virtue of the fact that it came about as a result of a subpoena or in the context of litigation.[24] The Eleventh Circuit reasoned:

> No one disputes that Lane was acting pursuant to his official duties as CITY'S Director when he investigated Schmitz's work activities, spoke with Schmitz and other CACC officials about Schmitz's employment, and ultimately terminated Schmitz's employment. That Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, does not bring Lane's speech within the protection of the First Amendment. Furthermore, because formal job descriptions do not control, that Lane's official duties did not distinctly require him to testify at criminal trials falls short of triggering First Amendment protection. Although not dispositive, we consider it pertinent that the subject matter of Lane's testimony touched only on acts he performed as part of his official duties... nothing evidences that Lane testified at Schmitz's trial "primarily in [his] role as a citizen" or that his testimony was an attempt to comment publicly on CITY'S internal operations.[25]

On petition for certiorari to the Supreme Court, the former employee framed the issue in *Franks* as whether a government employer is "free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and *was not a part of the employee's ordinary job responsibilities*."[26] By framing the issue in this manner – i.e., that the testimony itself was not a part of the employee's ordinary job responsibilities - the petitioner is seeking to distinguish the case from *Garcetti*; however, as the Eleventh Circuit noted, the fact that testifying was not one of the employee's job duties should not be dispositive. Rather, the subject matter of that testimony would determine whether the speech is protected under the First Amendment. In its ruling, the Eleventh Circuit disagreed with three other Circuits on this point, necessitating review by the Supreme Court.[27]

The way the petitioner has framed the issue likely leads many to conclude that the Eleventh Circuit's decision resulted in injustice. After all, it seems fundamentally unfair that someone could be fired for testifying in court pursuant to a subpoena. However, as the Court explained in *Garcetti,* public employees should not be given *expanded* rights simply because they work for a governmental entity. An employee who is acting as an employee in the scope and context of his or her employment should be protected by all rights and benefits afforded to any employee (both public and private) under state and federal law.