

2013

Legal Questions from Georgia Librarians

Part II

Ten Case Studies

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Introduction

In September 2013, I compiled a set of ten case studies analyzing legal questions submitted by library directors from around the state of Georgia. Near the end of that project, more questions were raised, and those are addressed in this second compilation.

As with the first installment, the legal issues addressed here are illustrated using factual scenarios. That library directors have sought information on certain legal principles indicates their ability to recognize red flags and spot issues. The object of this work is to identify sources, both primary and secondary, for library directors to turn to when legal dilemmas arise or may be anticipated. Also, the collaborative process of sharing questions and analyses that come up in libraries throughout the state has resulted in a growing bank of strategies and resources for addressing a wide range of legal issues.

In utilizing this document, readers should remember that it is intended to be an educational resource, not a substitute for legal counsel. The interpretation of statutes and case law is completely dependent on the specific facts of a given situation.

Q: Can/should a public library prohibit a patron from distributing religious materials to other patrons and library staff?

The United States Supreme Court has repeatedly held that the First Amendment protects the right to engage in charitable solicitation. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). As to religious materials, the Court has recognized that “the hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses” and is entitled to the First Amendment guarantees of freedom of speech and freedom of the press. *Murdock v. Com. of Pennsylvania*, 319 U.S. 105, 109, 63 S. Ct. 870, 873, 87 L. Ed. 1292 (1943). Even solicitation for funds is a form of protected speech acknowledged by the Supreme Court. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988). Accordingly, an attempt to prohibit these activities by a governmental entity, e.g., a public library, is presumptively unconstitutional.

Furthermore, public libraries within American society are traditionally thought of as physical embodiments of the “marketplace of ideas.” In *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit held that the public library is a limited public forum designated for the “communication of the written word.” And the American Library Association’s Library Bill of Rights states, “Libraries should

cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.” It would offend these traditional library ideals to prohibit an individual from distributing written materials inside a public library.

Of course, the right of an individual to come into a library and distribute written materials to others is not absolute. A library has the right and the obligation to restrict inappropriate or bothersome conduct. In *Kreimer*, a New Jersey public library prohibited a homeless man from using the library due to his odor. The appellate court ultimately upheld the library’s policy, which stated, “Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building.” The court in *Kreimer* recognized that this rule “would require the expulsion of a patron who might otherwise be peacefully engaged in permissible First Amendment activities within the purposes for which the Library was opened, such as reading, writing or quiet contemplation.” That court went on, however, to conclude that because the purpose of the rule was to prohibit one patron from unreasonably interfering with other patrons’ use and enjoyment of the Library, the policy was a narrowly tailored restriction used to promote the library’s “significant interest in ensuring that all patrons of the [Library] [can] use its facilities to the maximum extent possible during its regularly scheduled hours.”

Applying the holding of *Kreimer* to the situation involving a patron who comes into a library to distribute written materials of a religious nature to other patrons and library staff, an exercise of a well-recognized First Amendment right, a

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library would be justified in prohibiting the conduct only in the event the activity curtailed the library use of other patrons or prevented staff from doing their jobs. For example, an individual who comes into a library and distributes religious materials in a disruptive manner or seeks to engage other patrons in unwanted dialog on the topic would be subject to enforcement of library rules on proper behavior. The mere act of handing out written materials of a religious nature, however, is not enough to warrant the abridgment of the patron's right to spread his or her ideas.

There is an additional consideration to be given under the current scenario: is it appropriate for a public library, which is a governmental entity, to allow the dissemination of religious materials? In an attempt to refrain from imposing on a patron's free speech rights, administrators of a public library must be cognizant of another First Amendment guarantee: the establishment clause. The establishment clause bars the government from endorsing religion and religious beliefs or otherwise commenting on religious truth. Government may neither favor religion over nonreligion nor favor one religion or sect over others.

Arguably, allowing an individual to utilize a library to advance religious messages would be an endorsement or comment on religious issues by a governmental entity. Whether there is an establishment clause issue turns on whether the speech at issue—the written religious materials—is private or governmental. Establishment clause responsibility is triggered only when the religious expression is attributable to the government or when the government

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endorses private speech. In both instances, there must be some government involvement. Under the scenario presented, the library is neither expressing ideas nor endorsing them. The library's involvement begins and ends with its role as a gathering place for people.

A slight modification of the facts would alter the establishment clause analysis. If a library allowed distribution of religious tracts from a particular religious viewpoint but disallowed the distribution of materials from an opposing religious viewpoint, there would be a violation of the establishment clause due to an endorsement of a specific religious view by the library. Also, if an employee of a library, during his or her on-duty hours, distributed religious materials, the action would be attributable to the library meaning that the speech now originates from a governmental source rather than a private source.

Corbin, Caroline Mala. "Mixed Speech: When Speech Is Both Private and Governmental." 83 *New York University Law Review* (2008): 605, 616.

Liebler, Raizel. "Institutions of Learning or Havens for Illegal Activities: How the Supreme Court Views Libraries." 25 *Northern Illinois University Law Review* (2004): 1, 73.

Q: What duty/right does a librarian have to monitor the materials used and borrowed by minors?

The First Amendment of the United States Constitution creates a right to access information. This right is not specifically enumerated within the language of the First Amendment, but the United States Supreme Court's interpretation of the law has broadened its scope to encompass the right to receive information and ideas as well as the right to read. As stated by Torrans (2004), "Public libraries play a vital role in promoting the fullest exercise of that right." However, questions may arise when considering access issues with respect to minors.

The United States Supreme Court has held that the First Amendment applies differently to minors than adults. *Erznoznick v. Jacksonville*, 422 U.S. 205, 214, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975). Nevertheless, the Court said, "[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 212-13 (emphasis added). And at least two Supreme Court Justices recognized that the right may be particularly strong at a public library. *Board of Education Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 892, 915, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). Therefore, only in limited instances will a governmental entity such as a public library be able to legitimately deny a child access to information contained in the library.

This issue becomes further complicated when parents request library staff to monitor and control their children's access to information. Undoubtedly, parents are entitled to substantial control over their children's access to information, and the First Amendment does not restrict the power of private individuals to control the flow of information to those under their supervision. A librarian asked by a parent to monitor what a child reads or borrows is left to decide whether to (1) reinforce the parents' position, (2) remain neutral, or (3) even facilitate the minor's efforts. The legality of each position is considered below.

The first avenue, reinforcing a parent's position, could be a violation of a minor's individual right to receive information as guaranteed by the First Amendment. The notion of facing legal action, however, in the form of a lawsuit by the child against a library for upholding the restrictions imposed by his or her parent, is quite farfetched. Therefore, analysis of this course of action is really more of philosophical exercise than a legal review. According to the American Library Association's (ALA) Intellectual Freedom policies, "Unless there is an applicable Harmful to Minors Act, a policy of free access (limited only by parental decisions of appropriateness for very young children) provides the greatest insulation for the library from constitutional attack for restricting access to materials protected by the First Amendment." Additionally, ALA publishes a four-page notice alerting young people to their rights to access information (www.ala.org/alsc/files/.../intellectualfreedom/kidsknowyourrights.pdf).

The second course of action, remaining neutral in the face of parental controls, has no legal implications for a librarian. There is no legal compulsion to protect another's First Amendment rights. There remain, however, the tenets of intellectual freedom that are interwoven into the profession of librarianship. Therefore, evaluation of this choice of action, like the first, will likely come down to philosophical beliefs rather than legal concerns.

The final course of action, facilitating access in contravention of a parent's dictates, likewise raises no legal concerns. While Georgia does have criminal laws against the distribution of materials harmful to minors, O.C.G.A. § 16-12-103, public libraries are expressly exempted from the law. O.C.G.A. § 16-12-104. Therefore, a librarian who assists a child in accessing information that has been declared off limits by a parent, is not in legal jeopardy. Of course, the real world difficulties that may arise as a result of circumventing parental authority are considerable.

In conclusion, the only legal concern for a public library in deciding whether to monitor the access of information of minors turns on the breadth of children's First Amendment rights as compared to adults. While the limitations of a minor's right to receive information are murky, it is certain that these individuals are constitutionally entitled to access information. Nevertheless, as a practical matter, the level of exposure to risk in terms of legal action is extremely low. Therefore, a public library's decision on this matter will be driven largely by philosophical and feasibility concerns. Taking the time to develop a policy to guide the response to

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this thorny issue will mean balancing the profession's ethical beliefs about information access with an individual organization's day-to-day realities in terms of what its patrons expect. Below is a sample policy reflecting a library's decision to remain neutral as to materials accessible by minors.

The Library upholds the right of each individual to have access to constitutionally protected materials. The Library is designed to serve its patrons with a wide range of educational and recreational collections, programs, and services, some of which may contain material of a controversial nature. Library staff cannot assume a parental role or take responsibility for children in the Library or for what children check out or access. It is the responsibility of parents and legal guardians to determine what information is appropriate for their children. Parents and legal guardians are encouraged to take an active role in their child's reading activities and interests.

Ennis, Bruce J. ALA Intellectual Freedom Policies and the First Amendment
Accessed November 15, 2013 at
<http://www.ala.org/Template.cfm?Section=basics&Template=/ContentManagement/ContentDisplay.cfm&ContentID=164106>.

Ross, Catherine J. "An Emerging Right for Mature Minors to Receive Information."
University of Pennsylvania Journal of Constitutional Law. (1999): 223, 243.

Torrans, Lee Ann, (2004). *Law and Libraries*. Libraries Unlimited: Westport, CT.

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Q: Are there nepotism or conflict of interest concerns when members of a hiring committee are related to public library job applicants?

Black's Law Dictionary defines nepotism as “bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship to the appointing authority.” A more general definition is provided by dictionary.com: “favoritism shown to relatives or close friends by those with power or influence.”

Organizations, particularly governmental in nature, avoid nepotism because it is seen as unfair, and it brings to mind more sinister concepts like cronyism and the spoils system. Most public employers have policies against nepotism in making hiring decisions. For example, the Georgia Board of Regents has the following policy regarding employment of relatives:

No individual shall be employed in a department or unit which will result in the existence of a subordinate-superior relationship between such individual and any relative of such individual through any line of authority. As used herein, "line of authority" shall mean authority extending vertically through one or more organizational levels of supervision or management.

Relatives are defined as husbands and wives, parents and children, brothers, sisters, and any in-law of any of the foregoing.

Anti-nepotism has been legislated in Georgia with respect to who is eligible to serve on a local school board and who is eligible for employment in public schools. O.C.G.A. §§ 20-2-51(c)(4)(A), 20-2-101(b)(2). Georgia's statutes governing public library boards are not as specific; however, the policy reasons for the anti-nepotism provisions of the school board statutes apply equally to library boards.

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O.C.G.A. § 20-2-51(c)(4)(A) provides in pertinent part:

No person who has an immediate family member sitting on a local board of education or serving as the local school superintendent or as a principal, assistant principal, or system administrative staff in the local school system shall be eligible to serve as a member of such local board of education. As used in this paragraph, the term “immediate family member” means a spouse, child, sibling, or parent or the spouse of a child, sibling, or parent.

Likewise, O.C.G.A. § 20-2-101(b)(2) prohibits employment of individuals who have immediate relations serving on a school board in high level positions within the schools.

Therefore, utilizing the school board anti-nepotism statutes as guidance for appropriate policy for public library boards would mean that an individual with a spouse (or child, sibling, parent, or in-laws of the same degree) serving on a library board or employed as an administrator of a library should not serve on that library’s board and vice-versa. Note that the legal definition of nepotism and the Georgia statutes pertaining to school boards are limited to immediate family members. In other words, a situation in which a library board is considering hiring the niece of a board member to serve as library director does not raise nepotism concerns. But when the board is considering employing the daughter of the board member, there is a nepotism issue.

Even in situations where the family relationship is not close enough to arise to nepotism, the overlap of family relations and friendship with public service can create ethical questions. The Georgia Public Library Trustee Manual states,

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“Library trustees should take care to avoid conflicts of interest. Because these can take many forms, it is good board practice to discuss this issue periodically. The most innocent actions can sometimes give the appearance of favoritism or personal gain to trustees. It is far easier to prevent such an occurrence than to regain public trust once it is lost.” Similarly, two tenets of the Ethics Statement for Public Library Trustees adopted by the Board of Directors of the American Library Trustee Association are:

Trustees must avoid situations in which personal interests might be served or financial benefits gained at the expense of library users, colleagues, or the institution.

It is incumbent on any trustee to disqualify himself or herself immediately whenever the appearance of a conflict of interest exists.

Applying these guidelines to the example of a library board considering employing the niece of a board member as library director indicates that the related board member would be wise to withdraw from the employment decision making. In the event the related applicant becomes library director, the related board member must be vigilant to avoid any essence of conflict of interest.

Association of Library Trustees, Advocates, Friends and Foundations. *Public Library Trustee Ethics Statement*. Accessed August 25, 2013 at <http://www.ala.org/united/sites/ala.org.united/files/content/trustees/orgtools/Ethics%20Statement.pdf>.

Black, Henry C, and Joseph R. Nolan. (1990) *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*. St. Paul: West Publishing.

Hopper, Lyn. (2006). *Tools for Trustees: The Georgia Public Library Trustee Manual*. Accessed August 25, 2013 at <http://www.georgialibraries.org/lib/publications/trusteemanual/>.

Q: Can a public library require employees to be paid via direct bank deposit?

According to the United States Treasury Department, “Electronic payments have become almost universally accepted and are standard across all sectors of the economy.” The only restrictions placed on employers by federal law with respect to payment of wages by direct deposit are that the employer may not require an employee to use direct deposit at a specific bank or charge an employee fees based on payment method. 15 U.S.C. § 1693k.

Laws vary from state to state as to the legality of mandatory direct deposit. The plain language of Georgia’s statute regarding the method for payment of wages provides that, with the consent of the employee, wages may be paid by credit transfer to an employee’s bank account. O.C.G.A. § 34-7-2. A strict construction of this statute would indicate that forcing employees to receive wages via direct deposit is not allowed.

On the other hand, a broader reading of the statute leaves open the possibility of conditioning employment on consent to receive wages via direct deposit. As of May 1, 2010, the State of Georgia made consent to direct deposit a condition of employment for new hires and re-hires. In other words, an applicant will be awarded the job he or she seeks upon agreement to receipt of wages via direct deposit. Therefore, there is a basis for a public library system, an arm of state government, to require consent to direct deposit for all incoming employees.

It is important to note that for those already employed at a library, consent must be obtained and cannot be tied to maintaining employment. Put another way, it would be improper for an employer to inform one who is already employed that continued employment will be conditioned on consent to direct deposit.

There are methods an employer could utilize to give current employees an incentive to consent to direct deposit. For example, Georgia's State Accounting Office has promulgated the following policy for employees who do not enroll in direct deposit:

Failure of an employee hired prior to May 1, 2010 to enroll in Direct Deposit will not affect the employee's employment. However, beginning July 1, 2013, all paper checks will be mailed/distributed directly to the employee from the employing agency on the employee's designated payday and will be dated the date of the employee's pay date. No post dated paper checks will be mailed prior to the designated payday. The employee is advised that the State assumes no responsibility for the delay in receiving a paper check via the United States mail or its equivalent. Should a paper check have to be reissued due to a lost check, the employee may have to wait up to seven days before a replacement check can be issued and mailed.

The result of this policy may be that an employee will likely not receive his or her payment as promptly as those who use direct deposit, and may not receive it as promptly as the prior custom with paper checks.

Consent for payment via direct deposit should be in writing and maintained in the employee's human resources file. In order to facilitate the electronic funds transfer, the employer must obtain banking information from the employee. The employee's agreement to direct deposit can be included in that information collection form. Sample language for an employee consent is as follows:

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I hereby authorize Cody County Library System, hereinafter called Library, to initiate credit entries and to initiate, if necessary, debit entries and adjustments for any credit entries in error to my Checking Account indicated above and the Depository named above, hereinafter called Depository to credit and debit the same to such account. This authority is to remain in full force and effect until Library has received written notification from me of its termination in such time and in such manner as to afford Library and Depository a reasonable opportunity to act on it.

The benefits of direct deposit to a library as an employer are numerous. Most important is the financial savings realized by cutting out the cost of producing checks and for postage in situations where checks are mailed to employees. There is a time savings as well: there is no need to a distribution process for checks and payroll departments are not asked to duplicate work such as when a check is lost. In the zeal to reap these benefits, an employer must not overlook legal requirements related to this method of payment. In Georgia, consent is required. Obtaining and documenting this consent is a prudent way to avoid challenges in the future.

Q: How may a library, as an employer, force someone to retire without facing an age discrimination suit?

Traditionally, age sixty-five was considered the age of retirement. Today, more people are choosing to continue working full or part-time well into their seventies and even eighties. An employer who would prefer an older worker to retire should be aware of what is required by law. Georgia is an at-will employment state; however, age is not a factor that can be utilized in making employment decisions.

The Age Discrimination in Employment Act (ADEA) prohibits age discrimination against people who are age 40 or older. 29 U.S.C. § 621. Additionally, Georgia law forbids compulsory retirement for an employee between the ages of 40 and 70. O.C.G.A. § 34-1-2. Certain occupations, such as airline pilot and police officer, are exceptions to the extent that a mandatory retirement age may legally be enforced.

Georgia law also protects public sector employees from age discrimination. The Fair Employment Practices Act establishes a commission to investigate allegations of discrimination, including age, by state governmental employers. O.C.G.A. § 45-19-20 *et seq.* FEPA does not provide a private right of action to an employee but could result in state-imposed remedies including reinstatement and backpay.

An employer may have valid reasons for discharge of an employee who is over age 40, including poor performance, absenteeism, or violations of workplace policy. As for all employees, documentation of the issues that have triggered the employer's desire to dismiss the employee is crucial. However, even if there is a valid and well-documented basis for discharge, consideration of the timing of the action is important. For example, if the employee's previous evaluations that occurred before age 40 showed evidence of marginal performance, the employer will be hard-pressed to demonstrate that poor performance—not age—is the real reason for the termination.

Early retirement incentive plans are frequently offered by employers to reduce their work force. The ADEA allows employers to request employees who accept early retirement incentives to sign a waiver releasing all potential claims against the employer under the ADEA. The following requirements apply to such a waiver:

- (1) It must be part of an agreement written in plain language.
- (2) It must specifically refer to rights or claims arising under the ADEA.
- (3) The employee may not waive rights or claims that may arise after the date that the waiver is signed.
- (4) The employee may waive rights or claims only in exchange for money or other benefits that exceed those to which he or she is already entitled.

(5) The employee must be advised in writing to consult with an attorney before signing the agreement.

(6) The employer must give the employee 21 days to consider the agreement before he or she signs it (or 45 days if the employee is terminated in a group layoff).

(7) The employee must have the right to revoke the agreement within 7 days after signing it.

29 U.S.C. § 626(f)(1).

A passive-aggressive approach to encouraging an employee to retire should be avoided. Comments by a supervisor about an employee's age, even made in a joking manner, could be evidence of an employer's discriminatory intent.

Consider the following scenario: At an office birthday party for a long-time employee, the supervisor jokes that it's time to trade in the rolling desk chair for a rocking chair. The party, which has been approved by the supervisor, includes "Over the Hill" decorations. Several weeks later, the supervisor asks the employee when she might think about "hanging'em up." On another occasion, the supervisor tells the employee she should be thinking about where she wants to spend her golden years. The employee soon announces she is retiring. After she retires, the employee sues the employer for age discrimination.

In this fact pattern, the employer did not force the employee to retire.

However, the employer could be found to have constructively discharged the employee based upon her age. Succeeding on a claim for constructive discharge in

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an age discrimination case is not easy; “a plaintiff must demonstrate that working conditions were ‘so intolerable that a reasonable person in [his] position would have been compelled to resign.’” *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997). Under the facts above, it is unlikely that a reasonable person would have felt compelled to resign. Nevertheless, comments about age or subtle suggestions that the time has come for retirement could be damaging if an employee opts for legal action. For example, in a recent case in the United States District Court for the Northern District of Georgia, a sixty-seven year old employee was discharged in a reduction in force. The employer’s supervisor had repeatedly asked him about his age and when he planned to retire, and the CEO of the company had months before the discharge commented to the employee that he was “really getting up there.” While the reduction in force was likely legitimate and the employer had a number of non-discriminatory reasons for discharging this particular employee, those comments and questions were found by a court to be sufficient evidence to allow the employee to proceed to a jury trial with his claim of age discrimination.

Returning to the question posed, how may an employer force an employee to retire, there is no magic answer. Presumably, the desire for the employee to retire stems from poor job performance, absenteeism, inappropriate behavior at work, etc. Therefore, the employer should take the same steps of documentation and discipline that would apply no matter an employee’s age. Should it become necessary to take an adverse employment action against the employee, the employer will be in the strongest position to defend against legal action if it has clear evidence that the

employee was disciplined, demoted, or discharged for a reason other than a non-discriminatory one, such as age.

Equal Employment Opportunity Commission. (2000). *Guidance on Early Retirement Incentives* available at www.lmc.org/media/document/1/eec_guidance_on_eris.doc (last accessed November 16, 2013).

Maurer, Todd J. & Nancy E. Rafuse. "Learning Not Litigating: Managing Employee Development and Avoiding Claims of Age Discrimination." *Academy of Management Perspectives* 15 (Nov. 2001): 110-21.

Q: What level of background check should a public library do with regard to job applicants?

It goes without saying that a public library as an employer has an interest in seeking a competent, reliable workforce. Moreover, Georgia law imposes upon employers “a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others.” *Drury v. Harris Ventures, Inc.*, 302 Ga. App. 545, 548, 691 S.E.2d 356, 359 (2010). Therefore, hiring libraries must make some level of investigative effort to screen job applicants. Doing so raises a number of legal questions.

While some people are not concerned about background investigations, others are uncomfortable with the idea of an investigator poking around in their personal history. Legally speaking, an employer may investigate a potential employee up to the point that the investigation becomes an invasion of privacy. The Restatement (Second) of Torts provides the following standard definition of intrusion upon seclusion: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”

Additionally, there are federal and state laws that prohibit the use of certain information garnered through a background check. For example, anti-discrimination laws prohibit employers from making hiring decisions based on factors ranging from an applicant’s religion to his or her genetic information.

In Georgia, official criminal history information is kept and distributed by the Georgia Crime Information Center (GCIC), a division of the Georgia Bureau of Investigation. A potential employer may request criminal history records by submitting the fingerprints of the person whose records are requested or a signed consent form with the person's full name, address, Social Security number, and date of birth. In most cases, the GCIC will not release records of arrests or charges that did not result in a conviction, or sentences for certain first offender crimes or for crimes where the individual was later exonerated or the charges discharged without court adjudication of guilt. *See* O.C.G.A. §§ 35-3-34, 35-3-34.1.

The United States Equal Employment Opportunity Commission (EEOC) has said that use of criminal history may sometimes violate Title VII of the Civil Rights Act of 1964. Last year, the EEOC issued extensive guidelines for employers in considering the criminal history of a job applicant or employee. The EEOC cited the most important considerations as: (1) the nature and gravity of the offense, (2) the time that has lapsed since the offense, and, (3) the nature of the job. In July of this year, nine state Attorneys General (including Georgia's) sent a letter to the EEOC criticizing the EEOC's application of the disparate impact doctrine in the use of criminal screens. In response, the EEOC reiterated its position that if an employer utilizes criminal background checks, there must be some level of individual assessment rather than a blanket screening.

The Fair Credit Reporting Act (FCRA) requires employers to obtain consent to view a job applicant's credit history. 15 U.S.C. §§ 1681-1681t. Additionally, the

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FCRA requires employers to provide applicants with a copy of their credit information used in the hiring decision, as well as an explanation of the applicant's rights. There is currently a bill in United States House of Representatives to amend the FCRA to prohibit credit checks by employees. However, the bill has remained at the committee level since February and is not expected to be voted upon before the current session ends.

Another aspect of financial background check would be bankruptcy actions, which are public record. However, employers cannot reject applicants solely because they have filed for bankruptcy. *See* 11 U.S.C. § 525.

The Internet and social media provide rich resources for information about an individual's suitability for employment, such as his or her dangerous tendencies, but a Google search can also expose an employer to liability. Title VII of the Civil Rights Act of 1964 prohibits an employer from refusing to hire an applicant because of his race, color, religion, sex, or national origin. Other statutes prohibit refusal to hire because of age, disability, and military service. Often, information posted by individuals will be sufficient for an employer to discern protected characteristics. For example, a Facebook page could indicate that an individual is affiliated with gay rights groups leading to the conclusion that he is gay or could reflect the plans of another individual to become pregnant. Additionally, an employer could decide not to hire a job applicant after seeing that he “likes” a particular religious website. Refusal-to-hire claims are difficult to prove; however, online searches leave a trail and may be admissible as evidence in civil litigation.

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In one major refusal-to-hire case, a leading candidate for a teaching position at a university was not hired after someone at the school conducted an on-line search and learned of the candidate's extreme evangelical beliefs. *Gaskell v. University of Kentucky*, 110 Fair Empl. Prac. Cas. (BNA) 1726, 93 Empl. Prac. Dec. (CCH) P 44047, 2010 WL 4867630, *5, *8–10 (E.D. Ky. 2010). The university informed the applicant of the search and of its concern about his views. The rejected candidate sued the university, and it settled the claim for \$125,000. Refusal-to-hire claims may become more popular as more employers opt to screen applicants online.

At the pre-offer stage of the hiring process, disability-related questions and medical examinations are prohibited under the Americans with Disabilities Act (ADA). Furthermore, employers cannot use medical information or the fact an applicant filed a workers' compensation claim to discriminate against applicants. *See* 42 U.S.C. § 12101. In Georgia, workers' compensation applications and appeals are not public records; therefore, this information will not likely be involved in a background check.

When an employer has completed its use of background materials, the best practice is to securely dispose of the report and any information gathered from it. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it cannot be read or reconstructed.

Earle, Beverly et. al., "The Legality of Pre-Employment Credit Checks: A Proposed Model Statute to Remedy an Inequity." *Virginia Journal of Social Policy & Law* 20(2012): 159, 172-73.

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Equal Employment Opportunity Commission, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*. April 25, 2012. Accessed on November 10, 2013 at www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

Peebles, Katherine A. "Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability." *William & Mary Law Review* 53 (2012): 1397, 1409.

Q: What are the options of a library as employer when an employee is often absent from work because of health problems but refuses to discuss her intentions with regard to maintaining her employment?

The Americans with Disabilities Act (ADA) prohibits employers from taking adverse employment action such as demotion or termination based upon an employee's disability. 42 U.S.C. § 12101 *et seq.* Depending on their scope and nature, "health problems" could equate to a disability under the definitions of the ADA. Asking questions about an employee's medical condition is prohibited. However, an employer is entitled to inquire about the type of leave the employee is taking, and for sick leave, the employer may request a doctor's note.

Also, it is always the employer's obligation to designate qualifying leave, paid or unpaid, under the Family and Medical Leave Act (FMLA). 29 C.F.R. §825.301(a). Regardless of whether the employee requests that an absence be counted as FMLA leave -- or even if the employee requests that the leave not be counted toward his or her FMLA entitlement -- the employer may designate a qualifying absence as FMLA leave. In order to ascertain whether the leave qualifies under the FMLA, the employer has a right to request that an employee provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

An employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning that the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether paid leave will be substituted for unpaid FMLA leave and

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whether the employer will require the employee to provide a fitness-for-duty certification to return to work.

When an employee is on FMLA leave, the employer may require periodic reports on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. 29 C.F.R. § 825.309(a). Such requests can be required at only reasonable intervals, which, in most cases, is 30 days. 29 C.F.R. § 825.308.

Applying these laws and regulations to the question about an employee often absent from work because of health problems, the employer must be careful in seeking additional information. The employer may not ask the employee (or co-workers or family members) directly about the health problems that the employee is experiencing. However, when the employee requests to take sick leave, the employer should follow up with questions to ascertain whether the reason for the sick leave (1) meets the employer's policy for use of sick leave, and (2) is a qualifying basis for FMLA leave. Also, for sick leave or FMLA leave, the employer may ask the employee for medical certification for the need to be absent from work. Note, however, that this procedure should be applied consistently to all employees who take sick leave or FMLA leave. Singling out this employee to add a requirement for taking leave that others are not subjected to is tantamount to discrimination.

Finally, when an employee is on an extended leave—sick or FMLA—the employer is entitled to receive status reports on the employee's condition (to the extent that

information is necessary to determine qualification for continuing leave) and the employee's intent regarding a return to work.

Equal Employment Opportunity Commission. 2005. *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act*. Accessed November 20, 2013 at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

United States Department of Labor. "Frequently Asked Questions and Answers about the Revisions to the Family and Medical Leave Act." Accessed November 23, 2013 at <http://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.htm>.

Q: For purposes of applying for grants, how can a public library prove its non-profit status?

Government entities are frequently asked to provide a tax-exempt number or “determination” letter to prove its status as a “tax-exempt” or charitable entity. For example, applications for grants from a private foundation or a charitable organization generally require this information as part of the application process. In addition, donors frequently ask for this information as substantiation that the donor’s contribution is tax deductible, and vendors ask for this to substantiate that the organization is exempt from sales or excise taxes.

The Internal Revenue Service (IRS) does not provide a tax-exempt number. A government entity may use its Federal TIN (taxpayer identification number), also referred to as an EIN (Employer Identification Number), for identification purposes. In order for a government entity to receive a determination of its status as a political subdivision, instrumentality of government, or whether its revenue is exempt under Internal Revenue Code section 115, it must obtain a letter ruling by following the procedures specified in Revenue Procedure 2013-1 (www.irs.gov/pub/irs-irbs/irb13-01.pdf). There is a substantial fee associated with obtaining a letter ruling.

As a special service to government entities, IRS will issue a “governmental information letter” free of charge. This letter describes government entity exemption from Federal income tax and cites applicable Internal Revenue Code sections pertaining to deductible contributions and income exclusion. This letter is

very general and simply states the fact that entities affiliated with government are usually exempt. Government entities can request a governmental information letter by calling 1-877-829-5500.

Another method of obtaining documentation of non-profit status is to apply for recognition of tax-exempt status under section 501(c)(3) of the Internal Revenue Code. This process is somewhat complex, but the result is a specific and definitive statement of non-profit status. To make this application, use Form 1023 ([http://www.irs.gov/uac/Form-1023,-Application-for-Recognition-of-Exemption-Under-Section-501\(c\)\(3\)-of-the-Internal-Revenue-Code](http://www.irs.gov/uac/Form-1023,-Application-for-Recognition-of-Exemption-Under-Section-501(c)(3)-of-the-Internal-Revenue-Code)).

In order to qualify for 501(c)(3) status, an organization that is affiliated with government, which public libraries in Georgia are, must be separately incorporated or formed to accomplish one or more exempt purposes. Exempt purposes set forth in section 501(c)(3) include educational and literary. 26 U.S.C. § 501.

In evaluating whether an organization qualifies for 501(c)(3) status, the IRS will look for the stated purpose of the organization contained in the creating document (such as a constitution.) Additionally, the organization's assets must be permanently dedicated to exempt purposes on dissolution either by specific provision in its creating document or by operation of state law. *See* O.C.G.A. §§ 20-5-51, 20-5-48.

Even if your organization did not file an application for tax exemption under section 501(c)(3) because it is a it is exempt under another Code section (i.e., governmental entity), it should annually file Form 990-N, otherwise known as an e-

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postcard. This form requests basic pieces of information including organization name, EIN, address, website, and officer names. If your organization is not submitting the 990-N, an officer of the organization should call IRS Customer Account Services at 1-877-829-5500 and ask that the organization be set up to allow filing of the e-Postcard.

The most accessible form of proof of non-profit status for purposes of grant applications or donors would be inclusion on the IRS charities database (<http://www.irs.gov/Charities-&Non-Profits/Exempt-Organizations-Select-Check>). According to the IRS, requesting the government information letter will not result in inclusion in the charities database. However, completing the full-blown application process for 501(c)(3) status and receiving approval as such will result in placement on the list. At the present there is a six-month processing time for these applications.

Q: What is a public library's responsibility when asked to provide access to its security camera video?

It has become commonplace for security cameras to record wide swaths of public activity. Most discussions about placement of surveillance cameras involve a debate about privacy rights versus the need for security and crime deterrence. A less prevalent, but important, concern is the extent of responsibility and property rights of a governmental entity, such as a public library, in the possession of its own security camera footage.

Undoubtedly, recordings made by a library security camera are covered by Georgia's Open Records Act. Public records are defined by the Act as "all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, data, data fields, or similar material prepared and maintained or received by an agency or by a private person or entity in the performance of a service or function for or on behalf of an agency or when such documents have been transferred to a private person or entity by an agency for storage or future governmental use." O.C.G.A. § 50-18-70(b)(2). Therefore, those recordings would be subject to a request from a member of the public, and a library would be required to turn over the recordings under the same parameters as other documents that fall under the Act.

A more likely scenario facing a library is an on-the-spot request from a patron who has lost her purse. The patron may request immediate access to recent footage from the camera, hoping that the camera will reveal what happened to her

property. Legally speaking, there is no requirement for a library to comply at that moment. The timeframe of the Open Records Act, three business days, is the only legal benchmark. O.C.G.A. § 50-18-71(b)(1)(A). On the other hand, there is nothing in the law to prevent a library sharing the contents of the video footage if it chooses to do so. The decision here will likely be based on numerous factors including the complexity of the recording set-up, whether there is ample staff to accommodate the request, etc. Establishing a policy and informing and training staff on how a library opts to respond to such requests will be helpful to library employees who may be faced with distressed and demanding members of the public.

Another factual scenario that may arise at a library is a request to view the security camera recordings by law enforcement. For example, the patron with the missing purse could file a property theft report, and the assigned officer may ask to view the camera footage as part of his investigation. Or the police could suspect a frequent library patron of conducting drug deals in a library. Therefore, the video footage would be relevant in any gathering of evidence.

From a library's standpoint, it is reasonable to view a request from an official law enforcement source as more compulsory than one coming from a patron. Often the police officer is simply another arm of the same government with which the library is affiliated, and, therefore, there may be an underlying desire on the part of library staff and policy makers to assist law enforcement in any way they can.

However, there is no legal requirement to acquiesce to a request to immediately view or take possession of a library's video surveillance footage simply because that

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request comes from a police officer. Georgia law makes it a crime to obstruct or hinder a law enforcement officer in the lawful discharge of his official duties. O.C.G.A. § 16-10-24(a). However, there is no affirmative duty to provide assistance.

Additional factors to consider when planning how a library will respond to requests for access to video surveillance are the legal and ethical concerns about library patron privacy and confidentiality. Georgia's confidentiality statute pertaining to library records states, "Circulation and similar records of a library which identify the user of library materials shall not be public records but shall be confidential and may not be disclosed" O.C.G.A. § 24-9-46. Therefore, video recordings that reveal what a patron is reading or borrowing could fall under this statute.

Randall (2013) describes the approaches by two public libraries in the Pacific Northwest with regard to requests by law enforcement to view or claim video footage. One library opted to share access with police officers upon request and as a result developed a collaborative relationship with law enforcement. The other library interpreted state law regarding confidentiality as a bar to turning over video footage absent a warrant or subpoena. The relationship between the library and the police department became so adversarial that the library board voted to remove all cameras.

The decision of how a library will respond to requests for its video recordings from members of the public and law enforcement agencies is for the most part a policy decision for the governing authority to make. Evaluation of a particular

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public library's position on intellectual freedom, specifically privacy and confidentiality, is a key part of how the issue will be resolved. Regardless of whether immediate access will be granted, a library must consider its surveillance video in terms of public records—which must be disclosed within three business days—and in terms of “circulation records”—which must remain confidential.

Randall, David. “Video Surveillance in Public Libraries: A Case of Unintended Consequences” 2013 46th Hawaii International Conference on System Sciences. Accessed on November 22, 2013 at <http://www.computer.org/csdl/proceedings/hicss/2013/4892/00/4892b932-abs.html>.

Q: What are the options for a library when a disgruntled patron photographs an employee and threatens to post the photo and describe the employee as rude and abusive (even when the employee has remained polite and appropriate in all dealings with the patron)?

As an initial matter, there is no legal prohibition to taking a person's photo in a public place without consent. Moreover, the Georgia Supreme Court has said, "[T]he public has an interest in learning about the operation and functioning of a public agency . . . and the work-related conduct of public employees." *Irvin v. Macon Telephone Publishing Co.*, 253 Ga. 43, 45, 316 S.E.2d 449, 452 (1984). Therefore, it is unlikely that there is any legal recourse available to prevent the patron for taking the photograph of a library employee at work in a public library.

In the event the patron does publish the photo and includes derogatory remarks, there are two potential avenues of relief available to the employee stemming from Georgia tort law discussed below. As for the library, its only recourse would be dealing with the patron through its conduct and disciplinary policy; this of course assumes that the patron exhibited behavior that is in violation of the policy. For example, if the patron becomes unruly or aggressive in his or her interchanges with a library employee, procedures for handling inappropriate conduct in the library will be triggered.

Legal action by the employee against the patron is possible if the photo and accompanying statements arise to defamation or invasion of privacy.

Under Georgia law, there are four elements in a cause of action for defamation:

- (1) a false and defamatory (reputation injuring) statement concerning the plaintiff;
- (2) an unprivileged communication to a third party;
- (3) fault by the defendant amounting at least to negligence; and
- (4) special harm or the actionability of the statement irrespective of special harm.

Mathis v. Cannon, 276 Ga. 16, 20-21, 573 S.E.2d 376, 380 (2002). While a speaker can be liable for false statements of fact, the First Amendment protects statements of opinion. According to the United States Supreme Court, “[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, one depends for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.” *Gertz v. Welch*, 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Accordingly, only factual statements can constitute defamation.

The tort of invasion of privacy protects “[t]he right of a person . . . to be free from unwarranted publicity, . . . or the unwarranted appropriation or exploitation of one’s personality, the publicizing of one’s private affairs with which the public has no legitimate concern.” *Napper v. Georgia Television Co.*, 257 Ga. 156, 160-61 (1987). The elements for recovery under this cause of action are:

- (1) the disclosure of private facts must be a public disclosure;
- (2) the facts disclosed to the public must be private, secluded or secret facts and not public ones;

(3) the matter made public must be offensive and objectionable to a reasonable man of ordinary sensibilities under the circumstances.

Cabaniss v. Hipsley, 114 Ga.App. 367, 372, 151 S.E.2d 496 (1966). This tort also encompasses publicity which places the plaintiff in a false light in the public's eye. *Id.* at 370. However, "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." *Athens Observer v. Anderson*, 245 Ga. 63, 66, n.4, 263 S.E.2d 128 (1980).

Under the facts presented, a difficult patron has stated an intent to publish a negative critique of service provided by a library employee. Because it is likely that the patron's post would contain statements of opinion and would probably not be perceived as horribly offensive by a reasonable person, there is little chance legal action against the patron would be successful.

Given the unreasonable stance taken by the patron in this factual scenario, it is possible that there could be additional encounters to come. If a pattern develops in which the complaints by the patron become disruptive, the library and the employee may consider contacting law enforcement authorities. Georgia's law prohibiting disorderly conduct includes use of "abusive words which by their very utterance tend to incite to an immediate breach of the peace." O.C.G.A. § 16-11-39. Additionally, should the patron's conduct become threatening or abusive, it may arise to the level of simple assault which includes "plac[ing] another in reasonable apprehension of immediately receiving a violent injury." O.C.G.A. § 16-5-20.

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