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Disciplinary Consequences of Peace Officer Untruthfulness
Part I - Job Applications

Contents

This is a two-part article. Part One addresses untruthfulness in the pre-employment application process, and its ramifications, after an applicant is hired.

Part Two examines disciplinary punishment for untruthfulness after a person becomes an officer or employee.

A. Introduction.

It has been reported that approximately 500,000 people falsely claim to have a college degree. Over 600,000 persons are released from prisons a year. Many will try to conceal their past. *See* 39 Creighton L. Rev. 828 & 839.

Suppose a person states on a job application that he or she is a community college graduate with a minor in criminal justice. Assume that the agency has an A.A. or 60-hour credit requirement, from a fully accredited institution, for appointment as a police officer – including 18-hours of concentration in criminal justice.

Suppose that an individual was hired and looked forward to a retirement at age 50, with a

minimum of 20 years of service. At age 49 the officer is accused of falsifying his or her employment application. The employee is a now a police lieutenant and has 19 years of outstanding service.

The alleged falsification is that (1) the college was only provisionally accredited at the time he or she applied; and (2) the individual only had 15 hours of concentration in "criminal justice" because a 3-hour course in "Introduction to Political Systems" did not qualify.

Suppose further, that the individual subsequently earned a Bachelor's and Master's degree in Criminal Justice. Is that fact even admissible as a defense? It has nothing to do with the application process! At best, it is a reason for mitigating the penalty, not excusing job application misstatements.

Why would an agency do this? Sometimes the reason is political. In other instances, a thorough background investigation is launched after a claim or lawsuit has been initiated by the employee.

If management can show that a terminated employee would not have been hired if the application form and interview had been truthful, the damages are limited to back pay from the date of (wrongful) termination until the date the disqualifying information was learned.

Courts will look to several factors in reviewing resume fraud; among them are two questions:

- Did the applicant intentionally or only carelessly misrepresent his or her credentials?
- Was the misrepresentation substantial? Would it have made a difference in the selection process?

B. Reasons that peace officers are held to a higher standard.

Not every lie will result in a termination that is upheld on appeal or arbitral review, but police and corrections officers will be held to a higher standard because they frequently provide the sole testimony that a person was in the act of committing a crime, or admitted to a criminal act.

Recently, a distinguished criminal justice professor, who also serves as a police legal advisor, listed a series of reasons why untruthful police officers pose a special problem: (2008, Spector).

- Under the application of the collective-knowledge doctrine, police officers rely on the validity of information provided to them by fellow officers.

- Supervisors render decisions based on information received from officers.

- According to the tenets of community policing, citizens are urged to communicate and cooperate with law enforcement officials. If they trust and respect police officers, the ability to garner their support will only be enhanced.

- Prosecutors depend on honest reports, statements, and affidavits when prosecuting criminals.

- Judges rely on honesty in evaluating warrants.

- Jurors determine guilt or innocence and often liability based on an officer's investigation and testimony.

Because of a prosecutor's duty to reveal to a jury the past untruthfulness of an officer, an officer's ability to function is severely compromised if juries are so informed. Brady v. State of Maryland, #490, 373 U.S. 89 (1968); Giglio v. United States, #70-29, 405 U.S. 150 (1972).

Viewed another way, if a truck driver loses his job if his driver's license is revoked, a peace officer should lose his job if his reputation for truthfulness is undermined.

C. The law of contracts.

Most beginning law students are shocked to learn that concepts of fairness and benevolence have little place in the law of written instruments. Contracts are supposed to say what they mean, and mean what they say. The U.S. Constitution recognizes the sanctity of private contracts:

> Art. 1, Sec. 10: "No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts ..."

The exception is when a contract runs afoul of "public policy," which means the contractual language violates a clear and well-recognized federal or state policy. (Petersen & Boller, 2003). What is recognized as a public policy in one state may not be accepted in another. The U.S. Constitution offers no guidance here.

D. Doctrine of after-acquired evidence.

The Seventh Circuit has wrestled with the question of employer liability in after-acquired-evidence cases. In suburban Chicago, a former jail officer alleged that his termination was racially motivated. The sheriff said he was fired because of his arrest for criminal sexual assault, although that charge was later dropped.

At the time of his discharge, the sheriff did not know that the jailer had concealed a criminal record on his job application. The sheriff never would have hired the plaintiff and would have fired him had he known of the two prior convictions. The district court ruled for management.

On appeal, a three-judge panel said that an employer must show, by a preponderance of the evidence, it would have discharged the employee upon learning of the misrepresentation. Because of the nature of the plaintiff's crimes, the burden shifted to the plaintiff to prove that he would not have been fired, but for his race. The appellate panel affirmed the result. Washington v. Lake County, #91-1819, 969 F.2d 250 (7th Cir. 1992).

Three years later, the Supreme Court reviewed an age discrimination case, brought by a newspaper employee. Management claimed that it had dismissed the plaintiff as part of a staff cutback.

During pretrial discovery, management learned that the plaintiff had taken home several confidential documents in violation of company policy, which was a basis for termination.

The Supreme Court, in a unanimous opinion, held that the plaintiff could recover back pay from the time of her allegedly discriminatory discharge up to the date after-acquired evidence was revealed. Reinstatement and front pay are inappropriate, if an employer can establish that after-acquired evidence would, in fact, have led to termination. McKennon v. Nashville Banner Pub. Co., #93-1543, 513 U.S. 352, 115 S.Ct. 879 (1995).

E. When is an answer untruthful?

Recently, the Federal Merit Service Protection Board overturned an arbitrator that had sustained the termination of a FLETC instructor for falsifying her educational qualifications. She had listed a degree from Hamilton University, an institution that lacked Dept. of Education approval and granted credit for "life experiences."

To sustain a falsification charge, the Board ruled that management must prove an employee "supplied incorrect information with the intention of defrauding the agency."

She did receive a bachelor's degree in criminal justice from Hamilton, but the arbitrator focused on the value of the degree. FitzGerald v. Dept. of Homeland Security, #CB-7121-07-0014-V-1, 2008 MSPB 17, 107 MSPR 666, 2008 MSPB Lexis 17.

- Deceivers can be clever with the way they present their credentials, making it difficult to prove a deliberate lie.

F. Material omissions

An arbitrator sustained the termination of a county employee who, in her job application, omitted the fact that she had resigned from a criminal justice job, while under suspension. Multnomah County and M.C. Employees L-88, AFSCME C-75, 115 LA (BNA) 1499 (Calhoun, 2001).

Another arbitrator upheld the firing of a worker who consciously omitted listing prior surgeries and disability claims in her pre-employment application. Birmingham Steel and U.S.W.A. L-9777, FMCS Case #00/08457, 116 LA (BNA) 61 (Doering, 2001).

In some cases, termination is too harsh a punishment for civilian employees. A federal review panel reduced punishment of a postal worker who concealed a conviction on his job application, from termination to a reprimand. Perez v. U.S. Postal Service, #DA-0752-96-0575-I-1, 1997 MSPB Lexis 833, 75 MSPR 503.

The result likely would have been different if the appellant was a law enforcement officer. New York appellate courts, for example, have affirmed the termination of a police officers for:

- omitting mention of ongoing psychological treatment in his pre-service application. Gray v. Dept. of Personnel, 592 N.Y.S.2d 376 (A.D. 1993).
- omitting mention of military service and the use of an alias. Angelopoulos v. N. Y. Civil Serv. Cmsn., 574 N.Y.S.2d 44 (A.D. 1991).

G. What if the question is improper or unlawful?

The federal Merit System Protection Board voted 2-to-1 to reverse the termination of a federal air marshal that had falsified his application by omitting a prescription drug he had taken. However, asking an applicant to disclose the medications that he is taking prior to extending a conditional job offer violates 42 U.S. Code §12111(d) and 29 C.F.R. §1630.13(a).

The dissenting member wrote that a federal employee does not have the right to lie, even as a response to an improper question. Evans v. Dept. of Homeland Security, #AT-0752-

05-0844-I-1, 2007 MSPB 297, 2007 MSPB Lexis 7068.

In the private sector, the National Labor Relations Board reviewed the appeal of a union member who was improperly questioned about distributing fliers on coworker desks after-hours, that protested the layoff of some employees. She had been fired for lying about her activities. Because the subject matter of the disciplinary interview was improper (concerted labor activities) the employer could not terminate her for untruthfulness. U.S.A.A. and Williams, #12-CA-21735, 2003 NLRB Lexis 666, 173 LRRM (BNA 1331, 340 NLRB No. 90 (NLRB 2003).

- Neither of these cases involved peace officers, who have a duty to testify against others. The issue is, do two wrongs make a right? Not to a person who faces a criminal conviction based on the evidence of an officer that has lied on his or her employment application.

H. Disparate punishment is still a valid defense

The Civil Rights Act amendment of 1991 provides:

> "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S. Code § 2000e-2(m).

Unless an employer can prove that management would have made the same decision, even in the absence of the unlawful factor, the former employee will be entitled to reinstatement, back pay, and compensatory damages.

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AELE Monthly Law Journal
Wayne W. Schmidt
Employment Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: wws@aele.org
Tel. 1-800-763-2802

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