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PILCHAK COHEN & TICE, P.C.

THE EMPLOYERS LAWYERS

# WORKPLACE CHRONICLE

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## Recent Victories for Our Clients

PCT was successful in obtaining the dismissal of an unfair labor practice charge filed with the NLRB by an employee claiming that she had been retaliated against due to her pro-union sympathies and activities. The employee filed the charge shortly after the union lost an NLRB election where it sought to represent the employee and her co-workers. Although the employee received discipline in the form of a suspension close in proximity to the election, which raised the suspicion of the NLRB, PCT was able to overcome this by demonstrating the legitimacy of the employee's suspension through the employer's written disciplinary documents, published rules, and progressive discipline policy and track record

## HAPPY THANKSGIVING



## FULL EMPLOYMENT FOR CRIMINALS

By William E. Pilchak

Many of us behaved during our juvenile and adolescent years because we had been told that any transgression would "go on our permanent record." This was usually followed by the reminder that "the world needs ditch diggers, too." It turns out few convictions pose an insurmountable obstacle to a career, including the practice of law, as I learned when an acquaintance with a Breaking & Entering conviction was admitted to the bar.

The government has an interest in preventing people from being unemployable, including criminals. PCT has dealt with so many employment implications of criminal escapades, recently, that we decided it's a good time to review the employment law regarding criminal acts.

### Disparate Impact On Minorities

Because African-Americans and Hispanics are convicted at a greater rate than others in society, a blanket no-conviction policy may result in the disparate exclusion of minorities from the workplace. Minority applicants screened out by these policies may bring suit under Title VII and most state acts, including Michigan's Elliott Larsen Civil Rights Act ["ELCRA"], even if there was no intent to discriminate. Though most cases apply this doctrine to misdemeanors, the law has expanded to include felony convictions.

The foundational cases occurred in the 1970's and 1980's and involved manual jobs for which the applicant pools were the cross section of the entire population. However, the U.S. Supreme Court has stated that "figures for the general population might not accurately reflect the pool of qualified applicants," and in the information age, it would be interesting (but expensive litigation) to see if the EEOC can produce data that degreed African-Americans or Hispanics have more convictions than non-minority comparables.

The EEOC now has policies that disqualify those with convictions (and poor credit scores) under scrutiny. The EEOC requires employers to give

individualized attention to each conviction, weighing 1) the nature and gravity of the offense, 2) the time that has passed since the conviction or completion of the sentence, 3) and the nature of the job sought. This can be time consuming and costly, large companies, such as Wal-Mart, where thousands of employment decisions are made on an ongoing basis. But less-costly, bright-line policies may result in litigation.

### Statutory Limitations Upon Consideration of Convictions Regardless of Ethnicity

Some states limit an employer's consideration of convictions regardless of ethnicity. Washington and Hawaii prohibit consideration of convictions more than ten years old for everyone. Washington, Pennsylvania and Wisconsin all prohibit employers from making decisions on the basis of felony or misdemeanor convictions unless the conviction is in some way job-related. New York does the same and requires the employer to also consider the timing of the conviction and the safety and welfare of individuals and the public. Hawaii is the most onerous in this regard, permitting an inquiry about convictions only after a conditional offer of employment has been made, and precluding disqualification unless the conviction relates to the duties and responsibilities of the job.

While job-relatedness might seem to make sense, people who actually run businesses face scenarios where this requirement is unworkable. The best mechanic in the state might be a rapist, a conviction which does not seem to be related to the duties of his job. In another context, must an employer hire a convicted pedophile for a job that does not involve contact with children, and knowing the recidivism rates for pedophiles, wait for the day that another episode occurs so that the newspapers connect her business to the sordid news? Are drug convictions ever job related? The unfortunate effect of these laws is to empower convicted criminals to challenge hiring decisions and cast honest business people as the evil-doers and put them to an expensive defense.

**FULL EMPLOYMENT FOR CRIMINALS *contd***

**Criminal Acts That Did Not Lead To Conviction**

As a former criminal prosecutor, I know that plenty of criminal acts do not result in convictions. Diversion programs exist for offenders under the age of 21 and first time drug offenders of all ages. If the police engage in an improper search or fail to read Miranda rights, evidence is suppressed and the case dismissed. In other cases, witnesses cannot be located, are intimidated, sometimes murdered or are otherwise too fearful to testify. In rare cases, the defendant is acquitted by reason of insanity, though he or she is not mentally ill, and must soon be released.

Yet, the behavior leading to the arrest might be significant to an employment decision. An applicant for a health care position with access to controlled substances might have recently gone through a drug diversion program. An applicant who avoided a home invasion conviction because the police botched a search might have recently left a career of theft only after learning the police have him under surveillance. If you knew of the home invasion, you would want to keep your distance from the perpetrator. But many states have laws that effectively bring these people into the workplace.

Fortunately, Michigan's ELCRA is limited to a prohibition against requesting or making a record of a *misdemeanor* arrest that did not lead to conviction. Inquiries on past felony arrests are not mentioned and inquiries about pending felonies are expressly allowed.

Other states grant broader protection: Most states have provisions that applicants need not volunteer information about sealed records (which typically occurs after a diversion program). Colorado and Virginia have statutes providing that such sealed proceedings need not be disclosed even upon inquiry and Georgia and Illinois prohibit disqualification on the basis of them if learned by the employer. California, Hawaii, Massachusetts, New York, Rhode Island, Washington, and Wisconsin all preclude employers from asking about or making decisions on the basis of *any* arrests (felony or misdemeanor) that did not lead to conviction, with only California providing an exception for health care employees with access to patients and medication.

Occasionally, court decisions permit employers to drill down and make decisions based upon the underlying conduct, even where no conviction resulted, so that the "arrest" is not the but-for cause of the decision. However, if faced with a hiring decision in one of the states mentioned in the above paragraph, research should be conducted to find one of these hair-splitting decisions.

**Expunged Convictions**

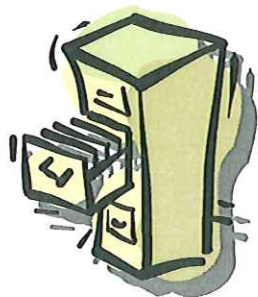
In Michigan, a conviction can be expunged after five years, if there are no further convictions other than minor misdemeanors. Only one conviction may be expunged. States nearly universally provide

that once an offense is expunged, an applicant need not identify the prior conviction, even if the response is under oath. The effect of an expungement is to render the conviction a nullity. Generally sex crimes cannot be expunged. Victims must be notified and may contest expungements of those with assaultive crimes. Expungements can be contested by the prosecutor and are generally granted only after careful consideration by a judge.



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**FORMS & POLICIES AVAILABLE ON THE PC&T WEBSITE:**

- Benefits and Detriments of Arbitration of Statutory Claims vs. Traditional Litigation
- Consent and Authorization to Release Employment Information
- Employment Application
- Fair Credit Reporting Act Forms
- Garnishee Disclosure Form
- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

## BADMOUTHING EMPLOYEES: DO EMPLOYERS HAVE ANY RECOURSE?

By: Rhonda H. Armstrong

Employers need to pay attention to the recent announcements of the National Labor Relations Board (NLRB) about employee use and misuse of social media. While most think of the NLRB in the context of union elections, strikes, collective bargaining and the like, it also enforces employees rights to engage in protected concerted activities for employees' mutual aid and protection even in a non-union setting.

The NLRB has recently weighed in on whether an employer can discipline employees who badmouth the company, mock management, or criticize coworkers through their Facebook (or other social networking) posts. Reconciling the decisions is no easy task. For example, the NLRB held:

- Employee Facebook posts/pictures mocking the employer's expenditures on food (hot dogs) for a luxury car launch was protected;
- Employee Facebook posts defending their work performance in response to a coworker gripe was protected (even with profanity);
- Employee Facebook post about use of

sick time, containing an innocuous threat that he felt like "setting it off" was not protected;

- Employee Facebook post criticizing his employer for not being available when he reached his trucking destination was not protected.

Reading between the lines, it appears the NLRB will find the activity protected where there is evidence that coworkers share or have expressed similar sentiments or where there is evidence that the workplace issue had been previously raised with management. Conversely, an employee's individual gripe or spontaneous act often is not protected. One factor the NLRB considers in such cases is whether the employer maintained an overbroad rule and relied upon it in the discipline (e.g., blanket prohibitions about "inappropriate conversations," "disrespectful conduct," "rude or discourteous behavior," etc.).

During a recent speech, the NLRB's General Counsel suggested that any handbook rules be narrowly tailored and/or that employers notify their employees they don't intend to

interfere with protected activities. While it is not our usual advice to encourage employers to notify employees of these rights, given the current make-up of the NLRB and the disturbing trend of government overreaching, you may be wise to discuss your options with your labor attorney.



## UNITED STATES DISTRICT COURT SUSTAINS DISCHARGE OF EMPLOYEE WHO FALSIFIED EXPENSE REPORT

By: Zachary H. Learman

On October 25, 2011, the United States District Court for the Western District of Michigan rejected claims that an employer violated state and federal gender and age discrimination laws when it terminated a former employee for falsifying expense reports. In *Donovan v Liberty Mut Group Inc*, 2011 US Dist LEXIS 122986 (W.D. Mich, 2011), the plaintiff, Sarah J. Donovan ("Donovan"), was a Michigan Branch Manager for the defendant Liberty Mutual Group ("Liberty"). Donovan was originally hired as a Sales Representative in 1990 and was promoted to various management positions until she became the Branch Manager over Liberty's Kentwood and Kalamazoo offices in 2008.

As the Branch Manager, Donovan was provided a company-issued Visa card for business expenses. Donovan submitted regular expense reports through the company's online "iExpense" program, which provided for reporting and reimbursement of cash expenses as well as credit card charges. After a November 2008 business trip to Florida, Donovan's manager began to question her over expense reporting discrepancies. Following several inquiries and an email to Donovan warning her of the consequences of submitting false or inaccurate expense reports, Liberty's fraud detection and investigation unit launched an investigation of Donovan's 2008 calendar year expense reports. The investigation revealed that she submitted duplicate expenses for six items as both charges and cash expenses. After Donovan admitted she submitted multiple duplicate expenses without offering an explanation, she was terminated.

Donovan brought an age discrimination claim under the Age Discrimination in Employment Act (ADEA) and Michigan's Elliot-Larsen Civil Rights Act (ELCRA) in the Western District of Michigan. The Court focused its attention on whether Liberty Mutual's legitimate business reason for termination (i.e. expense fraud) was pretextual. Donovan argued that the real reason for her discharge was a "palpable animus toward older workers." Donovan alleged that her manager openly advanced an "out with the old and in with the new policy," and that Donovan did not fit in with her manager's work atmosphere, which was one of gambling, excessive drinking and all-night partying, activities that might be enjoyed by younger branch managers, but not be by older employees.

## "GOING POSTAL" -- 20 YEARS LATER

By: Daniel G. Cohen

November 14th marked the 20 year anniversary of the Royal Oak Post Office shootings. The tragic events of that day put workplace violence on the map where it remained for most of the 1990s. Terms like "threat assessment, crisis intervention and crisis management" became household phrases. Workplace violence prevention training was offered by everyone and anyone. Employers paid attention, trained their managers and adopted zero tolerance policies. By the millennium, however, workplace violence seemed a distant memory.

Let's not kid ourselves. Workplace violence is not a thing of the past. Every year, nearly two million American workers report having been victims of workplace violence in the form of threats, harassment and intimidation. Many more cases go unreported. Workplace violence ranges from threats and verbal abuse, to physical assaults and homicide. In 2010, homicide was the fourth-leading cause of fatal occupational injuries in the United States. According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries, of the 4,547 fatal workplace injuries that occurred in the United States in 2010, 506 were workplace homicides. Although down from the peak of 1080 workplace homicides in 1994, homicide remains the leading cause of death for women in the workplace. And, 2010 saw a 13% rise in homicides for women at work.

It is hard to say precisely why homicides at work are down from the 1990s or why we saw a spike last year in the number of women murdered at work. But, whether workplace violence is actually on the rise or not, it's still a good time to revisit the subject, review your policies, and make any necessary changes to ensure you are prepared. One of the best protections you can offer your workers is the adoption of a zero-tolerance policy toward workplace violence. This policy should include a simple policy statement that reinforces your organization's stance on prohibiting aggressive or harassing behavior. It should cover all workers, customers, vendors, visitors, contractors, and anyone else who may come in contact with company personnel.

Of course, merely having a policy is not enough. Supervisors should know how to respond to inappropriate behavior. Employees will only feel safe to report aggressive or threatening coworkers when you consistently act on small problems before such problems become major ones. Therefore, building a culture of two way communication and a track record of "zero-tolerance" toward aggression and intimidation is critical to a healthy workplace. The final ingredient is conducting thorough background screening of prospective hires. Hiring someone with a history of violence, or even a wanted criminal, because a background check was not conducted in the screening process could mean the difference between life or death for employers and employees alike. There is no excuse for not doing your homework when such information has never been more easily accessible or affordable.



### FALSIFIED EXPENSE, *Cont'd*

Donovan sought to undermine Liberty Mutual's "expense fraud" rationale by suggesting that (1) her manager had "multiple, purposeful and unreported personal expenses on his corporate credit card — he was getting repeated cash advances from the Company to gamble at casinos;" (2) her manager and two other employees "were ultimately fired for ethics, credibility problems, inappropriate behavior and comments and poor treatment of co-workers;" and (3) the investigation into her expenses was anything but "thorough," and logically should have taken a different course, such as a check of her personal accounts, a request for repayment of the funds, and reporting her to certifying authorities to revoke her securities license, none of which happened.

The Court found Donovan's arguments unavailing. Significant to the Court was Donovan's concession during her deposition that her submission of double-expenses could "legitimately be viewed as the fraudulent submission of expenses." Also important to the Court was the fact that other employees, including Donovan's manager, were ultimately discharged for similar conduct. This ran counter to Donovan's claim that her violation of Company policy was a pretext for her termination.

There can be little doubt that submitting fraudulent expense items constitutes a legitimate reason to discipline and/or discharge an employee. However, since employees can, and often do, sue their employer even when they have engaged in serious misconduct, it is important that they: (a) publicize the prohibition in their employee handbook; (2) document the violation; and (3) make sure the rule is consistently enforced. Donovan's case certainly could have turned out differently had her manager and the two others not been discharged for engaging in similar conduct. Finally, employers are better off not orienting to "fraud" because proving "intent to defraud" is not always so easy. Instead, employers should stick to the fact that the employee "falsified" the records and was "dishonest."