School Board Hiring
Legal Considerations

By Robert P. Joyce

North Carolina boards of education, in their capacity as employers, have great latitude in deciding how to recruit employees and fill vacancies. No state statutes or regulations require them to advertise or post notices of vacancies, interview any specific number of candidates, or conduct interviews in a certain way. Boards of education are free to design policies covering these and related procedures as they see fit—or to delegate to the superintendent the responsibility for developing procedures.

Boards must, however, be greatly concerned with the possibility that poorly constructed or improperly applied procedures may run afoul of federal statutes outlawing discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

Posting and Advertising Vacancies

Two excellent tools for recruiting able candidates and promoting a sense of openness in a school system are posting notices of vacancies within the workplace and using media advertising to reach the wider community. Advertising jobs spreads information about employment opportunities to potential candidates outside the school environment, while posting vacancy notices in schools and in the central office ensures that people already working in the school system know about available positions.

Neither practice is required by law.

Posting

Job posting achieves three main goals. First, like advertising, it increases the possibility of attracting outstanding candidates who might otherwise not apply. Second, it can raise employee morale by stimulating upward mobility within the school system. Third, it can boost employees' motivation to enhance their skills in their current jobs in order to improve their chances of promotion.

A policy of posting vacancies within the school system is not, however, nearly as effective as advertising in averting the dangers of unlawful discrimination.[1] For this reason, job posting should be used in conjunction with media advertising.

Advertising

The greatest advantage of a policy that requires job openings to be advertised is the possibility of identifying outstanding candidates who would otherwise go unknown and so enhancing the richness of the workforce. A second advantage is that members of the community who see vacancies advertised are more likely to perceive the school system's employment practices as fair and aboveboard. For these reasons alone, boards may wish to adopt policies requiring that vacancies be advertised.[2]

The greatest danger in *not* advertising vacancies is the likelihood that other methods of identifying candidates—for example, school officials' personal knowledge of possible candidates in the school system or local community or word-of-mouth between people inside and outside the school system—may act as a barrier to opportunity for members of minority groups. Even if the reasons for relying on methods other than advertising have nothing to do with an intent to discriminate on account of, say, race, the effect may still constitute a violation of Title VII of the Civil Rights Act.[3] This is especially true where the school system workforce is already disproportionately white compared to the population of the community it serves. Communication through informal channels in such a situation is much more

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1. In fact, where the workforce is overwhelmingly white, posting vacancies may only increase the likelihood of an adverse impact against African Americans if it is not combined with advertising. *See* Thomas v. Washington County Sch. Bd., 915 F.2d 922 (4th Cir. 1990).

2. The State Personnel Act for these reasons requires public notice of vacancies in state government agencies. N.C. Gen. Stat. § 96-29 (hereinafter G.S.); N.C. Admin. Code tit. 25, ch. 1H § .0602.

3. 42 U.S.C. §§ 2000e through 200e-17 (1964).

likely to reach white candidates than African Americans or other minorities and to create an unlawful adverse impact on the basis of race.

This was the finding of a 1990 federal appeals court decision in the Fourth Circuit, which has jurisdiction over North Carolina.[4] The court found a Virginia public school system with an overwhelmingly white workforce in violation of Title VII when school officials, using only an informal method of communicating information about vacancies, unintentionally overlooked qualified black candidates.

A procedure requiring open, public advertising of all job openings can ensure that the school board will avoid this kind of adverse impact on the basis of race.

Interviewing

There is no North Carolina law or regulation requiring school systems to interview applicants or to interview them in a particular way. Nonetheless, school systems, like other employers, almost universally choose to interview at least the finalists for a position. The face-to-face opportunity to evaluate an applicant gives school officials a sense of the candidate's personality, poise, composure, appropriateness of behavior, communication skills, and "fit" for a particular job. Evaluation of these qualities—unlike the more objective data of years of experience, degrees obtained, licensure held, and so forth—is highly subjective and may well vary from interviewer to interviewer. That very subjectivity opens a wide door for unlawful discrimination on account of race, color, religion, sex, age, or disability.

Legality of subjective determinations

The courts recognize that the interview element of the employee-selection process is inherently subjective, but they have consistently held that subjectivity alone does not make using interviews unlawful.[5] In fact, subjective determinations *not* based on race, color, religion, sex, age, or disability can provide a defense to a claim of unlawful discrimination, as occurred in a case arising in the Alamance County school system.[6] A panel interviewing a candidate for a principal's job determined that her answer to a question about dealing with a poorly performing employee was vague. In that instance—as in several other interviews in which she was considered for jobs over the years—the panel made a subjective judgment that was adverse to the candidate, who was African American. She sued, alleging unlawful discrimination on account of race and challenging the subjectivity of the selection process. The court noted that the school system "has not attempted to argue that the procedures were not subjective. [Rather, the school system] has argued that subjective analysis of applicants for principal and assistant positions is essential."[7] Subjective determinations are not unlawful, the court held—and in this case they provided a defense to a claim of unlawful discrimination—but they do give rise to great opportunities for abuse. Therefore, the court said, the context in which such subjective determinations are made must be closely examined.

Context of subjective determinations

In the Alamance case just described, the court looked behind the interview panel's subjective determinations to their context. It noted that over the years African Americans (and women) had occupied places on the interview panels; that African Americans held jobs at all levels of the county school system and received promotions to administrative positions; that the selection procedures were applied uniformly to all applicants, black and white; and that the subjective inquiries were job related. In this context, the court held, the use of subjective determinations was not unlawful.[8]

In another case (involving a bank), the Fourth Circuit court took a somewhat different view of the context. It held that while "use of an all-white interviewing staff standing alone could not support a determination of liability" for unlawful race discrimination, there was nevertheless probative value in "the fact that in a racially imbalanced setting, the staff charged with the duty of evaluating [the] personal characteristics of job applicants was maintained all white throughout the period."[9]

Inquiries related to disabilities

The Americans with Disabilities Act and the regulations adopted under it prohibit potential employers from inquiring about a person's disabilities until after a conditional offer of employment has been made.[10] Interviewers' questions should focus not on the applicant's disabilities but on his or her ability to perform the essential functions of the

4. *Thomas*, 915 F.2d 922.

5. Anderson v. Bessemer City, 717 F.2d 149, 155 (4th Cir. 1983), *rev'd*, 470 U.S. 564 (1985).

6. Love v. Alamance County Bd. of Educ., 581 F. Supp. 1079 (M.D.N.C. 1984), *aff'd*, 757 F.2d 1504 (4th Cir. 1985).

7. *Love*, 581 F. Supp. at 1093.

8. A similar analysis of the context in which a subjective selection determination was made is found in an unreported case, *Jackson v. Richmond City School Board*, 2000 WL 34292578 (E.D. Va. 2000).

9. Equal Employment Opportunity Comm'n (hereinafter E.E.O.C.) v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981).

10. 28 C.F.R. § 1630.14.

job. Examples of questions interviewers may not ask include the following:[11]

- Have you ever been hospitalized? If so, for what?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Is there any health-related reason why you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last five years?
- How many days were you absent from work because of illness last year?
- Are you taking any prescribed drugs?
- Have you ever been treated for drug addiction or alcoholism?
- Have you ever filed for worker's compensation insurance?

These questions are all unlawful because they focus on the applicant's disabilities or on discovering disabilities the person may have. On the other hand, questions that focus on the ability to perform the essential elements of the job are lawful. For example, the interview panel may describe the essential elements of the job and ask whether the applicant is able to perform these elements with or without any kind of accommodation. If the answer is that the interviewee could perform the elements with some accommodation, the interview panel may ask how he or she would perform the tasks and with what accommodation.

If a person has a known disability—known because he or she has revealed it or because it is obvious—interviewers may not ask questions about the nature of the disability, its severity, the condition that caused it, the prognosis, or whether it will require treatment or special leave. These questions focus on the disability. Instead, the interviewers may identify the essential elements of the job and ask whether the candidate can perform them, with or without accommodation.

Job References and Liability

Sometimes employers have occasion to say unpleasant things about employees or former employees in the course of investigating possible misconduct, dismissing an employee, or providing information to a prospective employer. Employers in this situation sometimes fear that they may be held liable for the tort of defamation, but such fears are unnecessary. A broad legal protection known as *qualified privilege* protects employers in the most common employment situations. And, in North Carolina, a statute (discussed below) provides immunity from liability to employers providing truthful information in job references.

What constitutes defamation?

Defamation is defined as a false communication by one person (such as an employer) about a second person (such as an employee or former employee) that "tends to so harm the reputation of [the second person so] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[12] *Libel* (written material) and *slander* (spoken words) are the two main types of defamation. Sometimes a communication can be both, as when someone makes a statement to a news reporter (slander) knowing that it will be printed in the newspaper (libel).[13]

For there to be defamation, other people must be told. In legal terminology, there must be *publication* of the defamation; that is, there is no defamation if the speaker or writer communicates the negative information only to the person himself or herself.[14] In this case, there is no damage to the person's reputation, which is the essence of the claim of defamation.

Defending against a defamation claim

An employer accused of defamation can, of course, always argue that the statements alleged are not really defamatory. If they do not harm a person's reputation, lower the person's standing in the community, or cause others to avoid associating or dealing with the person, they are not defamatory. Even if they do, an employer who has spoken ill of an employee may offer two very strong defenses: the truth of the statement and a qualified privilege to make the statement (even if it turns out to be false).

Truth as a complete defense. A person cannot recover damages for defamation if what was said or written about him or her is true. Truth is a complete defense to a charge of libel or slander. In a case arising in Winston-Salem, a secretary had accused her boss of sexually harassing her.[15] She and the company entered into a settlement in which she agreed to resign and the company agreed to pay her a sum of money. Some time later, she applied for another job, and her prospective employer contacted the former employer.

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11. E.E.O.C., *Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act*, § 5.5(b) (1992), *available at* http://www.jan.wvu.edu/links/ADAtam1.html (viewed August 2005); http://www.eeoc.gov/policy/docs/adamanual_add.html (viewed August 2005).

12. W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 111 (5th ed. 1984).

13. Tallent v. Blake, 57 N.C. App. 249, 291 S.E.2d 336 (1982).

14. Friel v. Angell Care Inc., 113 N.C. App. 505, 440 S.E.2d 111 (1994).

15. *Id.* In a 2005 unpublished opinion, *Ryan v. University of North Carolina Hospitals* (N.C. App. March 1, 2005), the North Carolina Court of Appeals noted that an employee failed on his defamation claim because he could not establish the falsity of the statements made about him.

A representative of the company told the prospective employer that the secretary had made an unproven charge of sexual harassment, that she had left in adverse circumstances, and that the company would not rehire her. The secretary sued for defamation; but, the court said, as all the statements were true, there could be no liability for defamation.

Qualified privilege. Even if a statement made by an employer about an employee or former employee is false and defamatory, the employer is still entitled, in the proper circumstances, to a defense of qualified privilege. *Qualified privilege* means that the employer is not liable to the employee or former employee if the communication was made in good faith, if the person making the communication was upholding a valid interest or pursuing a legal right or duty, and if the person to whom the communication was made had a corresponding interest, right, or duty.[16]

A defense of qualified privilege most commonly arises in connection with job references. A prospective employer asks another employer about a former employee's performance and qualifications, and the former employer says something negative about the employee; the prospective employer decides not to hire the jobseeker, who sues the former employer for defamation. As always, truth is a complete defense; as long as what the employer said is true, there can be no liability for defamation. Moreover, as long as the employer was speaking in good faith, the qualified privilege applies—even if the statement turns out to be false—and there can be no liability. (For a discussion of North Carolina statutory protections, *see* subsection on "Statutory Immunity in Connection with Job References," below.)

Qualified privilege can, however, be lost in several ways. If the person making the communication is motivated by ill will or personal hostility toward the employee or former employee, the privilege does not apply; [17] in that case, the communication is not made in good faith.

Qualified privilege can also be lost by communicating the defamation to too many people—that is, to people who have no valid interest in the information. Exactly that occurred in *Presnell v. Pell*, a Surry County case.[18] The principal of a school received reports that the cafeteria manager, a fourteen-year employee, brought liquor into the school and gave it to painters who were working in the cafeteria. The principal told a number of people about the reports—not only the superintendent but also numerous fellow employees of the manager. The manager was fired, and she sued the principal and others for slander. The principal asserted the defense of qualified privilege, but the court held that the principal had forfeited the privilege by telling the manager's fellow employees, who had no valid interest in the information.[19]

Qualified privilege was applied in 1988 in *Davis v. Durham City Schools*.[20] Students told the school principal that a substitute teacher was physically abusing students while disciplining them. The principal reported the matter to the Department of Social Services and to the associate superintendent of personnel. The police investigated, and the substitute teacher was charged, tried, and acquitted. The teacher then sued for defamation. The court held that the principal could not be held liable for defamation because she was under a statutory duty to report suspected cases of child abuse.[21] Further, the court held, qualified privilege protected the principal; she had acted in good faith and reported a matter in which she had a valid interest to another person with a corresponding interest.

Qualified privilege was also upheld in a 1994 decision from Winston-Salem.[22] The communications officer of the school board told the superintendent that an employee had tried to have the superintendent's office broken into and searched for material that might embarrass the superintendent. In a defamation suit filed by the accused employee, the court held that qualified privilege protected the communication between the communications officer and the superintendent; the information was conveyed without malice, and in private, between two public officials with an appropriate interest in the matter.

Employer liability for an employee's defamation

If an employee defames another employee or former employee in a way not protected by either the defense of truth or qualified privilege, he or she may, of course, be held liable as an individual. But may the employer also be held liable? Recent North Carolina case law suggests that the employer is unlikely to be held liable. Because the school board in *Presnell* (mentioned above) had not purchased liability insurance to cover employee defamation, the court held that it was protected from liability by governmental immunity.

16. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979). *See also* Hanton v. Gilbert, 126 N.C. App. 561, 486 S.E.2d 432 (1997); Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994); Gregory v. Durham County Bd. of Educ., 591 F. Supp. 145, 156–57 (M.D.N.C. 1984).

17. You v. Roe, 97 N.C. App. 1, 387 S.E.2d 188 (1990).

18. 298 N.C. 715, 260 S.E.2d 611.

19. In a 1991 case, however, the state supreme court held that telling all employees that a particular employee had been dismissed for drug use was not too wide a communication, and the qualified privilege defense was recognized. Harris v. Procter & Gamble Mfg. Co., 102 N.C. App. 329, 401 S.E.2d 849 (1991).

20. 91 N.C. App. 520, 372 S.E.2d 318 (1988).

21. G.S. 115C-400. The holding in *Davis* may not, however, be consistent with the current child abuse reporting requirements found at G.S. 7B-301.

22. Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994).

In *Miller v. Henderson*, an earlier case arising in Beaufort County, a high school bookkeeper was fired by the principal. She sued, alleging that statements by the principal in connection with the dismissal defamed her. The court ruled that while the suit against the principal as an individual could go forward, there could be no valid claim against the school board because there was no "affirmative action or personal involvement on the part of [the board members] in the alleged defamatory publication; therefore, they may not be held individually accountable for the actions taken by [the principal] alone."[23]

Under the doctrine of *respondeat superior*, an employer can, in certain circumstances, be held liable for the actions of its employee. For this doctrine to apply, however, the plaintiff has to show either that (1) the employee's actions in speaking in a defamatory way were within the scope of his or her employment,[24] or (2) the employer endorsed the actions after they were taken. These are unlikely outcomes.

Defamation of a public official

The U.S. Supreme Court has held that the interests of robust discussion and debate in a democratic society require a high standard for defamation of public officials and public figures. If citizens can too easily be held liable for what they say about public officials, they might be dissuaded from entering into that robust debate. Therefore, for a public official or public figure to succeed with a claim of defamation, he or she must show, along with all the other elements of such a claim, an additional element: *actual malice*. This term means that the defamer either knew that what was said was untrue or showed reckless indifference to whether or not it was true.[25]

In a 1994 decision in a case arising in Wake County, the North Carolina Supreme Court applied this standard to a claim of defamation by a town manager.[26] The manager, the court held, was a public official and so would have to prove that any defamatory statement made about him was made with knowledge that it was false or with reckless disregard for whether or not it was false. That same high standard would certainly be applied to a school superintendent or community college president who attempted to sue for defamation.[27]

Statutory immunity in connection with job references

Despite the common law protections discussed in the preceding paragraphs—truth as a complete defense and qualified immunity—many employers (including public school units) have remained skittish about giving adverse (though true) reports on former employees. In recognition of that reluctance, the 1997 North Carolina General Assembly added a direct statutory protection. Section 1-539.12 of the North Carolina General Statutes (hereinafter G.S.) provides that an employer who discloses information about a current or former employee's job performance or job history to a prospective employer, at the request of either the employee or the prospective employer, is not liable in civil damages for the disclosure or for any consequences of the disclosure.

This immunity does not apply if the information disclosed is false and the employer knew or reasonably should have known that it was false. Protected information includes the suitability of the employee for reemployment; the employee's skills, abilities, and traits as they relate to suitability for future employment; and (if a former employee) the reason for the employee's separation from employment.

Crime of blacklisting

The immunity provided by G.S. 1-539.12 protects an employer from liability for civil damages. It does not provide immunity for criminal offenses. There is a little-known criminal statute, G.S. 14-355 (called "Blacklisting employees"), that makes it a misdemeanor to attempt to prevent a discharged employee from obtaining employment. The statute specifically provides that an employer who furnishes a truthful statement of the reason for discharge when requested by another employer is not committing the crime of blacklisting. So, there is no crime in giving truthful information in response to a request.[28]

Drug Testing

The Fourth Amendment to the U.S. Constitution provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated." In the context of public employment, this constitutional protection against unreasonable searches comes up most frequently in the context of drug testing.

It has become common practice for employers to test applicants for drug use, usually by collecting and analyzing urine samples. In fact, in 1995 federal regulations for the Omnibus Transportation Employees Testing Act of 1991

23. Miller v. Henderson, 71 N.C. App. 366, 370, 322 S.E.2d 594, 597 (1984).

24. See *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990), in which the court held that a principal was not acting within the scope of his duties when he assaulted a student. *Compare* White v. Consolidated Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147 (2004), *disc. rev. denied*, 359 N.C. 286, 610 S.E.2d 717 (2005).

25. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

26. Varner v. Bryan, 113 N.C. App. 697, 440 S.E.2d 295 (1994).

27. *See* Hugger v. Rutherford Institute, 63 F. App'x 683 (4th Cir. 2003).

28. Holroyd v. Montgomery County, 167 N.C. App. 539, 606 S.E.2d 353 (2004), *disc. rev. denied*, 359 N.C. 631, 613 S.E.2d 690 (2005).

began mandating drug testing for school bus drivers and others who drive commercial motor vehicles for school use.[29] The courts have been much more likely to view the drug testing of job applicants as constitutional than to find the testing of current employees constitutional. The following paragraphs look first at the more restrictive case law about current employees and then at the more lenient standard for testing the courts have applied to job applicants.

According to the Supreme Court in *Skinner v. Railway Labor Executives Ass'n,* when government is the employer, drug testing constitutes a search, because it "intrudes upon expectations of privacy that society has long recognized as reasonable."[30] To comply with the Fourth Amendment, therefore, the collection of urine for drug testing (the "search") must not be unreasonable. As the Court has said, "[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. What is reasonable, of course, depends on all the circumstances surrounding the search or seizure itself."[31]

The court, in determining what is "reasonable" must, in essence, strike a balance between the interests of the government in making the search and the interests of the citizen in protecting his or her privacy.[32]

Drug testing current employees suspected of using drugs

The courts have uniformly held that a public employer's reasonable suspicion that an employee is using drugs justifies requiring that employee to undergo a drug test.[33] When, for example, an undercover agent reported observing drug use at a job site, the drug-testing requirement was upheld.[34] An employee drug-testing policy permitting tests based on suspicion of a particular employee should include guidelines that (1) specify the circumstances or conduct that are sufficient to raise a suspicion; (2) identify the individuals (or categories of individuals) authorized to make the determination of suspicion; and (3) provide testing procedures designed to protect as fully as possible the privacy and dignity of the individual tested. The first and second requirements limit the discretion of the officials ordering the search, while the third limits the intrusiveness of the search. All three elements contribute to a finding that a particular search policy is reasonable under the Fourth Amendment.[35]

Random drug testing of current employees

Sometimes drug testing constitutes a "reasonable search," even if the employees being tested are not individually suspected of using drugs. In one case, the U.S. Supreme Court upheld the testing of railroad workers after accidents, deciding that the interests of the public in safe railroad operation outweighed the privacy interests of the workers.[36] The Court emphasized the great risk that impaired rail operators posed to the public, the deterrent effect that testing might have, and the fact that drugs had been known to be factors in previous accidents. In another Supreme Court case, the random testing of customs agents who worked in drug interdiction was upheld.[37] This time, the Court emphasized the need to keep drug enforcement officers drug-free and pointed out that as these officers carry firearms they would pose a great threat if they were impaired. The North Carolina Court of Appeals, too, upheld random drug testing in the only case on this practice yet to come to our state's appellate courts.[38] In *Boesche v. Raleigh-Durham Airport Authority,* the employee involved had clearance to operate a motor vehicle on the fringe areas of the runway; the court found that the safety risk he would pose by driving in that area while impaired outweighed his interest in privacy.

The lesson of these cases is that in certain circumstances —especially where the safety of others is involved—the balance may be struck in favor of the employer's interest in drug testing over the employee's interest in privacy, even in the absence of suspicion that the particular employee is using drugs. Recent federal appeals courts have held that the jobs of the following public school employees involve sufficient safety considerations to tip the constitutional balance in favor of random testing: custodians,[39] principals, assistant principals, teachers, traveling teachers, teachers' aides, substitute teachers, school secretaries, and school bus drivers.[40] As mentioned above, school transportation

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29. 49 U.S.C. §§ 31301, 31306, and 31310.

30. 489 U.S. 602, 617 (1989). *See also* Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

31. *Skinner*, 489 U.S. at 619 (quotation marks and citations omitted).

32. See, for explicit statement of this principle, *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998). The Supreme Court used this balance in striking down a state statute requiring drug testing of candidates for election to certain state offices in Georgia. Chandler v. Miller, 520 U.S. 305 (1997).

33. *See, e.g.*, *Knox*, 158 F.3d 361; Fraternal Order of Police, Lodge No. 5 v. Tucker, 868 F.2d 74 (3d Cir. 1989).

34. Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985).

35. *Knox*, 158 F.3d 361; Aubrey v. School Board of Lafayette Parish, 148 F.3d 559 (5th Cir. 1998).

36. *Skinner*, 489 U.S. 602. The railroad workers were not actually governmental employees, but they were employed under a regulatory scheme that involved the government, making the mandatory drug tests government-imposed tests.

37. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

38. 111 N.C. App. 149, 432 S.E.2d 137 (1993).

39. *Aubrey*, 148 F.3d 559.

40. Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir. 1998). *See also* Crager v. Board of Educ. of Knott County, Ky., 313 F. Supp. 2d 690 (E.D. Ky. 2004).

workers are subject to random drug tests under the federal Omnibus Transportation Employee Testing Act.

Drug testing applicants

Sometimes employers wish to require all applicants for employment to pass a drug test before being hired. The courts have, for the most part, been willing to accept this practice as constitutional.[41] After all, as a federal appeals court commented in a case involving applicants for a particular federal job, "[i]f individuals view drug testing as an indignity to be avoided, they need only refrain from applying."[42] The privacy interests of applicants are simply not as great as the privacy interests of employees, the court said. On the other hand, a federal district court struck down a Georgia statute that required applicants for all jobs in state government (including the public schools) to be drug tested.[43] The privacy interests of applicants were clear, the court said—even though they were of lesser stature than those of already-employed employees. But because the state, in defending the statute, had not articulated its interests with respect to each category of applicant, the court could not undertake the necessary balancing and had to strike down the statute. The court made it clear, however, that if competing interests were fully articulated, the balance might well be struck against the applicants.

Criminal Records Checks of Applicants

No law requires school systems to conduct criminal records checks of applicants for employment. In recent years, however, for obvious reasons related to the safety of students and others, most school systems have decided to make those checks. There are three ways for school systems to check the criminal records of applicants for employment.

First, the school board's own employees or agents can have the clerks of court in the various counties check the applicant's name against conviction records. Certified copies of such records are public records, can be disseminated at will, and can be used with confidence as bases for employment decisions. There are no statutes directly related to conducting criminal records checks in this way, making it the least-regulated method. It is also, however, the least-efficient method, because of the effort required to check personally with many different clerks of court.

Second, the school system may engage the services of a reporting company that maintains its own database of criminal history information. This is the easiest method, but it has two potential drawbacks. First, the results are only as good as the information the company has available. And second, in using such reporting services, the school system must comply with the requirements of the Fair Credit Reporting Act (FCRA).[44] In general, FCRA requires employers (1) to inform applicants—in a document devoted solely to this subject—that a criminal history report may be obtained and used in making employment decisions; (2) to get written permission from the applicant to obtain the report; (3) before turning down the applicant, to provide the applicant with a pre-adverse action disclosure that includes a copy of the individual's criminal history report; and (4) after deciding not to hire the applicant, to provide him or her with the following information: the name, telephone number, and address of the consumer reporting agency that supplied the report; a statement that the reporting agency did not make the decision and so cannot supply specific reasons for it; and a notice of the individual's right to dispute information contained in the report and obtain a free copy of the report from the agency within sixty days of requesting it.

Third, the school system may take advantage of special statutes permitting school systems, as privileged employers, to request checks of the computerized criminal records systems maintained by the State Bureau of Investigation and the Federal Bureau of Investigation.[45] This method is potentially the most complete and reliable. However, it involves a number of statutory limitations, as follows: (1) the school system must enter into an access agreement with the State Bureau of Investigation; (2) the school system must adopt a uniform policy on conducting criminal record checks; (3) the school system must arrange for the fingerprinting of the applicant to facilitate the check; and (4) the school system may not base a negative hiring decision on the criminal record report but must "obtain from the repository of the record a certified copy of an applicant's or employee's conviction or shall consult with legal counsel prior to making a final employment decision based on the conviction."[46]

Conclusion

Boards of education are not required to comply with strict guidelines in designing their hiring practices. The challenge, therefore, is to devise practices that will increase the likelihood of identifying the best candidates and decrease the chances of a charge of unlawful discrimination or a lawsuit for defamation or violation of an applicant's statutory or constitutional rights. With common sense, this challenge can be met.

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41. *See, e.g., Knox*, 158 F.3d 361.

42. Willner v. Thornburgh, 928 F.2d 1185, 1190 (D.C. Cir. 1991).

43. Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110 (N.D. Ga. 1990).

44. The FCRA is a part of the Consumer Credit Protection Act, 15 U.S.C. § 1601. It governs the circumstances under which employers may request consumer reports from reporting agencies.

45. G.S. 115C-332 and G.S. 114-19.2.

46. 16 N.C. Admin. Code 06C .0313(b) (1996).