

Reference Searches Through Social Media Do Not Create FCRA Claims

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In their recruitment efforts, many employers will utilize social media to find suitable candidates for job openings. And, often employers will use the social media tools available to perform reference checks and/or verify a candidate's employment history, experience and education history. Recently in California, a group of individuals challenged these social media background searches by suing the professional social media website, LinkedIn Corporation, because the information gleaned about these persons allegedly violated their rights under the Fair Credit Reporting Act (FCRA). In [Sweet v. LinkedIn Corp.](#), Tracee Sweet, one of the named plaintiffs for the class, alleged she had applied for a position through LinkedIn. Sweet claimed the potential employer advised she had been hired following a telephone interview. A week after, the potential employer rescinded the offer and this decision was based on the employer's review of Sweet's references through LinkedIn. The employer had used the Reference Searches function on LinkedIn, which allows employers to find people with whom an applicant may have worked previously.

According to the class plaintiffs, this search engine allows employers to “[g]et the real story on any candidate” and to “[f]ind references who can give real, honest feedback” about job candidates. The Reference Searches function produces two types of information for paid subscribers: (1) the name and list of the search target's current and former employers; and (2) a list of other LinkedIn members who are in the same professional network of the *search initiator* and “who may have worked at the same company during the same time period as the search target.” The Reference Searches then produces results which include for each possible reference, “the name of the employer in common between the reference and the job applicant, and the reference's position and years employed at that common employer.” According to the complaint, each member of the class had a similar experience as Sweet. Each plaintiff believed that LinkedIn's Reference Searches function caused them to lose employment opportunities in violation of the FCRA. The U.S. District Court rejected the plaintiffs' claims and dismissed the action. The court explained that FCRA did not apply to the social media site and, instead, only to “consumer reporting agencies” that provide “consumer reports.” Under the FCRA, a “consumer report” is:

[A]ny written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part of the purpose of serving as a factor in establishing the consumer's eligibility for . . . (B) employment purposes.

The district court stated that the publication of the plaintiffs' employment histories were not consumer reports because that information came solely from LinkedIn's transactions or experiences with the plaintiffs as members of the social media website. In other words, the information that was

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subsequently shared to a third-party occurred solely as a result of the plaintiffs' voluntary provision of such information. As a result, that information is excluded from the protections of the FCRA. As the district court noted, the subsequent information sharing is precisely the reason why consumers such as the plaintiffs provide such information to LinkedIn. Additionally, the district court found that LinkedIn was not a consumer reporting agency, as defined under the FCRA. The court explained that LinkedIn did not become a consumer reporting agency "solely because it conveys, with the consumer's consent, information about the consumer to a third party to provide a specific product or service that the consumer has requested." Finally, the district court rejected the plaintiffs' argument that the list of names and information about the references included in the Reference Searches bear on the "character, general reputation, mode of living" and other relevant characteristics of the consumers who are the subjects of these searches. Instead, the court found that the results from Reference Searches are those in the *search initiator's network* and not in the target's network. Therefore, the results only communicate whether the search initiator (not the target) have the characteristics protected under the FCRA (e.g., character, general reputation, mode of living).