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A Memo on the Falsification of Employment Applications: An Arbitral Perspective

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Falsification of employment applications has become a major concern of both white and blue collar employers. Arbitrations resolving falsification discharges provide standards applicable to both employment sectors. This memo will examine the standards established by arbitrators in such cases and categorize several pertinent decisions made by arbitrators in recent years.

In making such decisions, arbitrators must carefully consider the employer's right to full, honest disclosure of all information related to making an employment determination. Given that falsification does occur, arbitrators must also consider the employee's right to retain his employee status following a falsification unrelated to the employee's responsibilities or job performance.

I. ARBITRATION OF FALSIFICATION CASES—TYPICAL SCENARIO AND STANDARDS OF REVIEW

A. Typical Scenario

Employment applications typically state that all answers must be made truthfully and that the employer retains the right to discharge if answers are not truthful. An applicant thus knows the consequences of falsely completing the application. For whatever reason, the applicant either omits or falsifies an answer. Dischargeable violations for

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1. A survey of 152 companies by Hodge-Cronin, an Illinois research firm, indicates that one in ten firms has caught people lying on resumes. Only one third of the companies said they always verify resume information, but about 80% of the executives polled said they would fire someone for false claims. Wall Street Journal, March 30, 1982, at 1, col. 5.

Blue-collar falsification is often undetected until months or years after the application was executed. See infra notes 50-51 and accompanying text.

2. See Remington Office Equip. v. Int'l Ass'n of Machinists, Local 228, 50 LAB. ARB. REP. (BNA) 53, 56 (1968) (Hebert, Arb.).

3. The primary reason is that the prospective employee fears that he will not get the job unless he omits or falsifies certain answers. See Indianapolis Power & Light Co. v. Elec. Util. Workers, 73 LAB. ARB. REP. (BNA) 512, 514 (1979) (Kossoff, Arb.) (grievant's testimony that she answered question untruthfully because she did not know if she would get the job if she answered "yes" strongly suggested that she did have knowledge of company rules).
falsification include failure to disclose prior arrest or correction record,\(^4\) prior injuries or medical treatment,\(^5\) legal relationships with current employees\(^6\) and previous employment history.\(^7\) The employer subsequently learns of the falsification either through random investigation or following an incident raising suspicion about the employee's capabilities or trustworthiness.\(^8\) The employer then discharges the employee, and the employee invokes the arbitration process pursuant to a collective bargaining agreement to dispute the grounds for the discharge.

**B. Arbitrator's Standard of Review**

The consequences attaching to a falsification discharge are so severe that most arbitrators hold the employers to a reasonable doubt standard.\(^9\) The burden is thus placed on the employer to come forward with sufficient evidence to justify discharge.

Arbitrators have upheld discharges based on two primary theories: the punishment theory and the annulment theory. Under the punishment theory, a penalty of discharge is appropriate even when several years elapse prior to discovery of the falsification.\(^10\) Under the annulment theory, the employment contract is considered voidable by the employer because it was obtained through misrepresentation of a material fact forming part of the basis of the employer's decision to hire the applicant.\(^11\)

Arbitrators have deemed the following facts relevant in determining whether an employer properly discharged an employee:

(a) the deliberateness and willfulness of the falsification;
(b) the materiality of the falsification in relation to the employer's initial decision to hire and to the employee's continuing employment;

4. See infra text accompanying notes 18-21.
5. See infra text accompanying notes 27-31.
6. See infra text accompanying notes 32-36.
7. See infra text accompanying notes 37-40.
8. Such an event is likely to be an on-the-job injury. See Interpace Corp. v. Int'l Longshoremen's Union, Local 6, 54 LAB. ARB. REP. (BNA) 534 (1970) (Myers, Arb.). It may also be an attitude problem exhibited by the employee. See Tiffany Metal Products Mfg. Co. v. Int'l Bhd. of Teamsters, Local 574, 56 LAB. ARB. REP. (BNA) 135 (1971) (Roberts, Arb.).
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(c) the employer's uniform application of the company rule or policy regarding falsification;
(d) the employer's promptness in enforcing the rule or policy;
(e) whether the penalty was stated and understood by the employee; and
(f) any mitigating circumstances.

These standards pervade the opinions to be examined in the text and footnotes below. It should be noted that arbitrators have gone both ways when confronted with factually similar situations. 12

II. CATEGORIZATION OF FALSIFICATION-DISCHARGE CASES

A. Arbitrators Upholding Employer Discharge

An employer has the right to demand that its employees be honest and truthful in every facet of their employment, 13 including answering the employment application. Absent an antiunion motivation the employer has the right to discipline an employee for dishonesty or untruthfulness. 14 More specifically, an employer is entitled to full and accurate information in order to properly evaluate the employment candidate. 15

An employer may discharge for falsification even absent a company rule if the falsification provides adequate grounds for discharge. 16 In such situations, the issue before the arbitrator is whether the employer has violated the bargaining agreement prohibiting discharge without just cause. 17

Falsification of previous arrests or convictions accounts for most of the arbitration in this area. The factors highlighted by arbitrators in upholding discharges are the willfulness and materiality of the falsification.


14. Id.


16. Thorsen Mfg. Co. v. Int'l Ass'n of Machinists, Local 1566, 55 LAB. ARB. REP. (BNA) 581, 585 (1970) (Koven, Arb.) (employee discharged for failing to reveal on application that he had been employed and was either discharged or forced to resign for cause).

17. Eaton Corp. v. Int'l Ass'n of Machinists, 73 LAB. ARB. REP. (BNA) 367 (1979) (Atwood, Arb.).
tion. In *Branch Motor Express Co. v. Freight Drivers Union, Local 557*, the grievant's discharge was upheld where the employer entrusted an employee with valuable cargoes and equipment. Similarly, in *Huntington Alloys v. United Steelworkers of America, Local 40*, the arbitrator found just cause for discharging the employee following the employer's reasonable attempt to determine whether the employee had broken into company personnel files during which the employer discovered the falsification.

Discharged employees frequently raise "the one year rule" in their defense. The rule rests on a waiver theory and purports to set a time limit after which arbitrators will not find just cause for discharge. The limitation period generally only applies, however, where the misrepresentation was not serious and ceased to be relevant to the employment. In cases involving prior arrest records and convictions, arbitrators have not applied the rule because the passage of time does not change the seriousness of the offense or diminish the employer's policy not to hire applicants who have committed serious crimes. For example, in *Remington Office Equipment Co. v. International Association of Machinists, Local 228*, the arbitrator determined that the employer did not waive his right to terminate after fifteen months before discovering prior arrest record falsification saying that the proper waiver standard only applies to the lapse of time after discovery of the falsification.

Falsifying prior medical records or prior injuries also accounts for a number of arbitrated cases. Often the applicant withholds the information from the employer because he feels it is irrelevant to his job performance or would tend to disqualify him from consideration.

The common thread running through medical record/prior injury cases is that because the grievant's medical condition is of primary im-

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18. 52 LAB. ARB. REP. (BNA) 451 (1969) (Cayton, Arb.).
19.  Id. at 452.
20. 74 LAB. ARB. REP. (BNA) 176 (1980) (Katz, Arb.).
21.  Id. at 180. The Company's action was upheld under both the punishment and annulment theories.  Id. at 181.
22. See *Horizon Mining Co. v. United Mine Workers, Local 2935, 72 LAB. ARB. REP. (BNA) 1171 (1979) (LeWinter, Arb.) (most arbitrators would not find just cause for discharge after a long period of employment)*; *Tiffany Metal Products Mfg. Co. v. Int'l Bhd. of Teamsters, Local 574, 56 LAB. ARB. REP. (BNA) 135 (1971) (Roberts, Arb.).
23. 56 LAB. ARB. REP. (BNA) at 139-40.
25. 50 LAB. ARB. REP. (BNA) 53 (1968) (Hebert, Arb.).
26.  Id. at 58-59.
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Importance, any previous injury or illness requiring treatment is considered a continuing condition. For example, in Chanslor-Western Oil and Development Co. v. Oil, Chemical & Atomic Workers Union, Local 1-6, a roustabout who injured his back lifting tubing was properly discharged for not revealing prior back treatments where the job duties of a roustabout involved hard labor, including lifting. In another case, an employee who worked for less than one year was held to have been properly discharged when the employee did not reveal previous psychiatric treatment.

A further common thread in these cases is that arbitrators have asserted the employer's right to solicit relevant information about prospective employees' health and enforce employment health standards. Furthermore, in all these cases the falsification was willful and implicitly designed to secure the grievant's employment.

Another less consequential, nevertheless adequate, ground for discharge, is falsification of an applicant's relation to present employees. Such information is requested pursuant to company rules prohibiting relatives from being employed simultaneously. For example, in Indianapolis Power & Light Co. v. Electric Utility Workers, an employee who answered "No" to an employment application question regarding relatives working at the plant was properly discharged when her testimony showed that she had knowledge of the company rule. The company's policy in Indianapolis Power was found to have been uniformly enforced and not in violation of any term or condition of the employment contract. Similarly, in Midland-Ross Corp. v. United Steelworkers of America, Local 4102, the employer was found to have been justified in discharging an employee who failed to reveal that his brother was employed at the company and his omission was both will-

27. In Interpace Corp. v. Int'l Longshoremen's Union, Local 6, 54 LAB. ARB. REP. (BNA) 534 (1970) (Myers, Arb.). The arbitrator opined that the one-year rule did not bar discharge because the grievant's condition was a continuing one and it cannot be said with assurance that a prior back injury was absolutely not related to the grievant's present injury. Id. at 540.
28. 61 LAB. ARB. REP. (BNA) 1113 (1973) (Meinors, Arb.).
29. Id. at 1115. The arbitrator held further that grievant's physician's statement that he would regard grievant's back problem as "insufficient" was irrelevant. Id.
30. United States Steel Corp. v. United Steelworkers of America, Local 5030, 74 LAB. ARB. REP. (BNA) 354 (1980) (Simpkins, Arb.). But see I.E. Products, Inc. v. United Paperworkers Int'l, Local 977, 72 LAB. ARB. REP. (BNA) 351 (1979) (Brooks, Arb.) (employee had only worked a short time, thus there was no opportunity for time to have dissipated the effect of his injury).
31. Id. at 354; Zia Co. v. United Ass'n of Journeymen and Apprentices, Local 412, 52 LAB. ARB. REP. (BNA) 89, 92 (1969) (Cohen, Arb.).
32. 73 LAB. ARB. REP. (BNA) 512 (1979) (Kossoff, Arb.).
33. Id. at 514, see supra note 3.
34. 73 LAB. ARB. REP. (BNA) at 514-15.
35. 55 LAB. ARB. REP. (BNA) 258 (1970) (McNaughton, Arb.).
ful and material.  

Finally, failing to reveal adverse prior employment history also may furnish adequate grounds for upholding employee discharges. In Tiffany Metal Products Mfg. Co. v. International Brotherhood of Teamsters, Local 574, an employee was justly discharged for deliberately failing to reveal previous employment where a bad attitude was demonstrated. In a similar situation, the same basis existed for sustaining an employer's discharge of an employee who failed to reveal two previous jobs that ended in discharge and resignation for cause. In both cases the employer was found to have acted promptly and in good faith upon discovery of the falsification.

B. Arbitrators Holding Discharge Improper

Arbitrators do not always uphold discharges, however. Mitigating circumstances and equities favoring the discharged employee have dictated contrary results even when arbitrators have confronted factual situations similar to those where discharges have been upheld. Given that falsification of employment applications, albeit unfortunate, is a continuing practice, arbitrators have developed a body of decisional law disallowing falsification discharges where it would be inequitable to do otherwise. Mitigating factors considered by arbitrators include the employee's work performance, the materiality of the falsification, the employee's ability to recall the damaging event, relation of the falsification to present job responsibilities, and the employee's level of sophistication when filling out the application.

Arbitrators have reversed employer discharges based upon a grievant's prior arrest or conviction record. In two such cases the grievant reasonably believed that his arrest record had been expunged. In Kaiser Steel Corp. v. International Hod Carriers Union, Local 1184, the employee was told in open court following completion of his probation

36. Id. at 260.
37. 56 LAB. ARB. REP. (BNA) 135 (1971) (Roberts, Arb.).
38. Id. at 139-40.
40. Id. at 585, 56 LAB. ARB. REP. (BNA) at 141. Arbitrators have upheld discharges based on less common falsifications as well. For example, an employer's discharge of a grievance for falsifying his birthdate was upheld in United Packing Co. v. Amalgamated Butcher Workmen, Local 641, 56 LAB. ARB. REP. (BNA) 673 (1971) (Smedley, Arb.). In Powers Regulator Co. v. United Steelworkers of America, Local 7223, 56 LAB. ARB. REP. (BNA) 11 (1970) (Epstein, Arb.), an employee's failure to note her college degree and the fact that she had been terminated from her last job also provided grounds for a proper discharge.
41. 64 LAB. ARB. REP. (BNA) 194 (1975) (Roberts, Arb.).
period that the misdemeanor charge was dismissed and he was advised by his attorney that the dismissal served to expunge the conviction.\textsuperscript{42} In \textit{United States Postal Service v. American Postal Workers Union},\textsuperscript{43} the grievant likewise relied on his attorney's advice that charges against him would be dropped at the end of one year.\textsuperscript{44} The standard in both cases was whether the grievant had a reasonable belief that he could act as though he had no criminal record, thus foreclosing the employer's argument that the falsification was willful.\textsuperscript{45}

In \textit{Dart Industries, Inc. v. Brotherhood of Railway Clerks, Local 1902},\textsuperscript{46} the employee's failure to report arrests on his employment application was found not to justify discharge.\textsuperscript{47} The arbitrator in \textit{Dart Industries} held that the omission was not material to the grievant's eligibility for the job, given that the grievant had a limited education and nothing indicated that the employer had instructed the grievant on how to fill out the application.\textsuperscript{48}

Obviously, no rule of law requires an employer to reject an applicant because of medical problems.\textsuperscript{49} Neither is an employer always justified in discharging an employee who failed to reveal a medical problem when applying for a job. This concept is reinforced when a significant period of time has elapsed since the employee filled out his employment application. In one case, the grievant executed his application eight years before discovery of the falsification.\textsuperscript{50} In another case, the injury occurred over ten years prior to the employer's discovery of the falsification.\textsuperscript{51}

The other predominant factor in cases involving undisclosed prior medical treatment or injuries is a lack of any relationship between a recent injury and prior undisclosed injury. In \textit{International Harvester Co. v. International Association of Machinists, Local 685},\textsuperscript{52} the arbitrator found no such relation between the grievant's recent back strain

\textsuperscript{42} \textit{Id.} at 196.
\textsuperscript{43} 71 LAB. ARB. REP. (BNA) 100 (1978) (Krimsky, Arb.).
\textsuperscript{44} \textit{Id.} at 101. Prompt petition by grievant for expungement upon discovery of problem and judge's order granting expungement gave further credibility to grievant's position. \textit{Id.} at 102.
\textsuperscript{45} \textit{Id.} at 101; 64 LAB. ARB. REP. (BNA) at 196.
\textsuperscript{46} 56 LAB. ARB. REP. (BNA) 799 (1971) (Greene, Arb.).
\textsuperscript{47} \textit{Id.} at 805.
\textsuperscript{48} \textit{Id.} at 805-06.
\textsuperscript{49} Horizon Mining Co. v. United Mine Workers, Local 2935, 72 LAB. ARB. REP. (BNA) 1171, 1173 (1973) (LeWinter, Arb.).
\textsuperscript{50} Int'l Harvester Co. v. Int'l Ass'n of Machinists Workers, Local 685, 57 LAB. ARB. REP. (BNA) 765, 768 (1971) (Rose, Arb.).
\textsuperscript{51} Eaton Corp. v. Int'l Ass'n of Machinists, 73 LAB. ARB. REP. (BNA) 367, 371 (1979) (Atwood, Arb.).
\textsuperscript{52} 57 LAB. ARB. REP. (BNA) 765 (1971) (Rose, Arb.).
and an injury suffered in a previously undisclosed auto accident. Further, the arbitrator in *International Harvester* failed to discover any intent to deceive on the part of the employee. Other factors mentioned were the minor nature of the injuries, the employee's satisfactory work performance and the employer's failure to act promptly upon discovery of the falsification.

In *Horizon Mining Co. v. United Mine Workers, Local 2935*, the discharge by a successor employer for a grievant's failure to reveal a back injury was held improper where the predecessor employer validated the grievant's employment status by putting the grievant to work with full knowledge of the falsification. The arbitrator in *Horizon Mining* held that the grievant's medical history established that he could perform his mining job and that a doctor's certification failed to state that the grievant could not perform his job.

In one case dealing with a falsification discharge concerning a relative-rule violation, the arbitrator in *Norandex, Inc. v. Teamsters Union, Local 73*, found the discharge improper when the applicant was merely engaged to an employee when he failed to answer the pertinent question. The arbitrator applied common sense to the application question asking whether the applicant was related to anyone in the company and concluded that being a fiance is hardly a legal relationship which would ultimately constitute a relative-rule violation. More importantly, the arbitrator stated that leaving a space blank did not constitute giving a "false and misleading statement" within the meaning of the company rule prohibiting falsification of personnel records.

Although cases disallowing falsification discharges are not as numerous as those where arbitrators have upheld discharges, arbitrators have nevertheless recognized that in certain situations the employee's

53. Id. at 768.
54. Id. The employer was held not to have been exposed to danger as a result of employee's misrepresentation. Id.
55. *Horizon Mining Co. v. United States Mine Workers, 72 LAB. ARB. REP. (BNA) 1171 (1979)* (LeWinter, Arb.).
56. *Eaton Corp. v. Int'l Ass'n of Machinists, 73 LAB. ARB. REP. (BNA) at 371*.
57. Id.
58. 72 LAB. ARB. REP. (BNA) 1171 (1979) (LeWinter, Arb.).
59. Id. at 1175.
60. Id. at 1174-75.
61. 71 LAB. ARB. REP. (BNA) 1168 (1978) (Feldman, Arb.).
62. Id. at 1171.
63. Id. at 1170.
64. Id. at 1171.
interest in preserving his employment status outweighs those of the employer.

Conclusion

While arbitrators must decide each falsification case upon its particular facts,65 they have developed workable and readily applicable standards to help guide their decisions. The majority of the opinions examined here upheld employer’s discharges. However, similar factual settings lend themselves to contrary results when arbitrators have considered mitigating circumstances.

Throughout all of the cases arbitrators have attempted to achieve a proper balance between discouraging willful falsifications and preventing unfair discharges. Application of the standards set out by arbitrators in blue collar disputes will provide guidance not only to those directly affected by such decisions but also to white collar managers facing similar decisions upon discovery of application falsification.

65. Interpace Corp. v. Int'l Longshoremen's, Local 6, 54 LAB. ARB. REP. (BNA) 534, 540 (1970) (Myers, Arb.).