FOR IT'S ONE, TWO, THREE 'CHECKS' YOU'RE OUT…

Despite Inroads, the Law Still Offers Little Privacy Protection for Employees

BY KEVIN I. LOVITZ

Since Curt Flood challenged the reserve clause in 1969, it seems that Major League Baseball has focused on employment law as much as it has on home runs and strikeouts. Wally Backman, whose fortunes changed faster than a Nolan Ryan pitch, proves yet again that no one, not even a major league manager, is immune from the legal entanglements employees face every day. Backman's plunge from the big leagues exemplifies how some employees today never stop paying for the sins of their past.

A little background may be helpful. Wally Backman was a solid player who spent most of his career with the New York Mets. While not a superstar, Backman was one of those players around whom winning teams are built. He broke into the Major Leagues in 1980 as a second baseman for the then-struggling Mets. His speed and agility made him a valuable asset during his fourteen-year career, which reached its pinnacle when he was instrumental in the Mets' 1986 World Series victory over the Boston Red Sox.

After retiring in 1993, Backman, like many former major leaguers, tried his hand at coaching minor league baseball. Backman had ambition and drive and wanted to manage in the "Big Show" —the Majors. Backman reached his goal on November 5, 2004, when he was hired to manage the Arizona Diamondbacks.

But within four days, his career came to a crashing halt. A media source revealed that Backman had a checkered past that included arrests, bankruptcy and other troublesome legal affairs. Regrettably, the Diamondbacks waited until after they had publicly announced Backman's hiring before initiating a criminal and financial background check. These "checks" confirmed their worst fears, and the team abruptly decided to fire the most promising candidate in their minor league system.

Unfortunately, Wally Backman's tale is becoming commonplace. Prospective employers are scrutinizing the past, and once private, lives of employees without end. Criminal and financial background checks, drug and alcohol testing, personality exams, reference checks and other such investigatory methods are becoming an "acceptable" part of the hiring process. And the law appears to be ineffective at protecting employees from hiring tactics that may constitute an invasion of privacy.

The tide may be turning, ever so slowly. For example, in Pennsylvania, the legislature enacted the Criminal History Record Information Act, which addressed at least one privacy interest—a prior criminal record. The Act provides a modicum of protection for a jobseeker with a criminal history by requiring an employer to limit its consideration of an applicant's prior convictions. For example, one provision, "Use of Records for Employment," permits an employer that possesses an applicant's criminal history to use the information when deciding whether or not to hire him or her. The Act limits the employer's right to use this information, however, by mandating that employers may consider felony and misdemeanor convictions only to the extent to which they relate to the applicant's suitability for employment in the position for which he or she has applied. 18 Pa.C.S. §9125.

Even though the Act limits the use of criminal convictions in hiring decisions, proving a violation can be a daunting task. Job applicants typically do not have access to the documentation and witnesses necessary to prove why an employer did not hire them. Moreover, employers often use standardized rejection letters that can be designed to mask the ulterior motives for the non-hire. Thus, challenging an employer's hiring practices can prove to be a fruitless pursuit.

Historically, Pennsylvania courts have offered little protection to an employee fired for conduct revealed as a result of a background check or drug test. With limited exception, Pennsylvania's "at-will" employment doctrine permits an employer to dismiss or refuse to hire an employee for any reason or no reason. Consequently, this longstanding rule of law has significantly curtailed an employee's ability to pursue litigation against an employer.

Nonetheless, courts in Pennsylvania have identified strong public policy considerations for protecting the privacy interests of employees. In *Geary v. United States Steel Corp.*, the seminal case involving a wrongful discharge claim, the Pennsylvania Supreme Court opined that there were "areas of an employee's life in which his employer has no legitimate interest." The court reasoned that if an employer were to intrude into one of those areas, especially where some facet of public policy is threatened, its conduct might give rise to a cause of action. 319 A.2d 174,180 (1974). By the same token, the Commonwealth Court recently reiterated in *dicta* that there is a "deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restriction upon former offenders." *Warren County Human Services v. State Civil Service Com'n (Roberts)* 844 A.2d 70, 74 (Pa. Cmwlth. 2004).

Indeed, more than twenty years ago, the Superior Court faced this issue in *Hunter v. Port Authority of Allegheny County*, 419 A.2d 631, 634 (Pa. Super. 1980). In *Hunter*, an employer dismissed an employee, a bus driver, when it learned that he had a thirteen-year-old assault conviction. The employee sued for wrongful discharge, claiming he was fired in contravention of public policy. Reversing the trial court's dismissal of the claim, the Superior Court reasoned

that the trial court "could not assess, on the basis of the averments in the complaint, the relationship, if any, between the assault thirteen years prior to appellant's employment application and appellant's present ability to perform the duties of a bus driver." *Id*. at 637. Significantly, the court was willing to entertain the notion that a wrongful discharge action could be maintained under such circumstances. That job protection could be derived from the temporal proximity of the crime and its relation to the job at hand was groundbreaking.

In *Cisco v. United Parcel Services, Inc*476 A.2d 1340 (Pa. Super. 1984), the court drew a further distinction between present and past criminal activity. Although it upheld the dismissal of plaintiff's wrongful discharge claim, the court ruled that the employer was justified in dismissing the employee because it was not looking at a "cold rap sheet" but rather an arrest arising out of the "performance of his extant duties." *Id*. at 344.

Our courts have protected an employee's privacy in other instances. In *Borse v. Piece Goods Shop, Inc*the Third Circuit upheld a cause of action for wrongful discharge where an employee—a woman whose job was selling "buttons and bows"—refused to consent to a urinalysis and property search, which she alleged invaded her privacy. 963 F.2d 611 (3rd Cir. 1993). In *Borse*, the court acknowledged that privacy interests in the workplace could be derived from common law rights and that such interests were a legitimate source of public policy for purposes of a wrongful discharge claim.

Notwithstanding these small inroads, current statutes and case law continue to offer little protection to employees. For Wally Backman, his criminal history and other legal affairs were arguably job-related. His negative public persona could have had a negative impact on the morale of his ball club and may have damaged his ability to lead his team back into championship contention. In all probability, the Diamondbacks considered these issues when they decided to fire Backman. But, arguably, Backman's prior record might not have had any effect whatsoever on his players.

The moral of Backman's story, unfortunately, is that when it comes to applying for a job, little is sacred. The technology associated with background checks allow a company to decide the fate of a new hire in minutes—certainly faster than the law can offer protection. Unfortunately for Backman, his past caught up with him at the wrong time. The courts and the legislatures have more work to do to level the playing field and protect the rights of people who have paid their debts to society. But for Backman, there's always the Minors. ■

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