Defense of Wrongful Discharge Suits Based on an Employee's Misrepresentations

By *Morley Witus*

There is a new - or at least previously neglected - defense available to employers beseiged by lawsuits over personnel decisions. Some courts have ruled that an employee is not entitled to complain about his or her discharge or other adverse employment action where the employee obtained the job by lying in his or her application, interview, or resume.

The underlying idea is not new: It is derived from traditional principles of fraud. Only recently, however, has this defense come to be widely applied to employment litigation. Moreover, the courts have extended the defense in surprising ways, turning it into a powerful weapon for employers. Most notably, the employer may prevail even if the employee's discharge had nothing to do with the misrepresentations and even if they were not discovered until after the discharge.

There is nothing novel about employees losing their lawsuits or grievances when they have been fired *because* of dishonesty! So, for example, dismissals of unionized employees have been upheld on the ground that falsification of an employment application was just cause for discharge. Eg., *In re Laclede Gas Co.,* 86 Lab. Arb. (BNA) 480 (1986); L. B. *Darling* Div. *of Idle Wild Farm Inc.,* 106 LRRM (BNA) 1190 (1981). Similarly, when employees not covered by a collective bargaining agreement claim wrongful discharge, courts have found that dishonesty about credentials or qualifications constituted just cause for firing. E.g., *Forbes* v *Hotel Intercontinental Maui,* 21 ER Cases 833, 839-840 (D.C. Hawaii 1987). Claims of discrimination and retaliation have been no more successful - such claims have been generally rejected because the employee's lies in applying for the job provided a legitimate non-discriminatory reason for terminating his or her employment. E.g., *Merriweather* v *American Cast Iron Pipe Co,* 362 F Supp 670; 6 Fair Empl Prac Cas (BNA) 1242,6 Emp Prac Dec (CCH) P8966 *(1973); Lee* v *National Can Corp, 699* F 2d 932 (7th Cir 1983); *Douglas* v *Levingston Shipbuilding Co,* 617 SW 2d 718 (Texas Ct Appeals, 1979).2

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The concept that an employee may properly be dismissed for lying to obtain a job-while neither exceptional nor controversial - does not provide employers with a fool proof defense. While in a given case the fact finder may conclude that an employee's lies did warrant dismissal, the contrary conclusion is possible. Given an employee's exemplary performance, for example, a jury, judge, or arbitrator might find that there was no just cause for termination.

These are fact questions which ordinarily will not allow employers to escape trial via summary judgment. Similarly, where the employee claims discrimination (rather than breach of contract), a jury may find that the employer dismissed the employee because of his or her dishonesty. It is also possible, however, that the jury will find that discriminatory motive or bias played a significant role in the employer's decision. Again, a court is unlikely to allow an employer to short-circuit the trial process and obtain summary judgment on grounds of employee dishonesty.

As the rest of this article will show, the employee dishonesty defense is most effective if the employee's misrepresentations are *not* used to justify his or her dismissal. Rather, when the claim is breach of employment contract, the defense should argue that the employee's fraud vitiates the contract altogether. With regard to discrimination or retaliation claims, the issue can also be framed as whether the employee had the qualifications necessary to establish a prima facie case. As will be seen, when the defense is framed in these ways, the employer is more likely to succeed, though he or she did not fire the employee because of lying and did not even know about the lies at the time of the firing.

BREACH OF EMPLOYMENT CONTRACT

In a breach of contract case, it is elementary that where the plaintiff procured an agreement by fraudulent inducement, the agreement is voidable at defendant's option and the plaintiff is precluded from recovering for breach. When this familiar principle of general contract law is applied in the employment setting, it generates a nearly air-tight legal defense which can entitle an employer to summary judgment: An employee cannot claim any rights under an employment contract where he or she procured the job through misrepresentations. This approach focuses on fraudulent inducement at the outset of the employment relationship instead of focusing on the employer's decision to discharge and whether it was justifiable. By framing the issue in terms of the classic fraud defense an employer may win the case without trial even though the employer did not learn of the fraud until after terminating the employee.

Robitzek v *Reliance Intercontinental Corp,* 183 NYS 2d 870, 7 AD 2d 407 (1959), a suit for breach of a written employment contract, illustrates this Use of the defense. The employee was fired for poor performance. The company conceded there was a triable jury issue as to whether his job performance was adequate. *But the court ruled that the company had an absolute defense based on the employee's misrepresentation of his academic credentials in applying for the job.* Significantly, the company did not terminate the employee because of his misrepresentations - they were only discovered *after* his employment was terminated, during pre-trial discovery:

> It *appears* in *the affidavits presented upon the motion that* in *negotiations prior* to *the making of the contract plaintiff had represented* in *writing* to *defendant that he had* a *Bachelor of Science degree* in *Business Administration and a Master's degree* in *Retailing. The moving papers further disclose that during pre-trial examinations defendant discovered that plaintiff did not have such degrees . . . .*
>
> *The plaintiff has failed to controvert defendant's proof that the representations were made; that they were false and that defendant relied upon them. There remains* no *triable issue.*
>
> *The order* in so *far as appealed from should be reversed* on *the law and the motion for summary judgment dismissing the complaint granted, with costs* to *appellant.*
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> 183 NYS *2d at* 871-873 *(emphasis added).*

In *defending discrimination and retaliation claims, again the focus should not be on the employer's motive for discharging the employee.*

Having fraudulently procured employment in the first place, the employee cannot assert rights under the employment contract. As the court decided in the *Robitzek* case, belated discovery of the employee's deception is irrelevant, since the employment contract is completely voidable.

While there is no reported Michigan decision on point, this defense was successfully used last year in *Keller* v *Michigan Consolidated Gas Co,* Wayne County Circuit Court No. 86-627712-NZ. After plaintiff's discharge it was discovered that she was not a college graduate; at the time she applied for the job she had submitted a resume asserting that she had a bachelor's degree from the University of Colorado. The trial court dismissed plaintiff's breach of employment contract claims on a motion for summary judgment, holding that plaintiff's fraud cancelled the contract and disqualified her from insisting on the "Just cause" requirement (or any other term) of the contract. The trial court further held that she could not take refuge in the fact that the fraud only came to light after she was discharged.

DISCRIMINATION AND RETALIATION CLAIMS

In defending discrimination and retaliation claims, again the focus should not be on the employer's motive for discharging the employee. This only raises fact questions as to whether the employee was fired for lying on his or her application, and whether the employer might have been using this as pretext for illicit ulterior motives. As shown above, the fraudulent inducement theory may allow a defendant to sidestep these triable issues. In addition, shifting the focus to whether the plaintiff can establish that he or she was qualified for the position might also make these fact-bound inquiries irrelevant.

For example, in *Village of Oak Lawn* v *Illinois Human Rights Commission,* 133 III App 3rd 221, 478 NE 2d 1115 (1985), the state civil rights commission determined that the employer discriminated against plaintiff by

refusing to hire her because of her handicap. After refusing to hire her (indeed, after she filed her discrimination claim), the employer discovered that she had made false representations regarding her medical history and marital status. The trial court reversed the civil rights commission's finding of discrimination and held that "the fraud Walsh had committed in connection with her employment application vitiated all claims she may have against the village." 478 NE 2d at 1116. The Court of Appeals agreed:

> *Using this analysis,* we *find that no violation of the Act occurred here in either one of two ways. First, Walsh has not met* her *initial burden of proving even a prima facie case of discrimination. To establish a prima facie case, a plaintiff must prove by a preponderance of the evidence that she applied for an available position for* which *she was qualified, and that despite those qualifications, she was rejected under circumstances which would give rise to an inference of unlawful discrimination.*
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> *Walsh has not established at the outset that she was qualified for the job of a police officer. Trustworthiness, reliability, good judgment, and integrity are all material qualifications for any job, particularly one as a police officer.* Her *lying from the beginning disqualified* her *from consideration for the position and made* her *an unfit employee for the Oak Lawn Police Department*
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> *Second, even if Walsh had established a prima facie case, under step two of the* McDonnell *Douglas formulation, the village has articulated a legitimate, nondiscriminatory reason for its presumptively unlawful discrimination.*
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> *Even though the village had* no *knowledge of Walsh's misrepresentations at the time they were made, Walsh cannot take advantage of* her *own misdeeds.* Her *concealment cannot be used as a* shield *against the village's use of this reason to rebut the inference of unlawful discrimination.*
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> 478 NE 2d *at* 1117-1118 *(emphasis added).*

Similarly, in *Williams* v *Boorstin,* 663 F. 2d 109 (DC Cir, 1980), the United States Court of Appeals reversed a judgment that had been rendered in favor of an employee claiming retaliatory discharge because "the plaintiff had lied on his job application where he misrepresented his academic credentials." *Id* at Ill. Observing that "[l]ying on application forms and in interviews is reprehensible," the court stated:

> *Directly under a warning* in *bold type that "[a] false* or *dishonest answer to any question* in *this application may be grounds for rating you ineligible for Federal employment, or for dismissing you after appointment, and may be punishable by fine* or *imprisonment (U.S. Code, Title* 18, *Sec. 1001)," Williams certified* in *his* 27 *January 1967 application that his statements were true. In fact, they were false - and materially so.* He *had successfully completed only one year at Dalhousie University Faculty of Law, after* which *he was not permitted to return because of academic failure. This contrasts with Williams' representation of two years of successful law studies at Dalhousie. Furthermore, because he believed that the Copyright* Division *preferred to hire lawyers and law students as examiners, Williams fabricated three years of law training at Georgetown University.*
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> ***
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> In *the words of the district court, Williams "was a leader,'" he "was 'symbol to blacks.'" The record supports this characterization, and we accept* it. *Neither these accomplishments, nor the personal tragedy exemplified* in Wil*liams' rise and fall, however, convert this unsuccessful masquerade into a valid Title* VII *discrimination claim.*
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> ***
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> Mr. *Williams or any other Library employee,* civil *rights advocate or otherwise, could* simply *never be entitled to, nor expect to retain,* his or her *job after establishing such a formidable record of* lying *to* his *employer. Trustworthiness, reliability, veracity, good judgment these are all material qualifications for any job, including one as a Copyright Examiner, a job also requiring of the office holder a law degree.*
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> As *noted above* in *Part* A *of this section, qualification of the complainant is the pivotal component of the McDonnell Douglas prima facie case.*
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> ***
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> A *second defect* in *Mr. Williams' prima facie case can be characterized as disqualification. The lying itself, also from the outset, made him an unfit employee of the Library of Congress, wholly apart from the question of his not being a lawyer or* his *serving* well in *assigned tasks.*
>
> *We must agree with appellant that since it* is *a criminal offense to make false statements* on *federal employment applications and termination of* em*ployment is a* universally *accepted disciplinary action* in *cases of this sort, it* is *clear that plaintiff would have been fired notwithstanding any retaliatory motive* which *may have existed.*
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> *Id at* 112, 114, 117-118 *(emphasis added).*

Williams v *Boorstin* and *Village of Oak Lawn* suggest the following argument. To make out a *prima facie* case of retaliation or discrimination, a plaintiff must establish he or she was qualified for the position. An employee who obtains a job by misrepresenting his or her credentials or background lacks the requisite honesty to be employed, and is therefore not qualified for employment. Because the employee cannot establish one of the threshold elements of a claim, the question of whether the employer had a legitimate non-discriminatory motive for the adverse personnel action becomes immaterial. Before a court ever reaches the question of the employer's motive, the plaintiff's case fails as a matter of law.[3]

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The fraudulent inducement theory may also work in retaliation and discrimination cases. For example, in *Swanson* v *American Manufacturing Co,* 511 SW2d 561 (Tex Civ App 1974), the court affirmed summary judgment dismissing a retaliatory discharge claim:

> *When an employee makes false statements* in his *application for employment, the application* is *voidable at the employer's option and the employer may discharge the employee.*

Swanson exhibits the judicial animosity towards liars which is the: common theme in these cases:

> *Were this Court to adopt the reasoning and the position assumed by Swanson* in *this case and on this appeal* it *would not only encourage but would serve as an incentive to every person seeking employment to falsify* his *application, to deceive and to mislead the prospective employer* in *every possible way* in *order to gain employment.*
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> *Id. at 564-565.*

While not necessary, it is helpful for employers to put language in their application forms explicitly stating that any falsification will be grounds for discharge. Thus, in *Douglas* v *Levingston Shipbuilding Co,* 617 SW 2d 718 (Texas 1979), the court affirmed summary judgment dismissing a wrongful discharge complaint, noting that the employee:

> *agreed that "any misrepresentation made by* him *in this application* will *be sufficient cause for cancellation of the application and/or for separation from Company's service if he has been employed . . . . "*
>
> *Plaintiff* is *estopped by* his *contract of employment from now taking the* position *that* his dismissal is *actionable.*
>
> *Id. at 720.*

Given the courts' distinct lack of sympathy for persons who defraud employers to obtain a job, counsel in employment litigation should never overlook a possible defense based on the employee's misrepresentations in applying for the job. For employers, the advantage of the approaches described in this article are twofold and related. First, the employee need not have been dismissed because of his or her misrepresentations. Second, the approaches outlined above often allow defense to side-step fact-intensive inquiries into just cause and employer motive. Thus counsel for the employer should always make a point to check the information given in the application and resume. Investigation and pre-trial discovery may turn up some misrepresentations which could provide the key to successfully defending the case.

Footnotes. _____ _

1. This article is not concerned with an employee's fraud or dishonesty on the job (which may also be grounds for termination). The focus is on lying to obtain the job.
2. Of course, discharges have been upheld only where employees provide false information (or concealed true information) *material* to the employers' decision to hire. Examples include misrepresentations concerning the applicant's educational credentials, *Robinson* v *US Air Force,* 635 F Supp 108, 41 Fair Empl Prac Cas (BNA) (1986); prior work experience, *Grier* v *Casey,* 643 F Supp 298, 41 Fair Empl Prac Cas (BNA) 1259 (1986); medical condition, *Swanson* v *American Mfg Co,* 511 SW 2d 561 (Texas Ct Appeals 1974); or criminal record, *Roundtree v Board of Review,* 4 III App 3d 695, 281 NE 2d 360 (1972).
3. In addition to the cases discussed above, in *Robinson v US Air Force,* 41 Fair Empl Prac Cas (BNA) 566, 635 F Supp 108 (D DC, 1986), a claim of race discrimination in employment was rejected where the employee had falsely claimed he had a masters degree on his application.

   > The standards, established by McDonnell Douglas Corp. v Green, 411 U.S. 792, 5 FOP Cases 965 (1973) require that a Title VII complainant must be qualified for the position. The nature and extent of the false information supplied by the plaintiff raise serious questions concerning his good judgment, truthfulness and reliability and basic qualifications as Director of the Youth Center.
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   > 41 Fair Empl Prac Cas (BNA) at 569.

   In *Grier* v *Casey,* 41 Fair Empl Prac Cas (BNA) 1259, 1267,643 F Supp 298 (WD NC, 1986), the court also dismissed claims of sex discrimination where plaintiff gave false information about her background on her application (and failed to disclose she was fired from other jobs).

   > *Integrity*, honesty, and a concerted effort in one's duties are legitimate qualifications to demand of any employer in any position, whether a corporate President or a postal clerk. The plaintiff does not have those qualifications.

   See also, Lee v National Can Corp, 699 F 2d 932,937 (CA 7, 1983); *Merriweather* v *American Cast Iron Pipe Co,* 362 F Supp 670, 6 Fair Empl Prac Cas (BNA) 1242, 6 Emp Prac Dec (CCH) P8966 (ND Ala, 1973).