OUTTEN & GOLDEN LLP

Advocates for Workplace Fairness

WRITTEN TESTIMONY OF OUTTEN & GOLDEN LLP
on
PROPOSED INT. NO. 1314-A, A PROPOSED AMENDMENT TO FAIR CHANCE ACT

January 22nd, 2020
The New York City Council, Committee on Civil Rights
250 Broadway, New York, NY 10007

Good morning. My name is Christopher McNerney, and I am an attorney at the law firm of Outten & Golden LLP. Thank you to the Committee on Civil Rights for holding this hearing and for providing the opportunity to testify.

Outten & Golden is one of the largest firms in the U.S. exclusively representing employees, executives and partners in all areas of employment law. We advocate for individuals' civil rights in the workplace, and we combat worker exploitation and systemic discrimination through class action and impact litigation.

For over a decade, Outten & Golden has been in the trenches advocating on behalf of individuals unfairly denied employment because of their criminal history and working to chip away at the steep barriers to re-entry faced by individuals with records. Examples of our cases include *Gonzalez v. Pritzker*, No. 10 Civ. 3015 (S.D.N.Y.), brought against the U.S. Department of Commerce on behalf of hundreds of thousands of African American and Latino applicants. These individuals sought temporary jobs for the 2010 decennial census and were rejected based on arrest records contained in the FBI database. The case was the first of its kind to achieve class certification on claims of disparate impact under Title VII of the Civil Rights Act of 1964 related to the use of criminal history records. For that litigation and settlement, my colleagues and I received the 2017 Trial Lawyers of the Year award from Public Justice. Our firm also has litigated numerous class actions brought under New York laws specifically protecting against discrimination on the basis of criminal history—on behalf of classes of applicants and employees, as well as organizations such as The Fortune Society and the NAACP New York State Conference Metropolitan Council of Branches.[1] Outside of litigation, we have represented many individuals navigating the complexities associated with finding employment with a criminal history.

We were working in this area prior to the passage of the Fair Chance Act ("FCA") and welcomed its passage. We have seen the real difference the FCA can make for individuals, families and entire communities, and we have also come to understand the ways in which

[1] *See, e.g.*, *The Fortune Society, Inc. v. Macy's, Inc.*, No. 19 Civ. 5961 (S.D.N.Y); *Mandala v. NTT Data, Inc.*, No. 18 Civ. 6591 (W.D.N.Y.); *Kelly v. Brooklyn Events Center, LLC*, No. 17 Civ. 4600 (E.D.N.Y.); *Millien v. The Madison Square Garden Co.*, No. 17 Civ. 4000 (S.D.N.Y.); *NAACP New York State Conference Metropolitan Council of Branches v. Philips Electronics North America Corporation*, Index No. 156382/2015 (Sup. Ct. N.Y. Cnty.).

employers continue to circumvent its spirit and intent. Our testimony is based on experience gained through such representations and our firsthand view as to the hurdles that employers put into place to prevent compliance with the FCA.

I. The Focus of this Testimony is to Advocate for a Narrower "Intentional Misrepresentation" Standard.

Through this testimony, we seek to comment on proposed Section 8-107(10)(g) of the Administrative Code of the City of New York, which addresses an employer's ability to deny employment to an applicant or employee based on a supposed "misrepresentation" of their arrest or conviction history.

The proposed language ensures that individuals will be provided with "a copy of the documents that formed the basis of the determination that a misrepresentation was made"[2] and "a reasonable time to respond[.]"[3] Such language provides an important corrective to the statute, but we believe it fails to address employers' weaponizing of the "intentional misrepresentations" defense to avoid any and all scrutiny of adverse actions under the FCA.[4] Accordingly, we submit this testimony.

II. Employers Routinely Use the Excuse of "Intentional Misrepresentations" to Avoid Scrutiny of Adverse Actions Under the FCA.

Over the course of many class and individual representations, our firm has observed a disturbing trend whereby employers use the defense that an applicant supposedly "intentionally misrepresented" their conviction history to avoid scrutiny under the FCA. Specifically, many employers require that, as part of the background check process, applicants self-disclose all (or most) of their criminal history when also authorizing a background check. If the applicant then asserts claims (either in court or before an administrative tribunal) alleging that they were unfairly denied employment because of their criminal history, the employer will use any discrepancy between the criminal history self-disclosed and revealed on the background check to claim they are not liable under the FCA. They will argue that such a discrepancy is an "intentional misrepresentation" of criminal history,[5] which removes the individual from the

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2 Proposed Section 8-107(10)(g).

3 *Id.*

4 The proposed language also appears to improperly *lower* the existing standard from "intentional misrepresentations" to *any* "misrepresentations."

5 *See* N.Y. Correct. Law § 751 ("Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee."); N.Y. Admin. Code § 8-107(10)(a) ("It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to deny employment to any person or take adverse action against any employee by reason of such person or employee having been convicted of one or more criminal offenses, or by reason of a finding of a lack of 'good moral character' which is based on such person or employee having been convicted of one or more criminal offenses, *when such denial or adverse action is in violation of the provisions of article 23-a of the correction law*." (emphasis supplied)), (11-a)(c) ("Nothing in this subdivision shall

protections of the Act.[6] The logic is that a denial for supposed "intentional misrepresentation" of criminal history is not a denial because of "having been convicted of one or more criminal offenses[,]" and thus the employer is not obligated to perform an analysis under New York Correction Law Article 23-A ("Article 23-A") or is otherwise liable under the FCA.

Especially troubling, we have observed that: (i) employers often will only raise the defense of "intentional misrepresentations" when faced with a lawsuit; and (ii) *pro se* litigants are especially vulnerable to this practice and apt to have their complaints of discrimination with administrative tribunals dismissed based on an employer's invocation of "intentional misrepresentations" that is premised on nothing more than a failure to fully disclose the applicant's entire criminal history.

Accordingly, we believe employers' use of the "intentional misrepresentations" defense flouts the FCA's protections and intent, and injures New York City residents with criminal histories who seek gainful employment.

A. The "Intentional Misrepresentations" Defense Prevents Consideration of the Article 23-A Factors.

The FCA was enacted to ensure that "job seekers" are "judged on their merits before their mistakes" and "to level the playing field" for "New Yorkers who are part of the approximately 70 million adults residing in the United States who have been arrested or convicted of a crime."[7] Employers' increasingly common legal strategy of focusing on what information an applicant discloses instead of whether a conviction actually "relate[s] to a job or pose[s] an unreasonable risk"[8] frustrates these goals and serves to keep qualified applicants with criminal histories from suitable employment.

A requirement that applicants completely disclose their criminal history is nothing more than a memory test, is not probative of intent to lie, particularly when applicants are also authorizing background checks and understand that employers will get their records from a third party, and is another hurdle to employment for individuals with criminal histories.

B. When Raising this Defense, Employers Often Do Not Evaluate Intent.

The "intentional misrepresentations" defense is especially troubling because, in our experience, an employer typically will not make any effort to determine whether an applicant truly misrepresented their criminal history. Rather, the employer will simply compare the

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prevent an employer, employment agency or agent thereof from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record.").

[6] *E.g.*, *Millien*, 17 Civ. 4000, ECF No. 40 (Answer) at 1 ("Both [Plaintiffs] . . . failed to disclose criminal convictions on their job application materials. As a result of those failures, neither Plaintiff was eligible to be hired."), 21 ("Plaintiffs' claims under the NYCHRL are barred because the intentionally misrepresented their criminal background.").

[7] Section I. Legislative Intent, Fair Chance Act: Legal Enforcement Guidance, available at https://www1.nyc.gov/site/cchr/law/fair-chance-act.page.

[8] *Id.*

information an applicant self-disclosed to the information reflected in a background check report, and if it does not perfectly match, make a determination of "intentional misrepresentation."[9]

The reality of applicant experiences is much different, and there are many reasons why an applicant might fail to fully disclose criminal history outside of a supposed desire to mislead the employer. Thus, an inference of intentionality that is derived simply by comparing what an applicant self-disclosed to what a background check revealed is highly problematic.

First, individuals may be unaware of the full extent of their criminal history because they: (i) pled to a crime that is different from the one with which they were initially charged (particularly for an individual who is not incarcerated, it is not always clear whether the disposition of his or her charges resulted in a conviction (or its equivalent) or not); (ii) misremembered older convictions; (iii) failed to understand the differences between felony, misdemeanor, or violation[10] convictions; (iv) did not realize their conviction included multiple, separate offenses; or (v) misstated the full extent or proper phrasing of their criminal history on job applications given the technical and varied terminology present in the criminal justice system.[11] Second, the employer's self-disclosure requirement may itself impede accurate disclosure, because it is either unclear what the employer seeks or requires incredibly broad disclosures. Third, the applicant may nonetheless try in good faith to comply with the employer's requirements by, for example, disclosing their most serious or their most recent conviction—believing, consistent with the FCA, that a background check will then be run and they will be provided with an opportunity to explain the entirety of their criminal history at a later date.

In our experience, employers do not typically account for these nuances when making a determination of "intentional misrepresentations." This is perhaps because employers know that if they deny employment because of a criminal record, they will face scrutiny and potential litigation. But if they deny employment because of supposed "intentional misrepresentations" they may not.

III. Our Proposed Solution.

Respectfully, the proposed amendment to the FCA does not go far enough to address the

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9 *See, e.g.*, *Millien*, 17 Civ. 4000, ECF No. 40 (Answer) at 1, 21.

10 Violation convictions (*e.g.*, as disorderly conduct, unlawful possession of marijuana, and low-level trespassing) are not criminal convictions, *see* N.Y. Crim. Proc. Law § 160.55, but are adjudicated in criminal court. As a result, criminal defendants are typically advised that violation convictions will not appear on commercial background checks.

11 A criminal record is not comprised of a single document. "Information about arrestees, [suspects,] defendants, pre-trial detainees, probationers, inmates, and parolees is recorded in numerous and over lapping files, records, and databases that include: RAP sheets created by police and nationally integrated rap sheet systems; court records; police investigative and intelligence information shared at the local, state, and federal levels; and other private databases[.]" Nairuby L. Beckles, *The Criminal "DNA" Footprint: Viewing the Mark of Criminal Records Through the Legal Lens of the Genetic Information Non-Discrimination Act*, 59 How. L.J. 485, 492–95 (2016).

serious issue of employers misusing the "intentional misrepresentations" defense. While it is important that an employer be required to state "the basis of the determination that a misrepresentation was made" at the time of denial of employment,[12] as drafted there is nothing to limit an employer from overbroad, inconsistent, and illogical determinations of intentionality.

Fundamentally, employers are wielding "intentionality" as a litigation defense to avoid the FCA and its protections for individuals with criminal records. Unless this defense is made less appealing (and scrutinized by courts and administrative agencies), employers will continue to embrace it to excess. Accordingly, we respectfully propose that Section 8-107(10)(g) be amended in the following ways to provide that:

- The employer bears the burden of establishing that an applicant or employee *intentionally* misrepresented their criminal history;
- A determination of misrepresentation of criminal history will be treated as a denial "by reason of such person or employee having been convicted of one or more criminal offenses"; and
- If the employer establishes misrepresentation, it will merely be treated as one factor to evaluate as part of a wholistic review of all the Article 23-A factors.

These modest amendments will go a long way toward minimizing non-compliance with the FCA. By clarifying that employers bear the burden of establishing intentional misrepresentations, employers will be incentivized to collect actual information as to why a person may have failed to fully disclose their criminal history, leading to a fairer system. By treating a denial for "intentional misrepresentation" as a denial because of criminal history, employers will no longer be incentivized to find "intentional misrepresentations" because it will no longer allow them to avoid scrutiny under the FCA. Similarly, by treating a failure to fully disclose as just one factor to be considered along with Article 23-A, it will allow for a fairer review of the entire person. It also will avoid situations where an applicant is denied employment for failing to disclose a conviction that would not otherwise disqualify them from employment.

Thank you again for your time and consideration of this testimony.

Respectfully submitted,

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[12] As discussed, absent such language, employers will often wait to assert this defense until faced with litigation.