ARTICLES

WILLAMETTE LAW REIVEW

Volume 41:2 Spring 2005

DECEITFUL EMPLOYERS: COMMON LAW FRAUD AS A MECHANISM TO REMEDY INTENTIONAL EMPLOYER MISREPRESENTATION IN HIRING

RICHARD P. PERNA*

INTRODUCTION

The capital markets and the investing public have been shaken in recent years by a series of high-profile scandals at companies such as Enron, Arthur Anderson, Tyco, Worldcom, and, most recently, a string of mutual fund companies. But investors are not the only "victims" in this environment. Corporate deceptions on this scale can lead to massive job cuts and employee dislocation affecting both current and former employees. In the early going, when the Enron crisis was still a part of the daily headlines, the media clamor over the interests of employees was almost deafening.[1] Later, when news of the

* Professor of Law, University of Dayton School of Law. Very special thanks to my wife, Merideth Trott, for her wonderful support and editorial assistance. In addition, this Article would not have been possible without the research and organizational effort of my research assistant, Tami Hart, class of 2004, University of Dayton School of Law.

1. *See, e.g.*, David Lightman, *Unemployed and Broke After Enron: Congressional Panel Hears About Ex-Workers Ordeals*, HARTFORD COURANT, Feb. 6, 2002, at A1; Bill Murphy, *Laid Off Workers Lash Out at Lay*, HOUSTON CHRON., June 19, 2002, at B1; Eric Berger, *The Court May Approve $28 Million Severance Deal for 4,200 Former Enron*,

massive accounting fraud at Worldcom broke, even President Bush expressed concern for the employees of the then almost bankrupt company.[2]

This concern over the impact of corporate fraud in the contemporary workplace led the author to inquire whether and how employees have used common law fraud actions against current and past employers to remedy the impact of employer misrepresentation. While the effects of a massive Enron-type corporate fraud can be significant and widespread, a review of the recent case law in this area shows that most employee claims of employer misrepresentation result from more "mundane" fact patterns related to employer assertions made during the pre-hiring process. Most of these so called "truth in hiring"[3] claims typically are asserted when employees have accepted new positions in reliance on false statements or promises the employer made during pre-hiring negotiations. Even the most straightforward pre-hiring discussions normally involve employer dissemination of information important to a prospective employee's decision to accept or reject an offer of employment. During this time, employers rarely paint a picture of their work environment as anything but welcoming because this is generally a time of extreme optimism for employers and prospective employees alike. Pre-hire information is often upbeat and usually encouraging, and often includes general descriptions of the company,[4] the job,[5] the general working environ-

---

HOUSTON CHRON., Aug. 28, 2002 at A1; David Francis, *The Need to Guard Nest Eggs, Even from Their Owners*, CHRISTIAN SCI. MONITOR, Mar. 11, 2002, at 21; Alix Nyberg, *After Anderson: Surviving the Demise*, CFO, THE MAGAZINE FOR SENIOR FIN.EXECUTIVES, Jan. 1, 2003, at 68.

2. *See, e.g.* Dana Milbank, *In Growing Bad News, Risk for GOP and Bush*, WASHINGTON POST, June 28, 2002, at A01 (criticizing "corporate leaders who have not upheld their responsibility" and vowing to "hold people accountable" for fooling employees and investors). President Bush expressed these initial concerns about the Worldcom accounting fraud in a press conference held during the G-8 meeting in Canada on June 26, 2002, the day that the Worldcom fraud was revealed. *Id.* He followed up with a second statement on June 27, 2002, again expressing concern for the shareholders and employees of Worldcom. Peter J. Howe, *Reeling from WorldCom—Experts Think Firm Escaped Notice with Simple Tactics Not Flagged by Auditors*, THE BOSTON GLOBE, June 28, 2002, at E1. He also lectured the CEOs of corporate America to fulfill their obligation to treat their shareholders and employees with honesty and respect. *See id.* ("If you are a responsible citizen and you run a corporation in America, you must fully disclose all assets and liabilities, and you must treat your shareholders and employees with respect.").

3. *See* Sandra J. Mullings, *Truth-In-Hiring Claims and the At-Will Rule: Should an Employer Have a License to Lie*?, 1997 COLUM. BUS. L. REV. 105 (1997).

4. *See infra* notes 31-38 and accompanying text.

5. *See* cases cited *infra* note 51.

ment,[6] the general financial strength of the company, and the economic prospects for the future.[7] Information can be much more specific and include promises of pay increases,[8] advancement,[9] and job protection or longevity.[10] In the most sophisticated negotiations concerning mid-level and high-level managerial employees, the information disclosed about the finances of the company can be far more extensive and specific.[11]

Certainly, as one considers the context of the above-noted corporate scandals, one can imagine that there were employees who might have completely avoided the economic dislocation and loss had they chosen not to accept jobs with these failing companies immediately prior to the disclosure of a massive financial crisis.[12] Absent significant financial or other incentives, it is difficult to imagine why an economically rational applicant would accept a job with a company about to implode Enron-style, assuming that they were provided accurate information about the employer's financial situation. This is especially the case when a potential employee does not know or understand the nature of the financial risk, and inadvertently plunges into the midst of financial dislocation and scandal.

Can an employee remedy this type of economic harm in the typical truth-in-hiring scenario? This question raises two related but distinct issues. First, does an employer have a duty to disclose material information to a prospective employee during the hiring process? If so, when an employer fails to reveal material information to a prospective employee, does that employee have a cause of action in constructive fraud for failure to disclose the material information? The

---

6. *See infra* notes 31-38 and accompanying text.

7. *See* cases cited *infra* notes 46-47.

8. *See* cases cited *infra* notes 30-31.

9. *See* cases cited *infra* note 34.

10. *See infra* notes 40-41 and accompanying text.

11. *See infra* notes 46-47 and accompanying text.

12. In addition to those who accept employment on the basis of an employer misrepresentation, current employees might also be injured by employer fraud. There are currently employed workers who, with actual knowledge of the true state of company affairs, might well choose to leave for a more secure and perhaps more lucrative position. Fraud claims brought by existing employees alleging misrepresentation that occurred subsequent to employment are not as prevalent as claims asserting misrepresentation in the hiring process. However, these claims are occasionally pursued by disgruntled employees. *See, e.g.*, case cited *infra* note 19. The concern about the regulation and dissemination of information by employers in the workplace has been the recent focus of academics working in this field. A recent edition of the Comparative Labor Law and Policy Journal was devoted to this very issue. *See generally* 22 COMP. LAB. L. & POL'Y J. (Summer 2001).

reported case law highlights the difficulty in establishing a successful claim for constructive fraud in the employment context.[13] Consequently, at least one commentator has argued for a federal legislative approach to address this type of employer fraud.[14]

Second, does an employer have a duty to assure that information voluntarily disclosed during the hiring process to a prospective employee is accurate and not misleading? Unlike the claim for constructive fraud, this action for intentional misrepresentation in the hiring context is widely available and is seemingly on the rise.[15] While the availability of both constructive fraud and intentional fraud actions in this context raises important questions, this Article addresses only issues primarily associated with an employer's affirmative duty not to provide false or misleading information to a prospective employee during the hiring process.

Historically, intentional employer misrepresentation in the hiring context has not been viewed as a major employment law issue. The primary casebooks in Employment Law give the topic short shrift,[16] and only a few recent law review articles have addressed the subject.[17] However, an analysis of the reported decisions from across the

---

13. As a general rule, an employer's "mere silence," or the simple failure to disclose material information, is not sufficient in the hiring context to support a claim of fraud. *See, e.g*., Glasgow v. Sherman Williams Co., 901 F. Supp. 1185 (N.D. Miss. 1995). *See also* Berger v. Security Pac. Info. Sys., Inc., 795 P.2d 1380 (Colo. Ct. App. 1990). Of course, the exceptions to the general rule apply to the hiring context, and an obligation to disclose can arise when an employer is otherwise under a duty to speak, see for example, *Clement-Rowe v. Mich. Health Care Corp.*, 538 N.W.2d 20 (Mich. Ct. App. 1995), or stands in a confidential or fiduciary relationship to the applicant. *See, e.g*., RPM Assoc. v. Lubore, 683 A.2d 177 (Md. Ct. Spec. App. 1996). In addition, the duty to disclose may arise when an employer partially discloses. *See id*. Finally, the RESTATEMENT (SECOND) OF TORTS § 551(2) (1977) would impose a duty to disclose essential facts in a business context when, because of the relationship between the parties, it would otherwise be unreasonable to do so.

14. See Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715 (1997), in which the author makes an economic and policy-based argument for a comprehensive federal statutory scheme to protect workers against fraud in the workplace. He notes the difficult preemption problems posed by section 301 of the LMRA and by ERISA. In addition, he suggests that some courts seem to apply "what amounts to a presumption against using common law tort to aid workers defrauded by their employers." *Id.* at 788. While his conclusion may be borne out by the cases in the constructive fraud context, the cases noted in the remainder of this Article do not seem to support his conclusion when employees assert common law claims of intentional misrepresentation.

15. *See infra* note 20 and accompanying text.

16. *See, e.g.* ROTHSTEIN & LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW (Foundation Press 2003).

17. See for example, Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1 (1997), in which the author conducts a broad survey of the variety of

country over the past twelve years suggests that these types of cases are on the rise[18] and that the subject warrants more attention than it has previously received.

This Article closely examines the nature of employee fraud actions brought to remedy alleged intentional employer misrepresentation during the hiring process.[19] Part I looks at the increasing incidence of these types of cases over the past twelve years. To better understand the nature of these cases, we develop a fact-specific case typology and use that typology to assess general success rates, as well as success rates for the various types of pre-hiring employer misrepresentation categorized by type. Part II closely examines the most successful and recurring defenses employers raise in these cases, and relates the success of the defenses to the various types of employer misrepresentations identified in Part I. Part III concludes by identifying recurring fact patterns that seem to influence the outcome of cases and assesses why plaintiffs seem to have a higher measure of success in some types of cases than in others.

---

fraud actions available to plaintiffs to remedy employer misrepresentation. *See also* Sandra J. Mullings, *Truth-in-Hiring Claims and the At-Will Rule: Should an Employer Have a License to Lie?*, 1997 COLUM. Bus. L. Rev. 105 (1997); James E. Meadows, *Dancing Around Employment At-Will: Can Fraud Provide Plaintiffs a Way to Hold Their Employers Liable?*, 65 MO. L. REV. 1003 (2000); Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715 (1997).

18. *See infra* note 20 and accompanying text.

19. This Article focuses on alleged employer fraud based on misrepresentations occurring during the hiring process only. Alleged employer fraud that results from misrepresentations that occur subsequent to a hiring decision and during employment is a different class of fraud case and not the subject of our inquiry in this Article. While there are far fewer cases in which the alleged employer fraud occurred during the period of employment rather than before, it is not an infrequent claim. *See, e.g.*, Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980); Milne Employees Ass'n v. Sun Carriers Inc., 960 F.2d 1401 (9th Cir. 1991); Washington v. Aircap Indus., 860 F. Supp. 307 (D.S.C. 1994).