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Oh, What a Tangled Web We Weave: Resume Fraud as a Defense to Employment Claims

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by [Sonia M. Pflaster](#)

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In an increasingly competitive job market, job-seekers are quick to take whatever steps they can to present themselves as qualified and attractive candidates to employers. Although there is no agreement on the prevalence of resume fraud, with the proliferation of websites geared to assisting job applicants in strategically “embellishing” their resumes, it is no surprise that job application fraud and resume fraud have risen dramatically in recent years. Employers need to address this type of fraud not only because poorly qualified employees can cause a loss of productivity and efficiency in the workplace, but also because of the wasted expenditures associated with recruiting and hiring such candidates. Moreover, if employers do not thoroughly verify the information contained on resumes and job applications, it may only be in later litigation, if ever, that they will uncover a fake master’s degree, falsified management experience, or an undisclosed felony.

Once resume or job application fraud has been discovered, what impact can this discovery have on an employer already embroiled in litigation with a former employee? Can employers use an employee’s resume or job application fraud as a defense to an employee’s claims? In May of 2008 the New Jersey Supreme Court provided some answers to the question, holding in a 7-0 decision in *Cicchetti v. Morris County Sheriff’s Office* that despite failure to disclose an expunged criminal conviction on his employment application, a sheriff’s officer could pursue discrimination and hostile work environment claims against his employer.^[1] Case law prior to *Cicchetti* appeared more generous to employers and suggested that an employee’s resume fraud could be used by an employer as a full defense to the employee’s employment-related claim. *Cicchetti*, however, substantially limits the ability of employers to use employee resume fraud as a defense, yet provides that evidence of resume fraud may nonetheless be used to limit damages available to the employee.

In *Cicchetti*, the plaintiff filed a complaint under a state anti-discrimination statute, asserting that his employer, the sheriff’s office, was liable for discrimination and a hostile work environment. During discovery, the employer learned that the plaintiff had failed to disclose on his employment application his twenty-year-old expunged conviction despite a specific question as to prior arrests and convictions. Relying on *Cedeno v. Montclair State Univ.*,^[2] a prior New Jersey Supreme Court decision, the employer moved for summary judgment and argued that the plaintiff was barred from bringing any employment-related suit because his undisclosed expunged conviction disqualified him from employment. The lower court granted summary judgment in favor of the employer, but the appellate division reversed, rejecting the argument that the employee’s prior conviction either created a statutory bar to holding public employment or precluded him from relief because of his misrepresentation.

The court in *Cicchetti* distinguished *Cedeno* on the ground that in the former case, the plaintiff was barred from his employment by a statute that prevented public employees convicted during the course of public employment from ever again obtaining public employment. In *Cicchetti*, the plaintiff was not convicted while a public employee, and therefore the employment forfeiture statute did not apply, and the applicable expungement statute did not create an equivalent absolute bar to employment with a law enforcement agency. Furthermore, because the employer did not present any evidence, in the form of either a hiring manual or policy, that it would not have hired the plaintiff had he disclosed the expunged conviction, the court was not

convinced that the expunged conviction should impact the employee's ability to recover under claims based on a hostile work environment.

After determining that the plaintiff could proceed, the court addressed how evidence of resume and job application fraud can affect damages in workplace discrimination or hostile work environment suits. Influenced by case development in federal courts, the court balanced the interests of employers and employees and held that regardless of the fraud, the plaintiff was entitled to be free from discrimination and a hostile workplace while he was employed. Therefore, non-economic damages, including punitive damages and damages for emotional distress, are not limited because of the fraud. However, economic damages, such as back-pay and front-pay, can be limited or extinguished if the employer can prove it would have terminated the employee upon learning of his expunged conviction.

The New Jersey decision accords with federal law on the impact of after-acquired evidence of wrongdoing discovered during the course of employment litigation. In *McKennon v. Nashville Banner Publ'g Co.*, the Supreme Court held that after-acquired evidence of wrongdoing that would have resulted in the employee's discharge does not pose a bar to recovery under the Age Discrimination in Employment Act ("ADEA").^[3] To do so, the Court reasoned, would render the underlying unlawful activity without remedy, contrary to the purpose of the ADEA. The Court held, however, that while employee wrongdoing is irrelevant to the question of liability, it bears on the specific remedy to be ordered. As a general rule, neither front-pay nor reinstatement is an acceptable remedy, and if an employer can prove that an employee's wrongdoing was severe enough that the employee would have been fired immediately upon the employer's discovery of the wrongdoing, back-pay can be limited from the date of the discharge until the date of the discovery. The Court instructed lower courts to treat each case on a case-by-case basis, taking into account circumstances that affect the equitable interests of all parties. Subsequent federal circuits have extended the *McKennon* analysis to apply to claims brought under other statutes geared towards protecting employees in the workplace, such as the Equal Pay Act.^[4] Federal circuits have also applied *McKennon* to cases of resume and job application fraud, rejecting employers' arguments that *McKennon* does not apply under the theory that an employee who obtains employment by misrepresentation has no employment contract and therefore no standing to sue for employment-related wrongs.^[5]

California law on resume fraud is very similar to federal law, although California courts have yet to articulate the impact of resume fraud on specific remedies. Prior to *McKennon*, a California Court of Appeal refused to assert a blanket rule barring a plaintiff who falsified his employment application from recovering on contract and discrimination claims, because the plaintiff's misrepresentations had no connection to his firing.^[6] In a later decision, the court distinguished the impact of resume fraud on wrongful termination and discrimination claims, holding that an employee's misrepresentation of her immigration status barred her from recovering on wrongful termination and contract claims, because her misrepresentation went to the heart of the employment relationship and posed serious consequences to her employer under federal law.^[7] The court treated the discrimination claim separately, holding that the plaintiff could recover despite her misrepresentation, because of public policy considerations and the lack of direct connection between her misrepresentation and the injuries she claimed. Similarly, an appellate court has held that an employer's discovery of the plaintiffs' undisclosed felony convictions provided a complete defense to the plaintiffs' wrongful termination suit because the plaintiffs' misrepresentation went to the heart of the employment relationship, and because federal law explicitly barred the plaintiffs from the specific employment.^[8]

Employers should be aware that in California, in New Jersey, and in federal court, evidence of resume fraud discovered during litigation will not bar an employee from recovering on claims brought pursuant to statutes aimed at protecting employees in the workplace. Although evidence of resume fraud is of limited use to employers when discovered during litigation, employers may be able to better protect themselves and deter applicants from committing fraud by explicitly stating in employment applications that lying on a resume or employment application is grounds for immediate termination. Employment applications should also require an applicant's signature attesting to the veracity of the information provided and allowing the employers to verify all information. Taking these steps will help employers limit an employee's economic damages in later litigation because they will make it easier to prove the employee would have been fired upon discovery of the resume or job application fraud. Employers should also know that they can maximize their use of evidence of resume or job application fraud as a defense in unlawful termination and contract cases by including in hiring manuals as many qualifications and disqualifications for employment as can be stated. Finally, consistently applying a policy of discharging employees immediately upon discovery of fraud may later assist employers in defending against certain types of employment claims.

Footnotes

1 *Cicchetti v. Morris County Sheriff's Office*, 947 A.2d 626 (N.J. Sup. Ct. 2008).

2 *Cedeno v. Montclair State Univ.*, 750 A.2d 73 (N.J. Sup. Ct. 2000).

3 *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

4 *Wallace v. Dunn Constr. Co.*, 62 F.3d 374 (11th Cir. 1995).

5 *Mardell v. Harleysville Life Ins. Co.*, 65 F.3d 1072 (3d Cir. 1995); *see also Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1006 (5th Cir. 1995).

6 *Cooper v. Rykoff-Sexton, Inc.*, 24 Cal. App. 4th 614 (1994).

7 *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833 (1998).

8 *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620 (1995).

Sonia M. Pflaster is a summer associate in our Los Angeles office and can be reached at
213.892.5923 or spflaster@mofo.com.