MySpace and the Workplace

More Challenges for the Modern Day Employer

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Abstract

The use of Social Networking Sites (SNS) by employers for hiring assessments is an emerging area of employment law that all employers and legal professionals must become familiar with. Given today's current dismal economic conditions, the subject of this presentation is both timely and important. Over 560,000 people lost their jobs in the US in January 2009. This startling number leads us to the unavoidable reality that the number of people looking for work has increased dramatically and the competition for the jobs that are available is fierce.

Employers have increasingly come to realize that they have more choices when it comes to making their hiring decisions. They are also painfully aware that in today's legal environment, they are more limited than ever with the regard to the disciplinary actions they have available to them once they actually hire an employee. This fact of life of the modern workplace makes the process of hiring the right employee more important than ever before.

Employers utilizing SNS to obtain information about job applicants in New York State and elsewhere are almost always within their legal right to do so, however, they must proceed with caution.

Employers' use of SNS raises several potential legal issues, including the invasion of privacy, discrimination, violation of the Fair Credit Reporting Act, violation of the SNS's terms of service, and defamation. There are several reported cases involving employees who sued after being fired for their content of their blogs or internet postings.

However, there are currently no reported cases in New York State anywhere else where an employer was sued for failing to hire someone based on information obtained by the employer that was contained on the candidate's SNS profile. As discussed in more detail below, however, recently passed legislation along with some guidance from the Federal Administrative Agencies responsible for enforcing anti-discrimination statutes indicate that employers must precede with caution using SNS as a tool to obtain background information on job candidates. Additionally, several statutes are implicated and must be considered when analyzing the use of SNS for hiring assessments.

In order to put this modern day applicant screening practice into context, it is helpful to have a basic understanding of the radical changes that have occurred to the Web over the past decade that has made this background checking tool available for employers. Therefore, Section One of this analysis provides a brief overview of the development of the traditional Web into what is now commonly known as the Web 2.0.

Section Two provides an analysis of the various reasons why employers and their recruiters have turned to the SNS's for information on candidates.

Section Three covers the various legal challenges that employers, recruiters, and legal professionals must be aware of if they are going to utilize the information obtained in the applicant's SNS.

The Modern Day Web

Over the past decade, the internet, as we know it, has changed dramatically. With these changes have come a plethora of new and complex legal concerns for the modern workplace.

The "traditional" web was one where information was shared in one direction (1). The users of the traditional Web were just visitors to the site. Think about when you first started using the internet. The average user did some online shopping, banking, and maybe visited websites of newspapers or network televisions stations. The major challenges facing employers in the traditional web era were the potential use for productivity and the occasional foray by employees into adult web sites (2).

Today's Web is very different. Online information is no longer just viewed by users. It is also now created and manipulated by users. In the modern workplace, employers must be concerned with how their employees are using these new and powerful tools. For example, company blogs can provide a useful internal communication tool, but they can also be the source of a defamation lawsuit or a breach of an important company trade secret.

What is WEB 2.0?

The Web 2.0 concept was introduced after the bursting of the dotcom bubble I 2001. At that time, many experts concluded that the Web was over-hyped (3). Some influential web pioneers (Al Gore was not included in this group) disagreed with this negative assessment and argued that the Web was more important than ever. These internet pioneers concluded that the dotcom bubble burst was not the end of the Web, but was actually a turning point that marked the beginning of a new and exciting era. This era is now commonly referred to as Web 2.0 (4).

Thus, the term "Web 2.0" is used to describe the latest generation of Web-based interactivity, relationship building and user generated content. It is Web software that is continually and collaboratively updated by internet users. It includes Web sites, Web applications or Web services that allow users to create content, control content or interact and collaborate with one another (5).

Some common and well known examples of Web 2.0 technology affecting the modern workplace today include:

Social Networking Sites (SNS) like MySpace.com and Face book. The SNS allow users to create personal profiles and are focused on connecting people using user generated content.

Blogs or Web logs are sites that allow an author to write on any subject in any fashion. Blogs are similar to a diary. Readers can leave comments in an interactive format. It is estimated that there may be as many as 100 million blogs and that a new blog is created very 7.4 seconds.

Forums are similar to blogs, however, the purpose of a forum is to solicit feedback. A forum is designed to two way communication between an unlimited number of people. They are very popular on News Sites where the paper seeks comments on an article that appears in the newspaper or website.

Wikis is the Hawaiian word for Quick. A Wiki is a web site that allows that allows anyone to easily add, remove and change the site's content, sometimes without permission. The most well-known Wiki is Wikipedia.org, an online encyclopedia written and maintained by users of the Web.

Virtual Communities are computer-based simulated environments where users inhabit and interact using virtual representations of themselves. The most popular virtual community is called Second Life (6). Parents of young children may be familiar with the Webkinz virtual community where children can care for a virtual pet online.

You Tube. Founded in February 2005, YouTube is the leader in online video, and the premier destination to watch and share original videos worldwide through a Web experience. YouTube allows people to easily upload and share video clips on www.YouTube.com and across the Internet through websites, mobile devices, blogs, and email. Everyone can watch videos on YouTube. People can see first-hand accounts of current events, find videos about their hobbies and interests, and discover the quirky and the unusual. As more people capture special moments on video, YouTube is empowering them to become the broadcasters of tomorrow. YouTube received funding from Sequoia Capital in November 2005 and was officially launched one month later in December. Chad Hurley and Steve Chen proceeded to become the first members of the YouTube management team and currently serve as Chief Executive Officer and Chief Technology Officer, respectively.

In November 2006, within a year of its launch, YouTube was purchased by Google, Inc. in one of the most talked about acquisitions to date. YouTube has struck numerous partnership deals with content providers such as CBS, BBC, Universal Music Group, Sony Music Group, Warner Music Group, NBA, the Sundance Channel, and many more (7).

Each of the above applications are being utilized in the modern workplace and each presents their own unique challenges to employers and legal professionals. Some of the broader issues raised by Web 2.0 applications include free expression, privacy, defamation and intellectual property infringement issues (8). As noted above, however, the focus of this presentation is limited to the use of SNS by employers to gather background information about prospective employees.

What are SNS and Why are Employers Using Them to Assess Job Candidates?

Social Networking Sites are virtual communities on the internet where people go to find and connect with others who have similar interests. SNS generally consists of a personal website that is often called a profile and includes the user's picture, likes, dislikes, interests, blog entries, geographic location, gender, and links to the profiles of friends on the site (9). Oftentimes, as we will see below, there is other personal information that may not put the user in the best light.

a) How popular are SNS?

Even though MySpace and Face book have only been in existence for a few years, they have amassed hundreds of millions of users worldwide and are growing more popular every day. MySpace had over 1 billion page views per day and 116 million registered users in December 2006. (10). Face book reports on its website that it currently has over 150 million registered users. (11).

b) Who is using SNS?

The main users of SNS are a group commonly called as 'Millennials'. Millennials are generally considered to be those people between the ages of 16 and 24 (12). It is important to point out however that they are not the only users of SNS. A recent study found that the median age of those who frequently go online to connect with people, manage digital content, work with online community groups and pursue hobbies is thirty-eight years old (13). Face book reports that the average age of its newest member is thirty years old (14).

Based on these numbers, it is clear that a large population of today's workforce is using SNS on a regular basis. This phenomenon has provided employers with a new tool to help manage the hiring process in today's modern workforce.

c) Use of SNS in the Employment Context

There is no doubt that employers and recruiters have discovered and are taking full advantage of the SNS to obtain information about potential candidates. The popular employment search website CareerBuilder.com conducted a survey of 1,150 hiring managers in 2006 and found that 26% of those managers used the internet search engines Google or Yahoo to learn more about job applicants and that 12% of those managers had used SNS like MySpace or Face book (18). The survey revealed that 51% of those who used Google or Yahoo did not hire someone because of what they found and that 63% of those who used SNS to research a candidate did not hire an applicant because of what they learned (16). NBC News reported that "a recent survey shows that over 77 percent of employers uncover information about candidates online and 35 percent have eliminated candidates based on the information they found (17).

On the other hand, SNS can also be positive and useful tools for prospective candidates. They can serve as cheap, efficient way for applicants to provide positive professional information about them and to build visibility and credibility as an expert in their field of interest.

d) Employers Must Authenticate SNS Information

Employers must proceed with caution when using SNS to gain information on potential candidates and before using that information to make employment decisions. At a minimum, employers must ensure that the information they are looking actually relates to the candidate in question and that it is authentic. There is a high likelihood that the information found on the SNS may not have been put there by the applicant.

Both MySpace and Face book have extensive disclaimers on their sites advising that they cannot and that they do not guarantee the accuracy of the postings contained o the SNS. In fact, the creation of false profiles is so prevalent that both sites have provided written procedures on how to report false profiles in order to have them removed. Unfortunately, it has been reported that college students have begun creating fake "explicit or unflattering social networking profiles of people they view as competition for a job."(18). The student who is the victim of this hi-tech sabotage may not even know the fake profile exists. Therefore, fairness and common sense dictates that employers review all SNS profile information carefully before making any hiring decisions.

e) Real Life Examples

There have been numerous reports and articles written about potential employees who failed to get hired for a job or who were terminated from a job because of the content of their MySpace or Face book page. One particular story that shows up repeatedly when researching this topic provides a perfect illustration of the kind of content employers are oftentimes finding when they look at applicant's personal web pages.

Brad Karsh, the president of Job Bound, which ironically is an online career counseling site, recounts the following story of a recent college graduate who had applied for a job at his company:

"Right before we interviewed a recent college graduate, we discovered that one of his interests listed on this social networking profile is: "Smokin' blunts with Homies, and bustin' caps in whitey" and one of his favorite quotes is: "Beware of Big Butts and a smile." Our "first impression" of our candidate was officially tainted. And he had little hope of regaining a professional image in our eyes. He was not hired." – Brad Karsh, President, Job Bound posted on CollegeGrad.com (July 26, 2006) (19).

One employer has taken the aggressive step of actually requiring applicants who have created personal or MySpace or Face book pages to allow the employer to have full access to the candidates' SNS page. The New York Post reported on January 21, 2009 that the New York City Police Department "is requiring police recruits who have MySpace or Face book pages to watch as an investigator sifts through their most private postings (20). The policy replaces a "previously announced policy of Googling would be cops and visiting them online in the publicly accessible pages of social networking sites (21). The story reveals that the NYPD's new policy has successfully alerted its investigators to some "unsavory would be cops" including an applicant who had a picture of himself "jokingly pointing a gun at his buddy" on his SNS. Needless to say, that applicant was not hired (22). Other would be police officers were reported to have boasted about gang memberships, had videos of violent police beatings, photos involving police uniforms or gear and snide or bigoted remarks on their pages (23). These were not the character traits the NYPD was looking for and none of those individuals made it past the investigation stage.

In another situation involving a seemingly bright young college graduate, a Duke University student did not get the job she applied for with a San Francisco Educational Consulting Firm after the Director of the Company looked at the applicant's Face book page just before the review. The Director found "explicit photographs and commentary about the student's sexual escapades, drinking, and pot smoking, including testimonials from friends, in addition to pictures of the applicant "passed out after drinking." The potential employer was quoted as saying, "When I saw that, I thought, O.K., so much for that (24).

One only has to look at the recent troubles of gold medalist Michael Phelps to realize that public perception means a great deal in the business world. It is clear from the few examples listed above that nothing good can come from exposing personal vices in public, not even if you happen to be a beloved athlete. Once those embarrassing episodes are released into the Web, they cannot be taken back.

f) Getting Dooced

Posting explicit or otherwise unflattering personal information on the Web is not only bad for the potential employee, that practice has also been proven to be unbeneficial to those who were gainfully employed as well. There are many sad tales of employees getting fired from their jobs because of content they had posted on their websites or blogs. The unfortunate experience of being terminated because of your web content is commonly referred to as getting "Dooced". The term Dooced was coined after Heather Armstrong was fired for posting negative comments about her bosses on her blog site which was and still is called Dooce.com (25).

Even employees who work for SNS themselves are not immune to getting Dooced. Joyce Park worked as a software engineer for a social networking site Called Friendster and claims she was terminated for posting publicly available information about the company on her blog, Troutgirl (26). "Employers have Dooced employees for breaches of confidentiality, disclosing trade secrets online, statements in violation of security laws, defamatory blog postings, or "cyber-smearing", and harassing or otherwise offensive online conduct" (27).

Legal Implications for Employers Utilizing SNS to Assist in Hiring Decisions

Modern day employers have an ever increasing number of employment law issues to contend with on a daily basis. The Courts are clarifying and strengthening workers' rights on a regular basis.

With regard to legal issues associated with obtaining personal information about an applicant from a SNS profile page, employers must remain conscious of Title VII of the Civil Rights Act of 1964, the ADA and the ADEA. All of these EEO statutes are in play when it comes to SNS and must be considered before any adverse hiring decisions are made by an employer.

Employers must realize that sometimes having too much information is not a good thing, especially when defending against a discrimination lawsuit. For example, an employer reviews an applicant's MySpace page and innocently discovers that the applicant's favorite activity is her weekly AA meeting. Is that employer setting himself up for an ADA lawsuit if he fails to hire the applicant? Would he have known about the AA meeting if he did not look at the SNS? It certainly would not have come up in an interview unless the applicant brought it up. If the applicant becomes aware that the employer reviewed her MySpace page, she could very easily file a complaint alleging she was not hired because of her disability. These are the types of questions employers must ask themselves if they are going to seek out applicant's personal information on the Web.

Invasion of privacy issues related to SNS profile assessments are not a major challenge for the employer in New York State. Employers must be careful however not to cross the line in their desire to know as much as they can about prospective employees by violating the SNS terms of use or using other unauthorized means to obtain that information.

The Fair Credit Reporting Act also is a factor to be considered by employers who hire recruiters to delve into the personal information of job applicants.

Recent Legislation and Case Law Strengthen and Clarify Employees' Rights in General

As noted above, in today's employment environment, it is more important than ever for employers to make informed hiring decisions. Employment law is developing in a decidedly pro-employee direction. It seems like everyday there is new legislation passed or another Court

decision strengthening the rights of the employee and adding additional restraints and obligations onto management.

One very recent and high profile example of this trend occurred just a couple of weeks when President Obama signed the Lilly Ledbetter Fair Pay Act into law on January29, 2009. Although it was not a surprise to the Labor and Employment Bar, with a stroke of a pen, the President overturned a decision from the United States Supreme Court that had restricted the ability of employees to sue over alleged unequal pay on the basis of gender.

In 2007, the Supreme Court held in Ledbetter v. Goodyear Tire & Rubber that the statute of limitations to sue an employer for discrimination ran from the time that the employer first adopted the discriminatory pay system, regardless of whether the employee experienced the effects of alleged discriminatory practice in each paycheck issued thereafter. The new law clarifies that the time to sue commences each time an employee receives a paycheck that allegedly reflects a discriminatory pay practice.

The Ledbetter case alleged gender discrimination, however, the new law applies to all forms of discrimination protected by Title VII, the ADEA, the ADA and the Rehabilitation Act. The Ledbetter Act impacts any and all compensation decisions including wages, benefits, and employee classifications and promotions that may impact compensation and is retroactive to May 28, 2007, the day before the Supreme Court issued its determination.

In another very recent pro-employee development, the Supreme Court decided in Crawford v. Metropolitan Government of Nashville, 555 US ___ (2009) that the Title VII protection forbidding retaliation by employers against employees who report workplace race or gender discrimination extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation.

On a more local note, New York State passed a new law intended to strengthen the prohibitions against employment discrimination against those with criminal records. This new law, which was effective on February 1, 2009, amends the New York General Business Law and contains both a notice requirement ad a posting requirement as follows:

380-c, General Business Law. If a user requests an investigative consumer report for employment purposes, the user must, in the notice of the consumer, state that a report will be sought and indicate that it is providing a copy of Article 23-A of the New York Correction Law to the consumer which sets for the anti-discrimination provision relating to those with criminal records. It does not matter whether the investigative consumer report will contain any criminal record information.

380-g, General Business Law. This amendment added sub-section (d) which provides that if a consumer report contains a criminal record then the user shall provide a copy of Article 23-A of the Correction Law to the consumer.

It is also the employer's responsibility under the New York law to evaluate the relationship of any conviction for the position sought. Under New York statutory law 296 (15) Executive Law, such an analysis is also a defense to a negligent hiring/retention claim. If a 752, Article 23-A Correction Law review of past convictions is conducted the employer can have past offenses excluded from evidence. So long as it is determined that the employer made a reasonable and good faith determination that the applicant should have been hired based on the factors outlined in Article 23-A, the employee's criminal record is inadmissible in any negligent hiring or retention case pertaining to the employee that may be brought against the employer.

In evaluating the criminal record with the position sought, the category of the offense may or may not relate to the job in question. For example, a recent misdemeanor theft may be relevant to a job where the employee is entrusted with the company's or customer's money or property, but an old felony conviction for the possession of a controlled substance may not be relevant at all. A drunken driving conviction may be relevant to a driving job, but it is probably not relevant to a secretarial position. The law requires that the employers judge each applicant with each position individually. This law will be enforced by the New York State Division of Human Rights and the New York City Commission on Human Rights.

The Fair Credit Reporting Act

The FCRA governs employment background checks for the purposes of hiring, promotion, retention, or reassignment (28). The FCRA and its protections only apply if an employer uses a third party screening company to conduct and prepare the background check (29). The applicant must be notified that an investigation may be performed, the applicant must be given the opportunity to consent and the applicant must be notified if information in the report is used to make an adverse decision (30). Therefore, if an employer hires a third party to search applicants' profiles, the employer would be bound by the provisions of the FCRA and would have to notify the applicant that his SNS profile had been viewed and that the investigation had resulted in an adverse employment decision (31)

Workplace Violence and Negligent Hiring

The growing concern over workplace violence provides some reinforcement to the employer who sees the value in performing background searches on potential candidates' SNS. Sources reveal that about 900 work-related homicides occur annually. In the six year period of 1993-1999, 1.7 million people a year were attacked as they worked (32). In one case, a pizzeria was ordered to pay $175,000 to the rape victim of its delivery man who had a long history of arrests. It was reported that the man did not even have a current driver's license (33)

In New Jersey, employers actually have an affirmative duty to investigate an employee's activities on email and the internet where those activities may lead to harm a third party (34). According to the decision handed down by the New Jersey Superior Court, if an employer is on notice of an employee's use of a workplace computer for an illegal purpose, the employer must investigate and take prompt and effective action to stop the unauthorized activity.

The above illustrations support the employer's desire to know as much as possible about the people they are hiring.

Discriminatory Statutes

An adverse employment decision based on the social networking profile of an applicant may potentially violate anti-discrimination laws. Title VII and the ADA as well as the New York State Human Rights Law and the New York City Human Rights Law prohibit discrimination based on an applicant's race, color, religion, sex, or national origin, or based on an applicant's disability (35). Most of this information is generally available on an applicant's SNS profile.

Employers cannot base their hiring decisions on information that the applicant is a member of ay of the protected classes listed above. In most instances, an employer will probably not be able to determine if an applicant was a member of any of the above protected classes at the pre-interview stage. Therefore, if the employer uses information contained in SNS profiles to

assist it in making hiring decisions, it would be difficult for that employer to defend against a claim that the information about the applicant's race, age, color, religion, sex, or disability was used as the basis for their hiring decision. On the other hand, ignorance of facts related to legally protected characteristics may be a powerful defense to a discrimination allegation. (36) This defense is lost the minute the employer views the SNS profile.

EEOC and OFCCP

The EEOC and the Office of Federal Contract Compliance Programs (OFCCP) have undertaken joint efforts to address the issue of employment tests and selection procedures. The agencies have determined that the use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. (37) "However, the use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability or age (40 or older). (38)

The EEOC does not have a written policy regarding the use of SNS profiles in making hiring decisions. However, the EEOC has recommended that employers can look at the OFCCP which has rules in place regarding internet applicants that went into effect in February 2007 for guidance. (39) Unfortunately, the OFCCP rules do not address the issue head on either. However, Greg Jacob, the solicitor of Labor since December 2007, said that the OFCCP's strategic focus on systemic discrimination over the past few years also has meant closer attention to employment tests and other selection devices used by federal contractors. (40) The agencies cautioned that "*Employers should be very careful in using outside sources of information databases that provide personal information on employees and applicants, and Web sites such as www.myspace.com,"* the officials said.(41)

According to the EEOC, the number of discrimination charges raising the issue of employment testing and exclusions based on criminal background checks, credit reports, and other selection procedures, reached a high point in 2007 at 304 charges. (42)

It is clear that the EEOC and the OFCCP are keeping a close eye on the potential for discrimination based on information found on the internet. In fact, the OFCCP has been studying how hiring practices that rely heavily on internet applications might discriminate against certain disabled individuals in recruitment and hiring.(43) Though there is not much in the way of guidance on the issue, we can look forward to further input by the main federal agencies charged with enforcing the anti-discrimination statutes.

Expectation of Privacy

In order for a person's privacy to be invaded, that person must have a reasonable expectation of privacy. (44) Most statutory and common law protections protect against "state" action and do not apply to private employers. New York does not recognize many of the common law privacy torts and has no explicit right to privacy in its constitution.

Privacy laws will generally not protect an applicant from being denied a position due to the contents of his personal internet postings. The New York Court of Appeals decided the issue almost 40 years ago in Nader v. General Motors Corp., 255 N.E.2d 785 (1970). In Nader, the Court rejected Ralph Nader's invocation of a limited right to privacy regarding particular facts or information that they had disclosed to third parties. The Court found that Nader was deemed to have assumed the risk that persons to whom he disclosed his information would spread that information to others. After Nader, facts shared with others are no longer private in New York.

There may be instances, however, where an employer could be found to have violated the privacy rights of an applicant. MySpace and Face book both have privacy settings that ca be set by the user to limit who can access the user's personal information. If an employer uses illicit means to gain access to an applicant's MySpace account, the employer may be in violation of the Secured Communications Act. (45) For example, if an employer asks someone who has authorization to view the applicant's site to provide the employer with information regarding the applicant. Or if the employer actually hacks into the SNS profile.

The Ninth Circuit Court of Appeals has recognized that a cause of action may be available in a situation where an unauthorized user obtains protected information in violation of the Stored Communications Act. (46) The SCA recognizes and punishes the offense of "intentionally accessing without authorization a facility through which an electronic communication service is provided…and thereby obtaining…access to a wire or electronic storage in such system (47). However, the SCA exempts from liability conduct authorized by a user of that service with respect to a communication of or intended for that user (48). Therefore, if MySpace users permit other students to access and view their profile, those who were employed as a spy for hiring companies will also likely be considered users of the MySpace service and of the MySpace user's stored information under the SCA terms.

Conclusion:

Employers using SNS profiles to obtain personal information about applicants for hiring decisions must proceed with caution. Existing EEO laws must be considered before any adverse hiring decisions are made and the employer must be careful to not violate any consumer protection laws. There is very little formal guidance on the issue at this point in time from the Courts or from the government agencies tasked with enforcing the EEO laws.

One respected commentator may have put it best in a 2008 symposium published in the Employee Rights and Employment Policy Journal: "In many ways, United States labor and employment law sleep-walked into cyberspace. Although there is wide societal recognition that new technologies are leading to the diminishment of personal privacy, there has not been an equal demand for changes in the legal paradigm (49). Employers and employment law practitioners should be on the lookout for the law to catch up with the hyper technical modern workplace that exists today.

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32. *Violence in the Workplace. 1993-1999*. Bureau of Statistics. http://www.ojp.usdoj.gov/bjs/abstract/vw99.html
33. See *Pizza shop ordered to pay delivery man's rape victim*. Omaha World Herald, September 5, 2001 at p. 3b.
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35. See generally Title VII of the Civil Rights Act of 1964, 42 U.S.C. &&2000c – 2000e-17; Americans with Disabilities Act, 42 U.S.C. &&12111-12117. A party alleging discrimination in employment must demonstrate that he/she is a member of the class protected by the statute, that he/she was discharged from employment or barred from a position for which he/she was qualified or paid less in such position and that his/her discharge, exclusion from employment, or receipt of lower wages occurred under circumstances giving rise to an inference of age or sex discrimination (see *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817[1973]; *Ferrante v. American Lung Assn.*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 687 N.E. 2d 1308 [1997]; *Mandell v. County of Suffolk*, 316 F.ed 368, 377 [2d Cir 2003]). Once a plaintiff demonstrates, by admissible evidence, a prima facie case of discrimination, the burdenshifts to the defendant to provide "some legitimate, nondiscriminatory reason for the [plantiff's] rejection" *(McDonnell Douglas Corp., 411 U.S. at 802).*

36. See Supra Note 8 at p. 469-470. See also, 18 Y Jury Civil Rights &81 (an employer cannot be charged with unlawful discrimination on the basis of disability where it was unaware of the complainant's disability at the time of making the employment decision complained of; *Reiniger v. New York State of Div. Of Lottery*, 105 A.D.2d 902, 482 N.Y. S.2d 60 (3d Dept 1984)
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