
WHO ARE YOU? FRAUDULENT CREDENTIALS AND BACKGROUND CHECKS IN ACADEME*

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“Get a genuine college degree in 2 weeks?” says an email advertisement that includes a telephone number that is available twenty-four hours a day, seven days a week. “No Study Required! 100% Verifiable!” says another advertisement, referencing the same telephone number. Apparently some individuals have taken advantage of this opportunity; an investigation in 2004 by the General Accounting Office found twenty-eight employees of the federal government who had “bogus degrees,” and another 463 federal employees who were enrolled in unaccredited institutions.¹ In Pennsylvania, a cat named Colby was awarded a master’s of business administration from a “diploma mill” called the “University of Berkley” that was subsequently sued by the Pennsylvania attorney general and shut down.² Colby’s transcript showed that the cat had a 3.5 grade point average and had attended the university for four semesters.³ The Secret Service has also raided homes and offices in three states, shutting down several fraudulent operations that provided diplomas for non-existing institutions such as “St. Regis University” and “James Monroe University.”⁴

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1. Stephen Barr, *An Endless Search for Accountability*, WASH. POST, May 16, 2004, at C2.

2. David Epstein, *Class Dismissed*, INSIDE HIGHER EDUC., July 8, 2005, available at <http://insidehighered.com/news/2005/07/08/mill>.

3. Debbi Mack, *Circuit Roundup*, CORP. LEGAL TIMES, Mar. 2005, at 72.

4. Thomas Bartlett, *Government Raids a Diploma Mill*, CHRON. HIGHER EDUC., Sept. 2, 2005, at A39. The former executive vice chancellor of “St. Regis University,” Richard J. Novak, agreed to plead guilty to wire and mail fraud and to violations of the Foreign Corrupt Practices Act. These pleas may lead to a prison sentence of up to ten years and fines of more than \$2 million. Thomas Bartlett, *Fake University Paid Bribes for Credentials*, CHRON. HIGHER EDUC.,

A related problem involves resume fraud, in which an individual either claims to have a degree that he or she has not earned or work experience that he or she has not had, or inflates prior work experience to make it appear that the position was more responsible or at a higher level than it actually was. For example, a professor in California who was named the state's poet laureate claimed to have a college degree, but had not earned one.⁵ A football coach hired by the University of Notre Dame claimed to have a master's degree that he had not earned.⁶ A popular professor who had taught for four years at Pennsylvania State University was found to have committed murder as a teenager and to have earned his college degree in prison.⁷

Staff members may also have misrepresented their academic or work credentials, or may have failed to disclose convictions for crimes that are related to their job responsibilities. One commentator estimates that at least fifteen percent of all job applicants in business organizations fail to report criminal convictions;⁸ another reports that nearly one quarter (twenty-three percent) of all applicants misrepresent their educational or employment credentials.⁹ Thorough background checks could very likely have identified these misrepresentations or omissions at the time these individuals were hired, and would have saved the employer embarrassment or, worse, legal liability if the employee harmed someone.¹⁰

Some states have enacted laws requiring background checks for certain employees, such as schoolteachers, day care workers, nurses, or other individuals who work with children, disabled individuals, or others who cannot care for themselves.¹¹ Many nonprofit organizations have implemented background checks for volunteers who work with youth.¹²

Although individuals have challenged employers' use of background checks,

Mar. 31, 2006, at A14.

5. Robin Wilson, *Fall From Grace*, CHRON. HIGHER EDUC., Apr. 4, 2003, at A10.

6. Welch Suggs, *Lessons Unlearned*, CHRON. HIGHER EDUC., July 5, 2002, at A37.

7. Scott Smallwood, *The Price of Murder*, CHRON. HIGHER EDUC., Sept. 12, 2003, at A8.

8. David Kelly, *How Well Do You Know Your Workforce?*, HR WIRE, Oct. 8, 2001, <http://www.hrwire.com/story.asp?01100808.htm>.

9. Merry Mayer, *Background Checks in Focus: Thorough Screening of Recruits Can Help Prevent Surprises*, HR MAGAZINE, Jan. 2002. A study conducted by ResumeDoctor.com reviewed over 1,100 resumes and found that forty-three percent had one or more "significant inaccuracies," including misrepresentations of education, job title, and dates of employment. David Koepfel, *Fudging the Facts on a Resume is Common, and Also a Big Risk*, N.Y. TIMES, Apr. 23, 2006, at 10-11.

10. For an overview of criminal background checks and sex offender background checks, see Paul G. Lannon & Maura J. Gerhart, *Campus Security: Keeping the Bad Ones Out and the Good Ones Safe*, NACUA 45th Annual Conference (June 2005), available at <http://www.nacua.org/meetings/virtalseminars/june2006/Documents/02I%20Lannon.DOC>.

11. See, e.g., Arkansas Nurses Practice Act, ARK. CODE ANN. § 17-87-312 (2005) (requiring background checks for first time applicants for a nursing license); CAL EDUC. CODE § 44332.6 (1998) (requiring a background check prior to issuance of a temporary certificate to work in an elementary or secondary school). See also N.J. STAT. ANN. 15A:3A-1 (2000) (requiring organizations serving youth to conduct background checks of both employees and volunteers).

12. Stephanie Strom, *Groups Expanding Background Checks*, N.Y. TIMES, Aug. 4, 2005, at A12.

including fingerprinting, under constitutional¹³ and common law¹⁴ theories, courts have upheld the use of background checks as long as appropriate notice of the background check was given to the individual. A number of colleges and universities, including James Madison University (Virginia), the California State University system, the University of Arizona, the University of Montana, Frostburg State University (Maryland), and Rowan University (New Jersey), conduct criminal background checks on either all employees, or on non-faculty employees. Pennsylvania State University initiated background checks for all new employees, including faculty, after discovering that a popular faculty member had committed murder over twenty years earlier.¹⁵

This article addresses fraudulent credentials and the use of background checks for faculty and staff positions at colleges and universities. After reviewing the relatively sparse litigation related to fraudulent credentials, the article discusses the various sources of legal liability for colleges and universities when either applicants or employees challenge the use or results of background checks, or when some third party alleges that the lack of a background check (or a defective background check) caused that individual some harm. The article also reviews employer defenses to legal challenges for the discipline or discharge of employees, or for the failure to hire, based upon the results of background checks. Finally, the article discusses legal and policy considerations in developing a policy for the use of background checks for employment decisions.¹⁶

I. FRAUDULENT CREDENTIALS

The problem of misrepresentation of academic degrees occurs in two ways. The individual may claim to have a degree that he or she did not earn, which is an action called "resume fraud." Or the individual may have obtained a fraudulent degree from a "diploma mill," an entity that sells diplomas and transcripts to individuals. Often these diploma mills have names that sound similar to actual colleges and universities, such as "Columbia State University"¹⁷ or "the University

13. *De Veau v. Braisted*, 363 U.S. 144 (1960), discussed in Catherine L. Donohue, *Review of Selected 1997 California Legislation: School Safety: Brutal Slaying Prompts Creation of Employee Criminal Background Check Prior to Employment*, 29 MCGEORGE L. REV. 729 (1998). See also *Henry v. Earhart*, 553 A.2d 124 (R.I. 1989) (rejecting constitutional challenge to mandatory fingerprinting and background checks of schoolteachers). For a discussion of the constitutionality of fingerprinting, see Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?*, 11 WM. & MARY BILL RTS. J. 1273 (2003).

14. See, e.g., *Barr v. Great Falls Int'l Airport Auth.*, 107 P.3d 471 (Mont. 2005).

15. Smallwood, *supra* note 7.

16. Colleges and universities may also conduct background checks on applicants or students, particularly those who will be placed in clinical settings such as hospitals or public schools. Conducting background checks on students may raise issues under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (Supp. 2002). Legal issues related to background checks on students are beyond the scope of this article.

17. *UCLA Soccer Coach Concedes that Degree Came from Diploma Mill*, CHRON. HIGHER EDUC., Feb. 8, 2002, at A39.

of Berkley.¹⁸ Attempting to use a fake degree is apparently not a crime in most states,¹⁹ which means that applicants may risk job loss but not jail time if they lie on applications or use diploma mill degrees to obtain a job or a promotion.

The scope of the problem is substantial. Since 1999, a variety of college and university administrators, athletics coaches, and faculty have been found to have falsified or exaggerated their academic credentials. The former president of Albright College (Pennsylvania) resigned after it was discovered that fellowships and board memberships that he had listed on his resume were fabrications,²⁰ and the president of Quincy University (Illinois) resigned after the trustees discovered that he had not earned two master's degrees that he had listed on his resume.²¹ Quincy Troupe, a professor at the University of California at San Diego, retired after it was discovered that he did not have the bachelor's degree that he claimed.²² The inaccuracy was discovered when Troupe was named as California's poet laureate.²³ The former associate director of the Lawrence Livermore National Laboratory resigned when it was discovered that he had not earned a Ph.D. in applied physics from Princeton, as his superiors believed that he had.²⁴ And several athletics officials were either dismissed or withdrew from new positions

18. Epstein, *supra* note 2.

19. North Dakota and Oregon have enacted laws that make the use of a fake degree to attempt to obtain a job a misdemeanor. See N.D. CENT. CODE, § 15-20.4-15 (LexisNexis 2003) (stating that issuing or using a false academic degree is a class C felony, and using or claiming to have a false academic degree to obtain employment, to obtain a promotion or higher compensation, to obtain admission to an institution of higher learning, or in connection with any business, trade, profession, or occupation is a class A misdemeanor). See also O.R.S. § 348.609 (2005) (forbidding individuals from representing that they have an "academic degree" unless it has been awarded by an accredited institution or has met other standards established by the Oregon Student Assistance Commission). Individuals found guilty may be fined up to \$1,000. Will Potter, *States Try to Crack Down on Diploma Mills*, CHRON. HIGHER EDUC., Dec. 19, 2003, at A26. And federal employees who misrepresent their educational credentials may be prosecuted under 18 U.S.C. § 1001, which provides for a fine of up to \$10,000 or imprisonment for not more than five years, or both, for making a "false, fictitious or fraudulent statement or representation" to a federal agency. 18 U.S.C. § 1001 (2000), amended by Act of July 27 2006, 18 U.S.C.A. § 1001 (West Supp. 2006). Other states prohibit the use of false information including: Colorado (COLO. REV. STAT. § 26-6-1-5.5 (West 2002)) (child care providers); Illinois (720 ILL. COMP. STAT. 5/17-2.5 (West Supp. 2006)) (college employees); Iowa (IOWA CODE § 715.6A(2)(d) (West 2003)); Michigan (MICH. COMP. LAWS § 390.1604 (West Supp. 2005)); New Jersey (N.J. STAT. ANN. § 18A:3-15.2 (West 1999)); Ohio (OHIO REV. CODE ANN. § 4715.19 (West 2006)) (dentists); and Tennessee (TENN. CODE ANN. § 39-17-112(b) (2004)). A few states outlaw the false production or alteration of an academic degree: Iowa (IOWA CODE § 715A.6A(2)(a) (2005)); Michigan (MICH. COMP. LAWS § 390.1603 (2005)); and Tennessee (TENN. CODE ANN. § 39-17-112(a) (2004)).

20. Julianne Basinger, *4 Years After a Scandal, a President Steps Down*, CHRON. HIGHER EDUC., Mar. 5, 2004, at A23.

21. Lindsay Bosslett, *President Quits after Resume is Questioned*, CHRON. HIGHER EDUC., Nov. 8, 2002, at A29.

22. *Id.*

23. Elizabeth F. Farrell, *California's Poet Laureate Admits to Lie on Resume*, CHRON. HIGHER EDUC., Nov. 15, 2002, at A15.

24. Robin Wilson, *Lab Official Resigns Over Lack of a Ph.D.*, CHRON. HIGHER EDUC., Sept. 17, 1999, at A18.

after it was discovered that they had not earned graduate degrees that they claimed on their resumes,²⁵ or their degrees were from diploma mills rather than accredited institutions.²⁶

Litigation involving resume fraud typically arises when an employer discharges an employee for falsifying his or her educational background on an employment application. Although one court asserted that misrepresenting one's educational attainment is not illegal,²⁷ judges have been unsympathetic to employees who have challenged discharges linked to resume fraud.²⁸

Many such challenges involve claims that the discharge was motivated by discrimination rather than by the employee's misrepresentation. For example, in *Williams v. Boorstin*,²⁹ the former employee had claimed several educational credentials, including a law degree from Georgetown University that he had not earned, to secure a position as a copyright examiner at the Library of Congress. The court rejected the plaintiff's claim of race discrimination and retaliation, ruling that the plaintiff's "formidable record of lying" to the employer clearly justified his discharge.³⁰ In other cases, plaintiffs have challenged their discharges on the grounds of retaliation for claims of sexual harassment. In *Fishel v. Farley*,³¹ a woman who misrepresented her educational credentials on her employment application was discharged for the falsification after she made a sexual harassment complaint. She sued the employer for harassment, but lost both that claim and the claim that her termination was retaliatory.³² The court found that the employer had responded promptly and appropriately to her harassment claim, and that the falsification was ample grounds for discharge.³³ Similarly, in *Rizzo v. Sheahan*,³⁴ a police officer who falsely claimed that she had earned a General Equivalency Diploma, and who submitted fraudulent documentation of such credential, was discharged after filing a sexual harassment complaint. The investigation of her fraudulent documentation had occurred prior to her filing the harassment complaint, and the court ruled that the employer had discharged her for just cause.³⁵

Public employees may bring constitutional claims when challenging a discharge based upon resume fraud. In *Barszcz v. Bd. of Trs. of Cmty. Coll. Dist. No. 504*,³⁶ a professor at Triton College stated on his application that he would receive his master's degree in economics a few months later. He did not receive the degree,

25. Welch Suggs, *Athletic Director Caught in 2002 Resume Scandal Gets a Second Chance*, CHRON. HIGHER EDUC., May 7, 2004, at A41.

26. *UCLA Soccer Coach Concedes that Degree Came From Diploma Mill*, *supra* note 17.

27. *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650 (4th Cir. 2004).

28. *See, e.g., Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980).

29. 663 F.2d 109.

30. *Id.* at 117.

31. No. 93-480, 1994 WL 43793 (E.D. La., Feb. 8, 1994).

32. *Id.* at *10.

33. *Id.* at *9.

34. No. 97 C 3995, 2000 WL 679982 (N.D. Ill., May 22, 2000).

35. *Id.* at *11.

36. 400 F. Supp. 675 (N.D. Ill. 1975).

and he did not inform college officials.³⁷ He was tenured three years later.³⁸ According to the court, he “wore a masters [sic] gown at several graduation ceremonies and accepted a salary consistent with that earned by Triton College teachers possessing masters [sic] degrees.”³⁹ Furthermore, the college catalog listed him as holding a master’s degree.⁴⁰ The college decided to terminate him without a hearing, but it allowed him to continue to teach until the end of the semester, and it then provided a full evidentiary hearing.⁴¹ The professor claimed that his termination violated the Fourteenth Amendment’s Due Process Clause, but the court disagreed, saying that the post-termination hearing satisfied constitutional dictates.⁴²

Misrepresenting one’s educational credentials may not only lead to termination, but may also make the individual ineligible for any severance benefits to which he or she otherwise would have been entitled. In *Moos v. Square D Co.*,⁴³ the plaintiff had given an altered college transcript to the employer at the time he was hired, stating that he had earned a college degree (which he had not), and raising the grades he had received in seven classes.⁴⁴ When a change of management occurred and the plaintiff was selected to be laid off, he again submitted the altered transcript to claim certain severance benefits.⁴⁵ When the employer discovered the misrepresentation, the plaintiff was discharged.⁴⁶ The plaintiff filed a lawsuit under the Employee Retirement Income Security Act,⁴⁷ claiming that the benefit plan administrator’s refusal to award him benefits violated the Act.⁴⁸ The trial court awarded summary judgment to the employer, and the appellate court affirmed, saying that the plan administrator had the discretion to determine that the plaintiff’s multiple misrepresentations concerning his credentials disqualified him from receiving the benefits.⁴⁹

Similarly, misrepresenting one’s educational credentials may make one ineligible for unemployment compensation once a job is lost. In *Denberg v. Loretto Heights Coll.*,⁵⁰ the plaintiff, who had worked as a part-time instructor at the college, applied for a full-time position.⁵¹ To be hired for the position, he was required to provide transcripts for the degrees he claimed to have earned.⁵² The

37. *Id.* at 677.

38. *Id.*

39. *Id.* at 677.

40. *Id.*

41. *Id.*

42. *Id.* at 679–80.

43. 72 F.3d 39 (6th Cir. 1995).

44. *Id.* at 40.

45. *Id.* at 41.

46. *Id.*

47. 29 U.S.C. § 1001 (2000).

48. *Moos*, 72 F.3d at 41.

49. *Id.* at 41–43.

50. 694 P.2d 375 (Colo. Ct. App. 1984).

51. *Id.* at 376.

52. *Id.*

plaintiff submitted forged transcripts stating that he had earned a Ph.D. from New York University, an M.A. from the University of New Mexico, and a B.A. from Hunter College.⁵³ In truth, the plaintiff had earned no college degrees at all.⁵⁴ Although the plaintiff informed his supervisor of his misrepresentations approximately four weeks after he had begun teaching, the supervisor did not inform the assistant dean of the problem until four months later.⁵⁵ When the assistant dean verified the misrepresentation, the plaintiff was fired.⁵⁶

The plaintiff applied for unemployment benefits, arguing that the discharge was without merit.⁵⁷ Because the plaintiff's teaching had been rated as satisfactory, he asserted that the degrees he claimed were immaterial to the job requirements.⁵⁸ He also asserted that the college's four-month tolerance of his misrepresentation was a waiver of the right to terminate him.⁵⁹ The court rejected both claims, ruling that possessing earned graduate degrees is an appropriate requirement for a faculty position, and that the college's accreditation status could have been threatened had it retained a full-time professor who had never earned a college degree.⁶⁰ The court upheld the denial of unemployment benefits.⁶¹

When an employee deceives the employer about his or her educational credentials, the employer may face legal liability from third parties. For example, in *Univ. of North Carolina v. Shoemate*,⁶² a resident at the university's hospital was hired after he presented forged documents supporting misrepresentations about his educational credentials.⁶³ The resident treated patients at the hospital for over a year before the misrepresentations were discovered.⁶⁴ A patient whom the resident had treated filed a malpractice action against the resident and the hospital, but the hospital refused to provide malpractice coverage for the resident, stating that his employment contract was obtained by fraud and thus was void.⁶⁵ Although the trial court ruled for the hospital, the appellate court reversed, stating that the resident was the hospital's agent, and thus, the hospital was obligated to provide malpractice coverage for him, despite his fraud, and irrespective of whether a valid employment contract existed.⁶⁶

Similarly, a construction consulting firm lost its motion for summary judgment

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 377.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* For a case brought by a security guard who was terminated when it was discovered that he had claimed a college degree that he had not earned, see *Miller v. Del. State Univ.*, No. 93A-12-001, 1994 WL 380442 (Del. Super. Ct. July 13, 1994).

62. 437 S.E.2d 892 (N.C. Ct. App. 1994).

63. *Id.* at 893.

64. *Id.* at 893-94.

65. *Id.* at 894.

66. *Id.* at 898.

when one of its clients sued the firm for losses it sustained, which it blamed on the defendant firm's employee.⁶⁷ That employee had claimed credentials that he did not possess; he had testified at an arbitration hearing on behalf of the client, and his misrepresentations had been discovered at that time.⁶⁸ The client argued that this revelation caused it to lose the arbitration and a large sum of money.⁶⁹ The plaintiff client sued the individual's employer for negligence, fraud, and breach of contract.⁷⁰ The court refused to award summary judgment to the defendant employer, stating that there was evidence that the client had relied upon the employer's representations concerning the employee's credentials.⁷¹

A case involving an employee protected by civil service regulations demonstrates the importance of prompt verification of an employee's educational credentials. In *Bond v. Dept. of Rehab. & Corrs.*,⁷² the plaintiff applied for a position as business administrator at the Mansfield Correctional Institution.⁷³ He claimed to have an MBA from Ashland College, which he had not earned.⁷⁴ The plaintiff was hired and worked for four years before the misrepresentation was discovered.⁷⁵ When the prison warden discovered the fraud, he discharged the plaintiff.⁷⁶ The State Personnel Board of Review upheld the discharge, and the trial court to which the plaintiff appealed affirmed the board's decision.⁷⁷ The appellate court reversed, citing the provisions of the state's administrative code requiring any discipline to be initiated no later than two years after its occurrence.⁷⁸ Because the falsification occurred four years before the plaintiff's discharge, the prison was barred by the regulation, which acted as a statute of limitations, from disciplining the plaintiff for his fraud.⁷⁹ Furthermore, had the prison followed the state's rules concerning the verification of educational credentials for employees, the fraud would have been discovered in time to discharge the plaintiff properly.⁸⁰

As the cases discussed above demonstrate, employees usually (but not always) lose challenges to discharges that occur when resume fraud or a fraudulent credential is discovered. The cases also demonstrate that the employee's fraud may involve the employer in legal claims of third parties in addition to litigation over the discharge. Therefore, the cases provide substantial legal justification for the wisdom of checking employees' credentials before hiring them.

67. *Wartsila NSD N. Am., Inc. v. Hill Int'l., Inc.*, 342 F. Supp. 2d 267, 270 (D.N.J. 2004).

68. *Id.* at 271.

69. *Id.* at 272.

70. *Id.*

71. *Id.* at 288-91.

72. No. 99-CA-22, 2000 WL 1604 (Ohio Ct. App. Dec. 21, 1999).

73. *Id.* at *1.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at *1-2.

78. *Id.* at *1-3 (citing OHIO ADMIN. CODE 124:3-04 (2003)).

79. *Id.* at *2-3.

80. *Id.* at *3.

II. LEGAL CONSIDERATIONS IN USING BACKGROUND CHECKS⁸¹

A. Statutory Requirements

Federal law⁸² and the laws of several states⁸³ regulate how background checks are conducted and the type of information to which the subject of the background check is entitled. The federal Fair Credit Reporting Act (“FCRA”) regulates the use of “consumer reports,” defined as reports about an individual’s personal and credit characteristics, character, general reputation, and lifestyle.⁸⁴ If the employer conducts its own background check without the use of an external agent, then the FCRA does not apply.⁸⁵ If, however, the employer uses an outside credit reporting, investigative service, or other entity to perform any aspect of the background check,⁸⁶ the FCRA requires that certain steps be taken with respect to

81. For a discussion of the legal constraints on various types of background checks, see MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 173–92 (Bureau of National Affairs, Inc. ed., BNA Books 2d ed. 2003).

82. Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 (2000). The Federal Trade Commission enforces the FCRA.

83. See, e.g., California Consumer Credit Reporting Agencies Act (CCRA), CAL. CIV. CODE §§ 1785.1–1785.36 (West 1998 & Supp. 2006) and the California Investigative Consumer Credit Reporting Agencies Act (ICRA), CAL. CIV. CODE §§ 1786–1787 (West 1998 & Supp. 2006). Several states require background checks for certain positions, such as school, residential care, or health care employees, and specify how the information may be used, to whom it may be disclosed, and whether the candidate has the right to obtain a copy of the background check report. See, e.g., Alabama: ALA. CODE § 16-22A-3(7) (LexisNexis Supp. 2005); Alaska: ALASKA STAT. § 14.20.017 (2004); Arizona: ARIZ. REV. STAT. § 15-512 (LexisNexis 2002 & Supp. 2005); Arkansas: ARK. CODE ANN. § 6-17-411 (Supp. 2005); Delaware: DEL. CODE ANN. 11 § 8571 (2001 & Supp. 2004); District of Columbia: D.C. CODE §§ 4-1501.01–4-1501.11 (LexisNexis Supp. 2006); Idaho: IDAHO CODE ANN. § 56-1004A (Supp. 2006); Illinois: 105 ILL. COMP. STAT. 5/10-21.9 (2006); Indiana: IND. CODE § 10-13-3-38.5 (LexisNexis Supp. 2006); Louisiana: LA. REV. STAT. ANN. §§ 15:587(1)(C), 17:15 (Supp. 2006); Minnesota: MINN. STAT. § 123B.03 (West Supp. 2006); Mississippi: MISS. CODE ANN. § 37-9-17 (West Supp. 2005); New Mexico: N.M. STAT. § 22-10A-5 (LexisNexis 2006); New York: N.Y. EDUC. LAW § 3035 (McKinney Supp. 2006); North Dakota: N.D. CENT. CODE § 12-60-24 (Supp. 2003); Ohio: OHIO REV. CODE ANN. §§ 109.572, 3301.32 (LexisNexis Supp. 2006); Oregon: OR. REV. STAT. § 326.603 (2005); Pennsylvania: 23 PA. CONS. STAT. ANN. § 6355 (West 2001); Rhode Island: R.I. GEN. LAWS §§ 12-1-4, 16-2-18.1 (Supp. 2005); Texas: TEX. EDUC. CODE ANN. § 22.083 (Vernon 2006); Utah: UTAH CODE ANN. § 53A-3-410 (Supp. 2005); Washington: WASH. REV. CODE § 28A.400.301 (West 2006).

84. 15 U.S.C. § 1681a(d)(1) (Supp. 2003). “Consumer reports” may include checks of Department of Motor Vehicle records, criminal background checks, and, under some circumstances, drug test results. Teresa Butler Stivarius et al., *Background Checks: Four Steps to Compliance in a Multistate Environment*, SOC’Y FOR HUMAN RES. MGMT., Mar.–Apr. 2003.

85. See 15 U.S.C. § 1681 (2000).

86. According to a report published by the Bureau of National Affairs, “most employers that want to conduct criminal history checks on their workers and job applicants use third-party consumer reporting agencies.” Eric Lekus, *Privacy Rights: Using FBI Databases for Hiring Purposes Raises Many Issues, Commentators Tell DOJ*, DAILY LAB. REP., Vol. 3, No. 40, Oct. 14, 2005, at 1364, available at <http://pubs.bna.com/ip/BNA/whl.nsf/is/a0b1p5k6d3>.

the information obtained from external agents.⁸⁷

1. The employer must notify the job candidate in writing, “in a document that consists solely of the disclosure,” that a consumer report may be used to make a hiring decision;⁸⁸
2. The employer must obtain the candidate’s written authorization to obtain a consumer report from an external agent;⁸⁹
3. If the employer relies on the consumer report to make a negative hiring or other employment decision, the employer must, prior to making the decision, give the candidate a pre-adverse action disclosure, a copy of the consumer report, and a copy of a summary of the individual’s rights under the Fair Credit Reporting Act, which the consumer reporting agency is required to provide along with the consumer report;⁹⁰
4. After the employer has made a negative employment decision, the employer must give the candidate notice of the negative action in oral, written, or electronic form. The notice must include the name, address, and telephone number of the consumer reporting agency that supplied the consumer report, a statement that the consumer reporting agency did not make the negative employment decision, and a notice of the candidate’s right to dispute the accuracy or completeness of the information provided by the consumer reporting agency, as well as notice of the candidate’s right to obtain a free consumer report from the agency within sixty days.⁹¹

The employer will also be required to certify to the consumer reporting agency that the employer will not misuse any information in the report in a manner that would violate federal or state equal employment opportunity laws or regulations.⁹²

The Federal Trade Commission has stated that a criminal background check conducted by the state police or the FBI is not a “consumer report” because these agencies perform these roles as part of their statutory duty to protect the public.⁹³ Furthermore, the FCRA does not apply to a communication by a previous employer to a prospective employer that involves information about the candidate’s “employment history and job performance” (e.g., a reference check,

87. See 15 U.S.C. § 1681 (2000).

88. 15 U.S.C. § 1681b(b)(2)(A)(i) (2000).

89. See *id.* § 1681b(b)(2)(A)(ii). Although the regulations do not address the use of electronic authorizations or “mouse clicks” to indicate acceptance of an employer’s requirements, it would appear that such forms of obtaining candidates’ authorization would not be excluded from the FCRA.

90. See *id.* § 1681b(b)(3)(A).

91. See *id.* § 1681b(b)(3)(B)(i).

92. See *id.* § 1681b(b)(1)(A).

93. Letter from Clarke W. Brinckerhoff, Attorney, Federal Trade Commission, Division of Credit Practices Bureau of Consumer Protection, to A. Dean Pickett, Attorney, Magnum, Wall, Stoops & Warden, July 10, 1998, <http://www.ftc.gov/os/statutes/pickett/index.htm>.

whether oral or written).⁹⁴ If an employer hires a private investigator to contact a candidate's references, current or former colleagues or neighbors, or to verify previous employment history and performance, that information would be considered to be a "consumer report" and would be subject to the FCRA.⁹⁵ But if the employer uses its own employee(s) to collect such information, the FCRA would not apply.⁹⁶

International background checks may require compliance with the laws of other countries or aggregations of countries. For example, the European Union's Directive on Data Protection regulates the transfer of personally-identifiable data to countries whose laws regarding data privacy do not meet the standards of the EU's Directive.⁹⁷ The U.S. Department of Commerce, in collaboration with the European Commission, has developed a "Safe Harbor" framework.⁹⁸ Employers certifying that they comply with this framework will be added to a "Safe Harbor List" and will be permitted to receive personal data from countries that are members of the European Union.⁹⁹

B. Lawsuits by Applicants or Current Employees

As noted above, individuals who have been rejected for employment as a result of background checks, or whose employment has been terminated after a background check was done, have challenged their use under tort and discrimination theories. Tort claims include defamation, negligence in obtaining or using the report, and invasion of privacy. Discrimination claims typically involve allegations of race discrimination. Although there have been few legal challenges to the use of background checks, litigation against nonacademic employers is instructive in analyzing how courts respond to plaintiffs' claims with respect to the use of background checks.

Employers should use care in communicating the results of a background check to co-workers or others who do not have a business need to know the information, particularly if it indicates prior criminal convictions. In *McClesky v. Home Depot, Inc.*,¹⁰⁰ an employee sued his former employer for defamation and negligence.¹⁰¹ McClesky was terminated from his position at a Home Depot store for falsification of his employment application.¹⁰² Although the employee had claimed on his

94. *Id.*

95. *Id.*

96. *Id.*

97. Directive 95/46/EC On the Protection of Individuals With Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

98. U.S. Department of Commerce, Export Portal, <http://www.export.gov/safeharbor/> (last visited Sept. 18, 2006). For a series of recommendations concerning international background checks, see Jason Morris, Nick Fishman & Robert Thompson, *Tips for Conducting International Background Checks*, SOC'Y FOR HUMAN RES. MGMT., June 2005, http://www.shrm.org/global/library_published/subject/nonIC/CMS_012943.asp.

99. *Id.*

100. 612 S.E.2d 617 (Ga. Ct. App. 2005).

101. *Id.* at 618.

102. *Id.*

employment application that he had not been convicted of a criminal offense in the past five years, a background check revealed that he had used an alias and had, indeed, been convicted of a variety of felonies during the five-year period.¹⁰³ McClesky claimed that the information in the background check was false and he took exception to the fact that three individuals were present at a meeting at which he was told that he was dismissed for falsification of his employment application.¹⁰⁴ The court noted that the three employees present at the meeting were the store manager, an assistant manager, and a loss prevention specialist, all of whom had a business reason to be present and to know the reason for McClesky's discharge.¹⁰⁵ The court determined that a fourth individual, who was told later that McClesky had been convicted of child molestation, also had a business need to know because he was a co-worker and McClesky's sudden departure had a significant impact on his workload.¹⁰⁶ This communication was made in a private room, and the co-worker was told that the information was confidential.¹⁰⁷ Despite the fact that this court shielded the employer from liability, a more prudent employer would have simply told the co-worker that McClesky had been terminated for cause, without elaborating on the reasons.

McClesky had signed a waiver at the time he applied for employment that "release[d] Home Depot and/or its agents and any person or entity, which provides information . . . from any and all liabilities, claims or lawsuits in regard to the information obtained from any and all of the . . . referenced sources used."¹⁰⁸ McClesky argued that the court should not enforce the release because the employer was grossly negligent and acted with malice.¹⁰⁹ The trial court awarded summary judgment to the employer, and the state court of appeals affirmed, ruling that the employer's behavior did not meet the standard for gross negligence or malice, and that the communication with the co-worker was privileged.¹¹⁰

Similarly, a part-time security officer at the Great Falls International Airport who was dismissed when a background check revealed an arrest for criminal nonsupport was unable to get his case before a jury. In *Barr v. Great Falls Int'l*

103. *Id.* at 619.

104. *Id.*

105. *Id.*

106. *Id.* at 620.

107. *Id.*

108. *Id.* at 618.

109. *Id.* at 619.

110. Communications subject to a privilege will not create liability on the part of the communicator. In this case, the court, although not specifying the type of privilege, appeared to refer to the "common interest" privilege, as described in Section 596 of the Restatement (Second) of Torts. *Id.* at 621; RESTATEMENT (SECOND) OF TORTS § 596 (1977). The court cited *Jones v. J.C. Penney Co.*, noting that "a qualified privilege also exists in those cases involving an employer's disclosure of the reasons concerning an employee discharge to fellow employees 'where the disclosure is limited to those employees who have a need to know by virtue of the nature of their duties (such as supervisors, management officials, . . . etc.) and those employees who are otherwise directly affected . . . by the discharged employee's termination.'" *McClesky*, 612 S.E.2d at 621 (quoting *Jones v. J.C. Penney Co.*, 297 S.E.2d 339, 340 (Ga. Ct. App. 2005)).

Airport Auth.,¹¹¹ Barr, the plaintiff, alleged a variety of tort claims, including invasion of privacy, negligence and negligence per se, and civil rights claims.¹¹² He also alleged that the employer breached the federal Privacy Act,¹¹³ which protects the privacy of confidential criminal information, as well as state law regarding the treatment of confidential criminal information.¹¹⁴

The court ruled that Barr's arrest was public information, and thus federal and state privacy laws regarding confidential criminal information did not apply.¹¹⁵ With respect to Barr's common law breach of privacy claim, the court ruled that Barr had no expectation of privacy in a public arrest record, even one that was thirty years old.¹¹⁶ And with respect to his negligence claim, the court ruled that the employer had no duty to limit disclosure of Barr's arrest, because it was public information.¹¹⁷

The court in *Barr* did not discuss the lawfulness of using arrest records in cases in which no conviction ensued to deny an individual employment or to dismiss an individual. In Barr's case, the fact that he was a security officer could justify the use of arrest records even if no conviction ensued. For most positions, however, both federal and state law generally forbid the use of arrest records alone unless the position is one involving public safety, as was the case in *Barr*. The Equal Employment Opportunity Commission has taken the position that the use of arrest records, when there has been no conviction, has a disparate impact on non-whites, who tend to be arrested, but not convicted, at a rate higher than that of white individuals.¹¹⁸ The federal courts have agreed.¹¹⁹ The laws of some states forbid using arrest records for crimes for which the candidate has not been convicted to deny an individual employment.¹²⁰ For example, Massachusetts law prohibits

111. 107 P.3d 471 (Mont. 2005).

112. *Id.* at 474.

113. National Crime Prevention Policy Compact (Privacy Act), 5 U.S.C. § 552(a) (2002).

114. *Barr*, 107 P.3d at 474.

115. *Id.* at 475.

116. *Id.* at 476.

117. *Id.* at 477.

118. The EEOC *Compliance Manual* states that the use of arrest records to make employment decisions may lead to disparate impact claims on the basis of race. "[W]hen a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow-up inquiries necessary to evaluate his/her credibility." *Section 15: Race & Color Discrimination*, 2 EEOC Compl. Man. (BNA) N. 331, at 60 (Apr. 4, 2006). See *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC Policy Guidance No. N-915-061 (1990). See also John L. Sarratt, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. C.R.-C.L. L. REV. 165 (1970).

119. See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970).

120. See, e.g., CAL. LAB. CODE § 432.7 (West 2003 & Supp. 2006); CONN. GEN. STAT. § 31-51i (West 2003); HAW. REV. STAT. § 378-2.5 (LexisNexis 2004 & Supp. 2005); 775 ILL. COMP. STAT. 5/2-103 (West 2001 & Supp. 2006); MASS. GEN. LAWS ch. 151B, § 4 (LexisNexis 1999 & Supp. 2006); N.Y. EXEC. LAW § 296(16) (McKinney 2006); OR. REV. STAT. § 181.555 (2005); R.I. GEN. LAWS § 28-5-7 (2003); WIS. STAT. § 111.335 (West 2002). See also Daniel L.

employers from inquiring into an applicant's arrests or detentions in situations in which no conviction resulted, as well as first convictions for drunkenness, simple assault, speeding, minor traffic violations, or disturbing the peace.¹²¹ Furthermore, under Massachusetts law, a sealed record is treated as though the individual had no criminal record.¹²² New York law requires written notice if a negative employment decision is related to a conviction.¹²³

C. Lawsuits by Third Parties

In addition to lawsuits by applicants or employees challenging the use of background checks, employers face the possibility of lawsuits brought by individuals who claim to have been harmed by an employee, and assert that had the employer conducted a reasonable background check, the harm would not have occurred. The most frequent legal claim is that of negligent hiring, in which a party physically or financially harmed by an employee sues the employer; claims of negligent retention or supervision often accompany negligent hiring claims. Under these tort theories, the employer may be held directly liable for his or her failure to use reasonable care in hiring an individual that the employer knew, or should have known, was unfit for the position.¹²⁴ The tort of negligent hiring differs from the doctrine of *respondeat superior*¹²⁵ in that the employer may be found liable for the tortious behavior of its employee even if the employee is not acting within the scope of his or her employment, while a plaintiff must demonstrate that the employee was acting within the scope of his or her job in order to prevail under a *respondeat superior* theory.¹²⁶ Because the injuries to individuals in these cases are typically not considered to be within the scope of the injuring party's employment, victims of physical violence or fraud tend to bring negligence claims instead.

Although negligent hiring cases are very fact-sensitive, and thus difficult to characterize in a general way, plaintiffs in such cases typically assert that the employer has breached a duty not to expose one or more third parties to a dangerous or incompetent employee. The plaintiff alleges that the employer breached this duty by not exercising reasonable care in hiring the employee, either

Solove & Chris J. Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357 (2006) (proposing a federal Model Privacy Regime to supplement current federal privacy laws, particularly with respect to commercial data brokers).

121. MASS. ANN. LAWS, ch. 151B, § 4(9) (LexisNexis 1999 & Supp. 2006).

122. MASS. ANN. LAWS, ch. 276, § 100A (LexisNexis 2002). See also COLO. REV. STAT. § 24-72-308(f) (West 2001 & Supp. 2005); VA. CODE ANN. § 19.2-392.4 (2004). For a review of state laws limiting the use of prior criminal activity in evaluating an applicant for employment, see Wendell V. Courtney & Matthew T. Rogers, Presentation, Checking New Hires at the Door, NACUA 45th Annual Conference (June 2005).

123. N.Y. CORRECT. LAW § 754 (West 2003).

124. For a discussion of the negligent hiring doctrine, see Michael A. Gamboli, *Negligent Hiring—Caveat Employer*, 44 R.I. B. J. 13 (Nov. 1995).

125. For a discussion of *respondeat superior*, or vicarious liability, see WILLIAM J. PROSSER, *LAW OF TORTS* 458-67 (West Publishing Company 4th ed., 1971).

126. Gamboli, *supra* note 124, at 13 (citing DiCosala v. Kay, 450 A.2d 508 (N.J. 1982)).

because the employer did not conduct a background check or because the background check was incomplete or inadequate. The plaintiff must also prove that the harm incurred was proximately caused by the employer's decision to hire the employee (sometimes referred to as the "nexus").

In *Blair v. Defender Servs., Inc.*,¹²⁷ a college student was assaulted by a custodian who was employed by a janitorial service pursuant to a contract between it and Virginia Polytechnic Institute and State University. The student sued the janitorial service for negligent hiring, negligent supervision, and negligent retention.¹²⁸ The contract required the janitorial service to perform background checks on all of its employees assigned to work at the University.¹²⁹ The employer had not performed a background check on the assailant, against whom a protective order had been issued in a nearby county for a similar assault on a woman.¹³⁰ Had the janitorial service conducted the required background check, it would have discovered the protective order.¹³¹ The student sued the janitorial service, but not the university.¹³² Although the trial court had awarded summary judgment to the janitorial service on the plaintiff's claims of negligent hiring, supervision, and retention, the appellate court reversed the award with respect to the negligent hiring and retention claims.¹³³ Because the university, not the janitorial service, was contractually responsible for supervising the custodian, summary judgment on the negligent supervision claim was affirmed. Similarly, in *Doe v. Garcia*,¹³⁴ a state supreme court reversed a summary judgment award for a medical center. The court ruled that the medical center, which had not conducted a reference check before hiring a hospital employee who later assaulted a patient, could be held liable for negligent hiring; the assailant had been terminated from his previous job for the same misconduct.

A community college that failed to conduct a background check on an instructor was found liable to a student he injured. In *Harrington v. Louisiana State Bd. of Elementary & Secondary Educ.*,¹³⁵ a student enrolled in a culinary apprenticeship program at Delgado College sued the instructor, who was also the program director, and the college's trustees for vicarious liability and negligent hiring, after the instructor raped her.¹³⁶ The instructor had a criminal record for drug violations and theft, and, although the college had checked the validity of his educational credentials, the college had not conducted a background check before hiring him.¹³⁷ The trial court had awarded summary judgment to the school board,

127. 386 F.3d 623 (4th Cir. 2004).

128. *Id.* at 624.

129. *Id.* at 626.

130. *Id.* at 627.

131. *Id.*

132. *Id.* at 630.

133. *Id.* at 628.

134. 961 P.2d 1181 (Idaho 1998), *abrogated by* Hunter v. State, 57 P.3d 755 (Idaho 2002).

135. 714 So. 2d 845 (La. Ct. App. 1998).

136. *Id.* at 852.

137. *Id.* at 850.

asserting that the rape had not occurred in the course of the instructor's employment, as he had taken the student to the home of a friend who owned a restaurant.¹³⁸ The appellate court reversed, ruling that the instructor-student relationship was in effect at the time of the rape, and therefore both the instructor and the school board were liable.¹³⁹

Cases involving physical assaults by individuals who have access to homes provide useful examples of the use of the negligent hiring theory. For example, in *Elliott v. Williams*,¹⁴⁰ a state appellate court reversed an award of summary judgment against a plaintiff who had been assaulted in her apartment by a security guard employed by the defendant landlord. The employer had not performed a background check prior to hiring the guard; had the employer done so, the plaintiff argued, the employer would have discovered that the guard had a criminal record.¹⁴¹ Although the defendant argued that the plaintiff's action of admitting the security guard to her apartment was the proximate cause of her injury, the court ruled that a jury could find that she relied on his position as a security guard to justify admitting him, and that the employer's act of hiring the security guard could be found to be the proximate cause of her injury.¹⁴² In a similar case, *Keibler v. Cramer*,¹⁴³ a trial court found that the employer had a duty to perform a reasonable background check on an employee hired to read gas meters, and that punitive damages could be awarded because the employer's failure to perform a background check could be deemed outrageous.¹⁴⁴ Failure to perform a background check for a position involving access to school-age children has persuaded judges to allow negligent hiring cases to go to a jury.¹⁴⁵ Background checks that are cursory and incomplete may also expose an employer to liability for negligent hiring.¹⁴⁶ The scope of a background check that may be suitable for a simple job that is subject to close supervision is different from the scope of a background check for an individual who is given substantial responsibility, access to vulnerable people or to money, or who has access to individuals' homes because of his or her job responsibilities.¹⁴⁷

138. *Id.* at 847.

139. *Id.* at 852.

140. 807 N.E.2d 506 (Ill. App. Ct. 2004). *See also* Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983).

141. *Id.* at 508.

142. *Id.* at 512.

143. 36 Pa. D. & C.4th 193 (Pa. Ct. C.P. 1998).

144. *Id.* at 200.

145. *See, e.g.*, Mueller v. Cmty. Consol. Sch. Dist. 54, 678 N.E.2d 660 (Ill. App. Ct. 1997). *See also* Harrington, 714 So.2d 845; T.W. v. City of New York, 729 N.Y.S.2d 96 (N.Y. App. Div. 2001).

146. *See, e.g.*, Welsh Mfg. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984). *See also* Wise v. Complete Staffing Servs., 56 S.W.3d 900 (Tex. App. 2001).

147. *See, e.g.*, Saine v. Comcast Cablevision of Ark., Inc., 126 S.W.3d 339 (Ark. 2003) (affirming summary judgment in favor of employer in case involving a cable installer who assaulted and attempted to murder a homeowner while performing his job in her house where a background check performed by employer found no information to suggest he had a predisposition to violence). *See also* Spencer v. Health Force, Inc., 107 P.3d 504 (N.M. 2005)

On the other hand, if the background check reveals no criminal record, or provides information that is not relevant to the job for which the subject is being considered, the employer may avoid liability for negligent hiring. For example, in *Reed v. Kelly*,¹⁴⁸ a woman who was sexually touched by a security guard sued his employer for negligent hiring. Although the employer had not conducted a background check, the court ruled that there was no nexus between the assailant's prior misconduct (slapping his wife and a fistfight with a coworker) and the harm done to the plaintiff.¹⁴⁹ Even though the employer admitted that it would not have hired the security guard had it known about the prior misconduct, the court affirmed summary judgment for the employer on the negligent hiring claim.¹⁵⁰

Similarly, in *Browne v. SCR Med. Transp.*,¹⁵¹ an employer that did a background check that revealed no criminal convictions could not be liable for negligent hiring of a bus driver who assaulted a developmentally disabled individual.¹⁵² Although the driver had a number of arrests for crimes, he had no record of convictions.¹⁵³ The plaintiff argued that the criminal record check using the assailant's name was insufficient, and that his fingerprints should have been submitted for a more thorough background check.¹⁵⁴ The appellate court affirmed summary judgment for the defendant employer, holding that because the individual had not been convicted of any crimes, even a fingerprint background check would not have revealed relevant information.¹⁵⁵ And in *Southeast Apartments Mgmt., Inc. v. Jackman*,¹⁵⁶ a tenant suing her landlord for negligent hiring did not prevail because the court determined that the landlord had conducted an appropriate reference check on the maintenance supervisor who had attacked the tenant.¹⁵⁷ The employer had collected detailed information on the applicant's background and had spoken with two former supervisors; none of the information gathered by the employer would have put the employer on notice that the employee would attack a tenant.¹⁵⁸

Courts rejecting negligent hiring claims also have done so on the basis that the information collected in the background check did not make actual harm done to the plaintiff foreseeable. For example, in *Moricle v. Pilkington*,¹⁵⁹ a homeowner whose diamond bracelet was stolen by an employee of a plumbing service who was working at her home sued the service for negligent hiring, arguing that the

(reversing summary judgment for employer where failure to conduct criminal background check for home health care worker could constitute negligent hiring).

148. 37 S.W.3d 274 (Mo. Ct. App. 2000).

149. *Id.* at 277.

150. *Id.*

151. 826 N.E.2d 1030 (Ill. App. Ct. 2005).

152. *Id.* at 649.

153. *Id.*

154. *Id.* at 648.

155. *Id.* at 649.

156. 513 S.E.2d 395 (Va. 1999).

157. *Id.* at 397.

158. *Id.* at 398.

159. 462 S.E.2d 531 (N.C. Ct. App. 1995).

employer should have performed a criminal background check on the employee who stole the bracelet. The court disagreed, noting that the employer had conducted a reference check with the employee's previous employer and that no information related to the employee's dishonesty had been communicated.¹⁶⁰ Similarly, when a patient who was assaulted by a health care worker sued the employer for negligent hiring, an appellate court affirmed the trial court's award of summary judgment to the employer, noting that the employer had conducted a background check on the employee and that the check had revealed no prior criminal activity.¹⁶¹

In addition to negligent hiring claims, individuals injured by the actions of an employee have filed claims of negligent retention and/or negligent supervision. In *Saine v. Comcast Cablevision of Arkansas, Inc.*,¹⁶² a plaintiff who was able to demonstrate that the employer was on notice that the employee had behaved in a sexually suggestive way to another customer was able to win reversal of a summary judgment ruling for the employer. The court noted that the possibility that the employer was on notice of this behavior suggested that the subsequent attack on the plaintiff was foreseeable and ruled that her claims of negligent supervision and retention would need to be resolved by a jury.¹⁶³ Similarly, in *T.W. v. City of New York*,¹⁶⁴ the court reversed summary judgment for the employer on the issues of negligent retention and supervision.¹⁶⁵ The court ruled that the employer knew that an employee who sexually assaulted a child had a criminal conviction and that his position as a custodian at the Police Athletic League community center would involve interaction with numerous children.¹⁶⁶ Given the employer's actual knowledge that the employee had a criminal conviction, said the court, the employer should have conducted a background check, which would have demonstrated that the employee had an extensive criminal record.¹⁶⁷ But in *Reed v. Kelly*,¹⁶⁸ the court affirmed summary judgment for the employer on the plaintiff's negligent retention and supervision claims on the grounds that the employee's prior misconduct did not put the employer on notice that the employee would engage in sexual touching and indecent exposure.¹⁶⁹

In a few cases, courts have refused to find employers liable for off-work conduct of employees. In *Guidry v. Nat'l Freight*,¹⁷⁰ a long-haul truck driver assaulted a woman while he was off duty.¹⁷¹ The court ruled that the employer had

160. *Id.* at 607.

161. *Munroe v. Universal Health Serv., Inc.*, 596 S.E.2d 604 (Ga. 2004).

162. 126 S.W.3d 339 (Ark. 2003).

163. *Id.* at 343.

164. 729 N.Y.S.2d 96 (N.Y. App. Div. 2001).

165. *Id.* at 97.

166. *Id.* at 98.

167. *Id.*

168. 37 S.W.3d 274 (Mo. Ct. App. 2001).

169. *Id.* at 277-78.

170. 944 S.W.2d 807 (Tex. App. 1997).

171. *Id.* at 809.

no duty to the victim, that the employer's duty was to hire safe drivers, and that the assault was not foreseeable.¹⁷² Similarly, a Nevada court awarded summary judgment to the employer in a negligent hiring lawsuit against a security service whose employee took a car without permission and injured a passing motorist.¹⁷³ The employer had verified the employee's prior employment, also as a security guard, and a criminal background check had been completed.¹⁷⁴ Neither inquiry indicated that the employee was likely to take a car without permission and to use it to harm another.¹⁷⁵

The litigation demonstrates that employers who conduct background checks on employees who have access to vulnerable individuals may very likely avoid liability when sued by individuals they refused to hire or by individuals harmed by their employees. Courts are sensitive to the relationship between prior criminal conduct and the requirements of the particular job and appear to be requiring that the type of injury was foreseeable before employers will be found liable for the crimes of their employees.

D. The After-acquired Evidence Doctrine

Although challenges by individuals either denied employment or dismissed from employment because of a negative background check are infrequent, such individuals may challenge the negative employment decision using discrimination theories rather than challenging the use of the background check itself. In such cases, if an employer discovers negative information about a job candidate or employee after the negative decision is made, the employer may be able to use the "after acquired evidence" doctrine to defend against a discrimination claim.

This doctrine was established by a decision of the U.S. Supreme Court in *McKennon v. Nashville Banner Publ'g Co.*,¹⁷⁶ in which a woman who was laid off from her position during a reduction in force sued the employer for age discrimination.¹⁷⁷ Prior to her separation from the company, she had photocopied confidential employer documents.¹⁷⁸ When the employer learned that she had copied the confidential documents, it changed the layoff to a termination for cause and argued that the misconduct precluded the plaintiff's recovery for the alleged age discrimination.¹⁷⁹ Although the trial court awarded summary judgment to the employer on that theory and the appellate court affirmed, the U.S. Supreme Court reversed, ruling that if the plaintiff could demonstrate that age was, in fact, the motive for her layoff, the plaintiff could prevail and could be awarded back pay damages up until the date on which the employer learned of the misconduct.¹⁸⁰

172. *Id.* at 811–12.

173. *Burnett v. C.B.A. Security Serv., Inc.*, 820 P.2d 750 (Nev. 1991).

174. *Id.* at 752.

175. *Id.*

176. 513 U.S. 352 (1995).

177. *Id.* at 882–83.

178. *Id.* at 883.

179. *Id.*

180. *Id.* at 886.

McKennon will not help an employer obtain a summary judgment ruling if an individual is able to marshal some evidence of discrimination. The case does, however, suggest that an employer who refused to hire a candidate, or who dismissed an employee, for subjective reasons that could suggest discrimination, but who later discovered resume fraud or found criminal behavior as a result of a background check, could limit backpay liability.

The conflict between the privacy rights of job applicants and employees, on the one hand, and the potential for harm that may be borne by innocent third parties on the other, creates a dilemma for employers. It appears, however, that applicants or employees seldom challenge the results of background checks or an employer's decision based on a negative background check. And even though not all negligent hiring cases result in a victory for plaintiffs, the negative publicity and expense of litigating these claims is substantial. For these reasons, some colleges and universities have implemented background check policies for staff, and in some cases, for faculty as well.

III. POLICY CONSIDERATIONS IN CONDUCTING BACKGROUND CHECKS

Although risk management and public relations considerations, among others, suggest that conducting background checks on employees is a wise idea, the subject is controversial on campuses. Background checks require the candidate to divulge private information that he or she may not wish the employer to know, and which the candidate may believe is marginally relevant or irrelevant to the position.¹⁸¹ Additionally, thorough background checks can be expensive. One source estimates that a criminal background check limited to one state would cost a minimum of \$200.¹⁸² Checks in multiple states or the collection of additional information would increase the price accordingly. Even the best criminal background check may not identify all criminal activity, since the National Criminal File does not include criminal records from all states, is only updated every six months, and contains primarily records of individuals who were incarcerated in prisons, but not in jails.¹⁸³ Attempts to reduce the cost of conducting background checks by using inexpensive online services may result in incomplete or otherwise erroneous background checks.¹⁸⁴

Information on prior criminal misconduct is not the only information that may be difficult to obtain. Former employers of the candidate may be reluctant to share information on job performance or behavior problems, fearing defamation or

181. For resources on privacy issues in background checks, and information for both applicants and employers, see PRIVACY RIGHTS CLEARINGHOUSE, BACKGROUND CHECKS & OTHER WORKPLACE PRIVACY RESOURCES, <http://www.privacyrights.org/workplace.htm> (last visited Sept. 27, 2006).

182. Greg Burns, *Holes Found in Cheap Background Checks*, CHI. TRIB., April 11, 2004, at 13.

183. Lynn Peterson, *Not All Criminal Records Checks are Created Equal*, THE VIRTUAL CHASE, 2005, http://www.virtualchase.com/articles/criminal_checks.html (last visited Sept. 27, 2006).

184. *See id.* *See also* Burns, *supra* note 182.

invasion of privacy lawsuits,¹⁸⁵ despite the fact that many states have enacted legislation providing some form of immunity from liability from defamation claims by former employees if former employers provide truthful information in good faith.¹⁸⁶ Even if state law protects an employer from ultimate liability for defamation when providing a reference, the law cannot prevent defamation lawsuits from being filed.

Institutions considering adopting a background check policy will need to consider a variety of issues. Several of these issues are discussed below.

A. Which Jobs Will Be Included?

Some colleges and universities conduct background checks on candidates for all positions, including faculty positions. The scope of the background check may depend on whether the position involves access to vulnerable populations, money, or institutional vehicles. For example, the University of Arizona policy includes “all temporary and regular appointed and classified new hires,” and requires the verification of “academic credentials, relevant licenses or certifications, work history and job performance.”¹⁸⁷ James Madison University (Virginia) also conducts background checks on all employees, including criminal records checks for all full-time and part-time employees.¹⁸⁸ At other institutions, only applicants for selected positions that are safety- or security-sensitive are required to undergo background checks.¹⁸⁹ At still other institutions, all staff must undergo a

185. See, e.g., Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their 'No Comment' Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381 (1996); John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117 (2004); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir) Rationality and the Demise of Employment References*, 30 AM. BUS. L. J. 123 (1992).

186. See N.M. Stat. § 50-12-1 (1995) (“When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee’s job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.”). See also FLA. STAT. ANN. § 768.095 (West 2005); HAW. REV. STAT. ANN. § 663-1.95 (LexisNexis 1995); IND. CODE ANN. § 22-5-3-1 (LexisNexis 2005); LA. REV. STAT. § 23.291 (1999); N.D. CENT. CODE § 14-02-05 (2005); Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent But Irrelevant*, 11 CORNELL J. L. & PUB. POL’Y 1 (2001) (stating as of January 2001, 36 states have enacted statutes providing immunity to employers who provide references for former employees).

187. Overview of University of Arizona Pre-Employment Screening and Background Checking Procedures, University of Arizona, http://www.hr.arizona.edu/02_sel/preEmpScreenOverview.php (last visited Sept. 19, 2006).

188. Policy 1321, Criminal History Investigation, James Madison University, <http://www.jmu.edu/JMUpolicy/1321.shtml> (last visited Sept. 19, 2006).

189. See, e.g., Employment Checking Procedures, Oklahoma State University (Feb. 2003), available at http://www.nacua.org/documents/oklahomasu_bckgrmdchk.htm. See also Background Checks, H.R. 2005-10, Office of the Chancellor, California State University (Mar. 1, 2005) (on file with author). The California State University policy lists examples of positions for which a background check is required, including individuals who are responsible for the care, safety and security of people or property; individuals with access to financial information or cash,

background check before being hired, but faculty do not.¹⁹⁰ In addition to determining which applicants for employment should be subject to background checks, institutions should consider whether certain volunteers, such as unpaid athletics coaches, or individuals who volunteer at university hospitals, day care centers, or other units with vulnerable populations, should undergo background checks as well. And finally, if the institution is using temporary or contract employees, or outsources certain functions, the employer should ensure that the firm supplying the employees conducts appropriate background checks if the institution does not perform this function itself.

B. What Kind of Information Should Be Collected?

Another important issue to be resolved is the type of information to be collected about an applicant. It would seem to be important to verify any educational credential that the individual claims, but seeking other types of information may appear to raise larger privacy issues. Is a review of the individual's criminal record necessary for all positions? Is a credit check necessary for those positions where the employee will not have access to institutional funds, procurement approval, corporate credit cards, or personally-identifiable information? Should prior work history be verified, and an evaluation of the individual's performance in prior jobs be made?¹⁹¹ The answer to these questions may differ depending on the position, or the institution may decide to perform a criminal background and credit check on all applicants.¹⁹²

And if the institution decides to conduct a criminal background check, how can

credit cards, or checks; individuals who can commit institutional funds; individuals who exercise control over the institution's business processes (as well as those with access to business systems); individuals with access to personally identifiable information about students, faculty, staff or alumni; individuals with access to controlled substances; and individuals who possess master or sub-master keys to the institution's buildings. *Id.*

190. See, e.g., Important Information for Final Candidates, Rowan University (N.J.) (on file with author).

191. As discussed earlier, reference checking by a prospective employer may be difficult if the former employer refuses to divulge information beyond verifying the individual's length of service and job title. For a discussion of the legal issues in seeking and providing employment references, see Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991).

192. Experts recommend using "routine" background checks for positions that are not safety-sensitive or do not involve access to funds, sensitive data, etc., and using "special" background checks for positions where a criminal background is more problematic because of the nature of the position. "Routine" background checks may include a credit check, a check by telephone of employment references, a criminal records check, a check of the candidate's driving record for the past three years, verification of educational credentials, verification of home address and telephone number, and verification of Social Security number. A "special" background check would include all of the elements of a "routine" check plus a check of bankruptcy filings, a civil filings search, verification of employment history, personal interviews with employment and other references, interviews with previous employers, property checks, residence checks, and a fingerprint check. Peter C. Hammes, Gordon R. Steele & Kenneth R. van Wyk, Corporate Risk Management, in KEVIN P. CRONIN & RONALD N. WEIKERS, DATA SECURITY & PRIVACY LAW: COMBATING CYBERTHREATS § 5.37 (Thompson/West 2002).

it be confident that the check has identified all relevant criminal misconduct? Experts say that the “best” criminal background check involves having an individual visit the courthouse in each county in which the candidate lived to check the criminal records.¹⁹³ Using the online sex offender registries for each state in which the candidate lived may not unearth all relevant information, because different states may call the same act by a different name, and sex offender registries may not be up to date.¹⁹⁴ If a candidate’s criminal record has been expunged, it may not appear on a background check.¹⁹⁵

Administrators and counsel will need to decide how extensive they wish background checks to be, and for which jobs they will use the most far-reaching (and thus the most expensive and potentially invasive of privacy rights) background checks. And, since it may not be possible to be completely certain that the background check has uncovered every relevant fact about the candidate, careful monitoring and supervision of employees in sensitive positions will also be necessary.

C. Who Should Conduct the Background Check?

As noted above,¹⁹⁶ employers that use an external “consumer reporting agency” to conduct background checks must comply with the Fair Credit Reporting Act. Although verifying degrees, checking employment references, and verifying prior work history can be done in-house, most states do not allow employers direct access to criminal records, and an external organization is frequently used to conduct these checks. Consumer credit agencies may be used to conduct credit checks of applicants or employees. In addition to the dictates of the Fair Credit Reporting Act, some states, such as California, require that an individual be notified that a background check is being performed, and be given a copy of the ensuing report.¹⁹⁷

D. How Should Negative Information Be Evaluated and Who Should Do the Evaluation?

Institutions conducting background checks need to develop criteria for evaluating any negative information that they receive about an applicant or current employee. How relevant is the information to the job that the individual is or will be doing? How long ago did any criminal or other misconduct occur? What was the nature of the offense? How old was the individual when the crime or other misconduct occurred? Can the individual be viewed as rehabilitated, or has subsequent misconduct occurred? If there have been arrests but no convictions, should these arrests be taken into consideration at all?

193. Peterson, *supra* note 183.

194. See, e.g., Darkness to Light, Using Registry of Sex Offenders Requires Caution, http://www.darkness2light.org/news/archives/news_03_16_00.asp (last visited Sept. 20, 2006).

195. See *supra* note 66 and accompanying text.

196. See *supra* notes 44–51 and accompanying text discussing the Fair Credit Reporting Act.

197. See, e.g., *supra* note 43 (discussing relevant laws).

In addition to developing criteria for evaluating the results of a background check, colleges and universities need to decide who will be authorized to review the information. For example, at James Madison University, the Human Resources Department receives the information and contacts the recruiting department if negative information is obtained. A decision to hire an applicant with a job-related conviction requires the approval of the vice president.¹⁹⁸ Given the confidential nature of much of the information that may be elicited by a background check, institutions should limit the number of individuals who have access to the information and should develop policies to protect applicants from inappropriate or unnecessary disclosure of this information.

E. Special Issues Relating To Faculty

Although faculty are among those individuals whose false credentials or prior criminal conduct have resulted in their discharge, in embarrassment, and in some cases, legal liability for their institutions, many faculty are deeply suspicious of the use of background checks for applicants for faculty positions. Although the verification of an applicant's college degrees and prior work experience, as well as conversations with a candidate's current and former colleagues concerning the quality of that individual's teaching, service, and collegiality, are not an issue for most faculty,¹⁹⁹ many oppose the use of criminal background checks for faculty positions.²⁰⁰

The American Association of University Professors has issued a report²⁰¹ that opposes criminal background checks for faculty positions but recommends that, if such policies are implemented, the provisions of the Fair Credit Reporting Act²⁰² be followed, regardless of whether the institution conducts its own background

198. *Supra* note 188.

199. American Association of University Professors (AAUP) Verification and Trust: Background Investigations Preceding Faculty Appointment, *available at* <http://www.aaup.org/statements/REPORTS/background.htm> (last visited Sept. 19, 2006). The report approves of search committees making:

thorough checks of a candidate's references and of interviewing a candidate's present and former colleagues. . . . [S]earch committees also check educational credentials, prior employment, professional experience, and the like. No doubt such reference checks entail some compromise of the privacy of candidates, but it is justified in light of reasonable institutional needs.

Id. at 2.

200. *Id.* Academic administrators may also oppose the use of criminal background checks for faculty on the grounds that such investigations might offend a sought-after candidate for an important faculty position. *See, e.g.,* Scott Smallwood, *Should Colleges Check up on Professors?*, CHRON. HIGHER EDUC., Sept. 12, 2003, at A12 (quoting President of Emory University as saying "I believe they [the faculty] feel it would be an incursion on their privacy, and that they would argue convincingly that the checking done in the faculty-hiring process is so thorough that the risk is minimal"). The University of Texas implemented a policy of background checks for new faculty hires, but rescinded it, while the University of Montana conducts criminal background checks on all individuals offered a position, including faculty. *Id.*

201. *See supra* note 199.

202. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2000).

checks or uses a third party. The report also recommends discarding all background check information except information relevant to the candidate who was hired.²⁰³ It also recommends that any inaccuracies in the report be corrected before the report is placed in the faculty member's personnel file or segregated in a confidential file with limited access.²⁰⁴

Other issues related to the use of background check information regarding faculty are the same as those discussed with respect to the use of such information for any employee.²⁰⁵ In addition, colleges and universities developing background check policies for faculty should consider the fact that, for most faculty hires, search committees are used to recruit, screen, and recommend candidates for faculty positions. Should the search committee verify candidates' degrees and former employment? Should a criminal background check be done? If so, how much and what kind of information should the search committee be given about the contents of the background check? And if search committee members are given background check information, what guidelines should the search committee be given to evaluate the relevance of certain criminal or civil legal records (such as a prior bankruptcy, previous drug offenses, etc.)?

With respect to candidates for faculty positions, the college or university should consider the rights of the candidate as well as its own concerns. Will the candidate be given a copy of the information elicited during the background check? Will that individual be given an opportunity to challenge allegedly incorrect or misleading information, or to explain certain items in the report? Answers to all of these questions will differ depending upon state law limitations on the use of criminal background checks, institutional culture, and the college or university's own history of problems with employees who had undisclosed criminal convictions or fraudulent credentials.

IV. CONCLUSION

Faculty, administrators, and counsel should consider the issue of using background checks carefully to ascertain whether individuals who claim to have earned degrees, to have a particular kind of work experience, and not to have a criminal record are, in fact, who they say they are. Verifying this information is an important risk management strategy; it is also an important indicator of institutional accountability.

But implementing a system of background checks requires thoughtful planning and decisions about which positions will involve background checks, the thoroughness of the check, the process for notifying the candidate about the check and providing any information that is relied upon in making the hiring decision, the way that negative information will be evaluated, and the reliability of the individual(s) or organization(s) used to conduct the background checks. In the end, one wonders whether the best that a background check can offer is a defense

203. *Id.* at 113.

204. *Id.* at 114.

205. *See supra* note 198 and accompanying text.

to potential liability for tort claims filed by individuals injured by a college or university employee. Although protection against legal liability is an important risk management strategy, background checks should help colleges and universities be more confident about the integrity of the individuals they hire. Academic communities function, in many respects, on the basis of trust; verifying the applicants' background information helps ensure, but cannot guarantee, that that trust is earned.