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

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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

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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-

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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.

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

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

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13. As a general rule, an employer's "mere silence," or the simple failure to disclose ede,r63hy"rTT2 13tis o3.er la n iTT9 y

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 re-