Lying On The Employment Résumé: Is It Illegal?

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The purpose of this study is to determine if, in view of current statutory and common law (case law) in the United States, misrepresentation of qualifications on an employment résumé or application form is an illegal act. Results of the examination may be useful to business communication instructors and counselors whose responsibilities include assisting students with the writing of résumés and other processes involved in seeking employment. The study concludes that it is illegal to commit résumé fraud only if the job seeker (1) is claiming an educational credential from a "diploma mill," a bogus institution and (2) is using the résumé in a state that has enacted legislation to discourage the activities of these schools. However, an employer may be within its legal rights to terminate an employment relationship based upon misrepresentation of qualifications, depending upon the state and the nature of the falsification.

Introduction

During the past 10 years, the topic of résumé fraud has retained the attention of print- and web-based media in North America and Europe. Newspaper articles, books, and bloggers have insisted that employers in the United States are confronting an "epidemic" of employment résumés laden with bogus qualifications (Combat résumé fraud, n.d.; Hoffer, 2007; Mark, 2006; Steingold & Schroeder, 2007). The resignations of high-profile individuals who have committed résumé fraud—including the former Dean of Admissions at the Massachusetts Institute of Technology, the CEO of RadioShack, and the head football coach at Notre Dame—receive global coverage. At least one website, www.fakeresume.com, has been established for the explicit purpose of providing jobseekers with strategies for effectively misrepresenting qualifications in order to obtain employment. As explained by the site organizers: "Over 53% of job seekers lie on their résumés. Over 70% of college graduates admit to lying on their résumés to get hired. Can you afford not to know the techniques, tricks and methods they use?" (Fake résumé, n.d.)

Survey research has produced inconsistent results concerning the estimated frequency of résumé fraud. An often-cited study, conducted in 2001 by ADP Screening and Selection Services, concluded that, of 2.6 million background checks, 44% of applicants lied about work histories on their employment résumés, 41% misrepresented education, and 23% falsified credentials or licenses (Résumé fraud: Beware!, n.d.). In 2003 a study of 11 surveys conducted between 1998 and 2002 concluded that human resources professionals have attained no consensus concerning the frequency of fraudulent job applications. The surveys estimated that between 16% and 67% of all résumés contain at least one falsified detail; on average, 25% of the examined résumés misrepresented the qualifications of applicants (Aamodt, 2002). In 2007, a major human

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resources blog estimated that only 10% -15% of all résumés contain "some form of embellishment" (Fiction in your résumé or cv, 2007).

Business communication textbooks and résumé preparation guides have not ignored the issue of résumé fraud. Generally, these sources do not adopt the alarmist tone prevalent in public media. Rather, textbooks and guides issue stern warnings to job seekers: Lying on an employment résumé or job application form exposes the applicant to serious risk. More specifically, individuals who are hired on the basis of fraudulent qualifications are continually in danger of losing their jobs (Farr, 2000; Kennedy, 2003; Locker, 2006; Rasberry, 2004). Because the focus of risk is upon the employer's ability to terminate an employee due to résumé fraud, business communication texts and résumé preparation guides imply that misrepresenting credentials is an illegal practice. However, these sources do not clearly articulate the legal issues involved and never directly assert that résumé fraud is illegal.

Purpose and method of the study

The purpose of this study is to determine if, in view of current statutory and common law (case law) in the United States, misrepresentation of qualifications on an employment résumé or application form is an illegal act. Results of the examination may be useful to business communication instructors and counselors whose responsibilities include advising students concerning the writing of résumés and other processes involved in seeking employment.

Source materials for this study include the texts of relevant statutes, decisions rendered by state and federal courts, and research published in law reviews. Cases will be selected on the basis of the frequency with which have been cited as controlling precedents throughout the United States.

Statutory law

At least 11 states (Illinois, Indiana, Kentucky, Maine, Michigan, Nevada, New Jersey, North Dakota, Oregon, Texas, and Washington) have currently enacted laws that make misrepresentation of employment qualifications a criminal offense. Five states—Kentucky, New Jersey, North Dakota, Oregon, and Washington—have classified this practice as a felony punishable by several years in prison. The remaining states consider résumé fraud to be a misdemeanor.

However, the scope of the offense as described in these statutes is very narrow. Specifically, it is illegal to use a bogus degree—issued by a "diploma mill" that exists solely for the purpose of granting degrees or certificates—to procure employment. By "use," most of the laws are referring to inclusion in an employment résumé. Washington is unique in that its statute specifies that mentioning a "diploma mill" degree during a hiring interview is also a misdemeanor (Schiavo case, 2006). The intent of the legislation enacted in these states is to discourage the practice of awarding so-called "degrees" from unaccredited institutions, often existing only as online addresses or mailboxes. However, these statutes cannot be broadly interpreted as rendering illegal a wide spectrum of misrepresentations, including falsified employment histories, work experience, or references. Indeed, the state laws do not forbid using the name of an actual, accredited institution that the applicant never attended.

Thus, there are no laws in the United States that forbid lying on an employment résumé or application, except for the narrow exception of bogus degrees. In the United States, responsibility for determining the legal status of misrepresentation by job applicants has largely been assigned to state and federal courts. These courts have frequently considered cases involving résumé fraud, and their holdings are generally reliant upon two concepts central to labor law: just-cause termination and the Doctrine of Employment-at-Will.

Just-cause termination vs. the Doctrine of Employment-at-Will

With regard to termination practices, employment law recognizes two types of employees in the United States: (1) At-will and (2) Just-cause. The majority of employees in the United States are classified as "at-will." These individuals can be terminated at any time, and for any reason—or no reason at all—and courts will generally not intervene to protect the ex-employee from allegedly unfair treatment by the employer. These practices, recognized in the field of employment law as the Doctrine of Employment-at-Will, have lengthy historical precedent and were established entirely by case law.

Most employees of the federal and state governments are considered "just-cause;" they "can be demoted or fired only for such cause as will promote the efficiency of the service" (5 U.S.C. §7513(a), 1978). Also, members of labor unions are usually covered by a written contract, called a "collective bargaining agreement," that contains a clause specifying that their employment can be terminated only for just cause. In addition, employees who have contracted their services with employers for definite periods of time can generally be removed only if a term of the contract has been breached; this also constitutes a "just cause." Just-cause employees who feel that their termination is unfair may bring suit against their employers. Courts recognize that just-cause workers have a right to due process and will assess merits of the arguments marshaled by both the employee and employer.

The Doctrine of Employment-at-Will was first articulated in *Payne v. Western & Atlantic Railroad Co.*, a Tennessee case decided in 1884. In its decision, the *Payne* court stated: "All may dismiss their employees at will, be they many or few, for cause, for no cause[,] or even for cause morally wrong, without being thereby guilty of legal wrong "(*Payne*, 1884). The *Payne* decision provided a succinct statement of the laissez-faire approach to labor, predominant in the late nineteenth century, that employers and employees are free to bargain for services rendered. This view held that employees may terminate their relationship with employers at any time, and vice-versa.

The concept of at-will employment is not a merely historical artifact, a temporary product of the Gilded Age of post-Civil War industrialization and entrepreneurship. Indeed, the Doctrine of Employment-at-Will has been adopted by courts in all 50 states and still represents the prevailing common law. However, beginning in the late 1950s, legislatures and courts have carved a series of exceptions to this Doctrine. In 1959, a California District Court of Appeal decided, in *Peterman v. International Brotherhood of Teamsters*, that an at-will employee cannot be discharged because he or she failed to commit perjury requested by an employer. This decision established a "public-policy" exception to at-will employment. The court held that certain actions performed by an employee serve the good of society and, even if imposed by an employer, cannot serve as grounds of dismissal.

Since *Peterman*, courts have recognized only a small group of protected activities as "public-policy" exceptions:

- Disclosing illegal activities on the part of employers;
- Serving on a jury;
- Filing workmen's compensation claims (*Murphy v. American Home Products,* 1983).

Currently, all but seven states recognize the public-policy exception originally articulated in *Peterman*.

In 1964, Congress established a second group of exceptions to the Doctrine of Employment-at-Will. Title VII of the Civil Rights Act prohibited wrongful discharge based upon race, religion, gender, age, or national origin. A third exception, the concept of implied contract, was recognized by the Supreme Court of Michigan in 1980. In *Toussaint v. Blue Cross & Blue Shield of Michigan* (1980) the court ruled that, even if employment is not for a definite term, a written or verbal statement indicating that an employee would be fired only for just cause was enforceable and these statements could create an "implied contract" between employee and employer if the statements engendered legitimate expectations of job security by the employee (*Toussaint*, 1980).

In *Toussaint*, the employee had worked for Blue Cross for five years before he was terminated. When he was originally hired, Toussaint asked the hiring officer about his job security and was told that his employment would continue "as long as [he] did [his] job" (*Toussaint*, 1980). Toussaint was also provided a manual containing Blue Cross personnel policies; within the manual were statements that disciplinary procedures would be applied to all employees who completed their probationary period and that it was Blue Cross's policy to terminate employees only for "just cause". According to the Michigan court, the employer's oral or written assurances regarding job tenure create an implied contract under which the employer cannot terminate an at-will employee without just cause and cannot take any other adverse employment action without following verbally described or written procedures. The implied-contract exception is currently recognized in 38 states (Muhl, 2001).

A fourth exception to the Doctrine of Employment-at-Will, the "covenant of good faith and fair dealing," is recognized in only 11 states; however, it represents the most far-reaching departure from the notion of at-will employment. The covenant of good faith concept was first articulated in *Lawrence M. Cleary v. American Airlines, Inc.*, a 1980 case heard by a California appellate court. In this case, an American Airlines employee who had worked for the company for 18 years was terminated without any reason. The court held that, by virtue of the airline's explicit policy of adjudicating personnel disputes and the longevity of the employee's service, the employer could not fire the employee without good cause. In its ruling, the court stated that "termination of employment without legal cause after such a period of time offends the implied-in-law covenant of faith and fair dealing" (*Cleary*, 1980). Nonetheless, a majority of courts in the United States have repudiated the notion that an employee's lengthy years of service, accompanied by a record of excellent performance, constitute a "covenant of good faith" between employer and employee.

Thus, despite the establishment of numerous exceptions to the Doctrine of Employment-at-Will, a majority of employees in the United States are still subject to the harsh wording of *Payne*, issued in 1884.

Is résumé fraud a just cause for termination?

The status of résumé fraud as a just cause for termination must be viewed within the context of the broader history of labor law in the United States. For an at-will employee, unprotected by any legally established protection, this status is irrelevant. Since an employer is within its legal rights to terminate the employment relationship for no cause, the employer may fire any employee, whether that employee's résumé or job application contains falsified details or is impeccably truthful.

On the other hand, if an employee is protected by the requirement that discharge can occur only for just cause, employers may legally terminate the employment relationship only if a specific instance of résumé fraud truly constitutes a "just cause." Surprisingly, there is a dearth of case law concerning this topic. The most frequently cited precedent is *Sarvis v. Vermont State Colleges*, a case decided by the Vermont Supreme Court in 2001.

The defendant in this case, Robert Sarvis, was an adjunct professor of the Community College of Vermont. In his application for employment, Sarvis misrepresented his prior business experience and also stated that he was particularly qualified to teach "business law and business ethics" (*Sarvis*, 2001). In fact, prior to commencing his employment in Vermont, Sarvis had served more than three years at the Allenwood prison in Lewisburg, Pennsylvania. He had been convicted of five counts of bank fraud, sentenced to serve 46 months in prison, and ordered to pay $12 million in restitution to five banks. None of these details were described in his résumé submitted to the Community College of Vermont.

Only after Sarvis's probation officer alerted College authorities concerning the criminal history did they learn of their employee's past conduct. The College immediately terminated Sarvis's employment. He responded by suing the College, claiming breach of contract and wrongful termination. In its ruling, the Vermont Supreme Court decided in favor of the College, stating that "We have held that dishonesty can provide reasonable grounds for a just cause termination" (*Sarvis*, 2001). However, the court stipulated that a misrepresentation or omission of information on a résumé or employment application comprises a just cause for firing only if the falsified information is "material." Two conditions must be met to satisfy the condition of materiality.

First, the falsification must be directly related to measuring a candidate for employment. "Measuring" may refer to employment qualifications as stated in a published job announcement (*Sarvis*, 2001). For example, if an announcement states that a position requires that the employee have a Bachelor's degree, the criterion of having achieved this degree will represent a "measure." Second, the misrepresented information must have been relied upon by the employer in making the hiring decision (*Sarvis*).

These two conditions of materiality did not originate with the *Sarvis* decision. Several prior cases, originating throughout the United States and involving instances of falsified qualifications discovered only after an employee had been terminated, also mention these conditions as criteria for determining if misrepresentation meets the legal standard for "just-cause" discharge (*Crawford Rehabilitation Services, Inc. v. Weissman,* 1997; *Johnson v. Honeywell Information Systems, Inc.*, 1992). However, *Sarvis* is the major case concerning résumé fraud as the primary reason for termination. The *Sarvis* decision, together with the preceding cases, carefully stipulated the conditions of materiality to emphasize that not all misrepresentation or résumé fraud constitutes cause for dismissal. Certain omissions or falsified details included in a résumé or application form may not be material. That is, some untruthful claims asserted by a job applicant may not be directly related to "measuring" a candidate for employment and also are not relied upon by an employer in making the hiring decision. Thus, courts have held that employers cannot simply identify *any* misrepresentation and claim that the falsified information provides legal grounds for just-cause termination. In actual practice, however, the determination of which misrepresentations are material can only be made as a result of litigation, an expensive process for both employer and employee.

For example, in 1999 the *Wall Street Journal* published an article claiming that Jeff Papows, the President of Lotus Development Corporation, had lied concerning his educational credentials when applying for employment (Aamodt, 2002). In addition, Papows falsified his military record and also misrepresented his level of expertise in Tae Kwon Do, a martial art. Papows was asked to resign, and he left the company's employ. If Papows had brought legal action for wrongful termination, it is conceivable that a court would hold that only some, or perhaps none, of these falsified details met the legal criteria for just-cause termination. Unless Lotus could demonstrate (1) that educational background, military record, or martial arts expertise was a documented requirement for the position of President and (2) that Papows would not have been hired had it been known that his qualifications were falsified, then a court would likely deem that his fraudulent claims were not material and that Lotus lacked grounds for a just-cause dismissal.

Résumé fraud as after-acquired evidence

Ironically, the majority of cases concerning résumé fraud involve situations in which an employee has been terminated for reasons other than falsification of qualifications. These cases follow a common scenario (Wahl, 1999). An employee is terminated for what, to the employer's view, constitutes just cause. In most instances, the reason for the discharge is poor job performance. Following the dismissal, the employee initiates a suit for wrongful termination. During discovery, the employer conducts a rigorous investigation of the employee's qualifications as stated in the résumé or original job application. If these qualifications are found to be falsified, the employer will charge that the original grounds for termination are still valid. However, additional grounds for discharge—the newly discovered résumé fraud—provide further justification for the firing. In such cases, the evidence of misrepresenting qualifications is revealed only after the termination has occurred. Thus, this information is considered "after-acquired evidence." The employer introduces this evidence as a defense against the employee's charge of wrongful termination.

State and federal courts have held that "after-acquired" evidence is an appropriate defense for employers (*Bonger v. American Water Works*, 1992; *Freeman v. Kansas State Network, Inc.*,

1989; *Johnson v. Honeywell Information Systems, Inc.*, 1992; *O'Day v. McDonnell Douglas Helicopter Co.*, 1992; *Summers v. State Farm Mutual Auto Ins. Co.*, 1988). In fact, the only case involving résumé fraud brought before the United States Supreme Court, *McKennon v. Nashville Banner Publishing Co.* (1995), sustained the use of "after-acquired" evidence by employers. As in the *Sarvis* decision, however, courts have held that this evidence can sustain a claim of just-cause termination only if the employer can prove that (1) the falsified or omitted information is relevant to determining (or "measuring") the job candidate's qualifications for employment and (2) the employer relied upon the falsified information to make the hiring decision.

One of the cases involving résumé fraud as after-acquired evidence, *Johnson v. Honeywell Information Systems, Inc.* (1992), held that the two criteria of materiality "…are necessary to prevent an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial" (*Johnson*). The same court stated that "We do not hold that any or all misrepresentations on an employment application constitute just cause for dismissal" (*Johnson*). Other state and federal courts in the United States have sustained this view.

Conclusion

From a legal perspective, it is illegal to lie on a résumé or job application only if the prospective employee (1) is claiming an educational credential from a "diploma mill" and (2) is using the résumé or application in a state that currently has enacted legislation to discourage the activities of unaccredited schools. However, an employer may be within its legal rights to terminate an employment relationship based on falsification of qualifications, depending upon the state and also the nature of the misrepresentation.

If an individual works in a state that offers no exception to the Doctrine of Employment-at-Will, the employee may be discharged for résumé fraud—or for any or no reason. The concept of "just-cause" discharge is irrelevant. However, if a person is employed in a state or situation (such as government employment or union membership) where employers may terminate only for a just cause, then the employer must demonstrate that the falsified information is "material."

If an employee claims that he or she has been wrongfully discharged on the basis of résumé fraud, the employee can initiate litigation to demonstrate that the conditions of just-cause termination are absent. Litigation is an expensive, time-consuming process, and the employee may be required to expend financial and other resources. In addition, there is considerable risk that the employee will not prevail in an action involving résumé fraud. If evidence of genuine misrepresentation is introduced into court, and this misrepresentation is deemed "material," the employee will not prevail. In a 1995 decision, the United States Court of Appeals for the Sixth Circuit held that it has a "policy of denouncing résumé fraud" (*Moos v. Square D Company*, 1995). Courts throughout the United States have generally shared that view.

Also, employers may assert résumé fraud as a defense against an employee who has been terminated for unrelated reasons. This "after-acquired" evidence of misrepresentation has been upheld by courts; employees found to have falsified their qualifications will likely not prevail in their attempt to prove wrongful termination.

Thus, although lying on the résumé is illegal in only a narrow sense and within few states, falsification of qualifications on a résumé or application form may be legitimate grounds for just-cause termination. The process of contesting this discharge is quite expensive and, unless the résumé or application is without blemish, will likely not result in a favorable outcome for the employee.

As mentioned previously, many business communication textbooks admonish students to write honest résumés because misrepresentation of qualifications can result in losing a job. These texts also remind applicants that the résumé is a marketing tool intended to present educational background and prior work experience in an appealing, persuasive manner. However, some textbook readers may not discern a clear distinction between persuasion and falsification.

Ironically, courts in the United States also recognize that this distinction is not readily apparent. The decision in *Johnson* (1992), for example, emphasizes that some misrepresentations on a résumé do not rise to the level of materiality and, therefore, are not grounds for just-cause termination. Thus, lying on the résumé may not—from the standpoint of state and federal courts—be a defensible reason for discharging an employee.

It seems, though, that business communication instructors have a responsibility to clarify to their students the ambiguities inherent in the notions of permissible persuasion and outright fraud. Fortunately, existing case law is relevant in this matter. In general, courts have required documentary evidence as proof that a material misrepresentation has occurred. That is, employee claims concerning educational background, past accomplishments, titles, or responsibilities can be deemed fraudulent only when the employer presents credible documents that demonstrate the falsity of the employee's assertions.

Thus, business communication instructors are provided an unambiguous message to students planning to enter the workforce: Make no claims on the résumé that can be disproven by documents retained in your employer's (or school's) files. The documents may provide clear evidence of fraud, and this fraud could be sufficiently material to warrant termination of employment.

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