

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2014

PHILADELPHIA, WEDNESDAY, APRIL 9, 2014

VOL 249 • NO. 68

An **ALM** Publication

Consideration of Applicant's Arrest May Violate Pa. Act

BY SID STEINBERG

Special to the Legal

Employers in Pennsylvania must be careful in how they use information received on an applicant's criminal background check. In the recent case of *Hoffman v. Palace Entertainment*, No. 12-cv-06165 (E.D. Pa. Mar. 25, 2014), the employer, Dutch Wonderland, was accused of using information regarding the plaintiff's 10-year-old arrest to deny her a position as a security officer. The court denied Dutch Wonderland's motion to dismiss as to this claim. The court also denied a motion to dismiss the plaintiff's Americans with Disabilities Act claim.

ABSENCES AS WATER PARK ATTENDANT

Heather Hoffman began working at Dutch Wonderland as a seasonal, part-time water area attendant in spring 2009. She was invited to return for the 2010 season, which she did. During the 2010 season,



SID STEINBERG is a partner in Post & Schell's business law and litigation department. He concentrates his national litigation and consulting practice in the field of employ-

ment and employee relations law. Steinberg has lectured extensively on all aspects of employment law, including Title VII, the FMLA and the ADA.

however, Hoffman had a series of absences that resulted in her receiving "points" toward discipline "up to and including firing," according to court papers. Hoffman continued to work throughout the year, but at the end of the season, Hoffman was not invited to return "because of issues with her attendance." She was, however, advised that she could apply for employment if she was interested.

Hoffman did so, applying in January 2011 for a position as a security officer. Hoffman checked the box for "no" when asked if she had any prior convictions for a misdemeanor or felony, court papers said.

2002 ARREST IN QUESTION

Dutch Wonderland offered Hoffman a position. Subsequent to the offer, however, "questionable issues came up about a 2002 arrest" during the company's background check. It is unclear (a) what the "issues" were and (b) whether this was the first such background inquiry the company had ever performed on Hoffman. Dutch Wonderland withdrew the offer of employment shortly after the "issues" arose "because the company did not feel that plaintiff was telling the truth."

It should be noted that the complaint alleges that Hoffman "demonstrated" the falsity of the arrest to the company and notes that the background check was performed by a credit company, rather than the Pennsylvania State Police.

Hoffman brought suit claiming, in part, that Dutch Wonderland's decision to rescind its offer of employment for the 2011 season violated the Pennsylvania Criminal History Record Information Act, 18 U.S.C. Sections 9101-9183.

CRIMINAL HISTORY RECORD INFORMATION ACT

The act provides, in relevant part (Sections 9125(a) and(b)), that, “Whenever an employer is in receipt of information which is part of an employment applicant’s criminal history record information file, it may use ... [only] felony and misdemeanor convictions ... [and] only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied.”

Moreover, the act defines “criminal history record information” to include “notations of arrests.” In short, a prospective employer may not use an applicant’s arrest, as opposed to his or her conviction, in the hiring process.

Dutch Wonderland moved to dismiss Hoffman’s criminal history claim pursuant to *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), for failure to state a claim as a matter of law. The court denied the motion, finding that Hoffman had plausibly alleged that the employer had impermissibly used her arrest record, i.e., “criminal history record information,” in “deciding to rescind its offer to plaintiff of a security officer position for the 2011 season.”

DISABILITY DISCRIMINATION ALSO ASSERTED

Hoffman also stated a viable claim of disability discrimination under the ADA. Specifically, she claimed that she submitted doctors’ notes for her absences during

the 2010 season and that during her interview for the security officer position, she disclosed that in late 2009 (that is, after being invited to return as a water park attendant), she had a miscarriage that caused her to suffer “seizure activity,” which was “petit mal” in nature. Her complaint alleged that Dutch Wonderland’s refusal to invite her to return after the 2010 season and its subsequent withdrawal of the employment offer for 2011 was discriminatory based upon her disability.

A prospective employer may not use an applicant’s arrest, as opposed to his or her conviction, in the hiring process.

Dutch Wonderland moved to dismiss Hoffman’s ADA claim for failure to allege a condition that “substantially limits one or more ... major life activities” and for failure to allege an adverse action related to her asserted disability.

The court found Hoffman’s ADA claim to be viable on every level. First, although both the pro se complaint and motion response were disjointed at best, the court determined that she had pleaded facts “sufficient to support a plausible inference that her seizure

disorder substantially limits her ability to work (by requiring her to take unscheduled absences for medical treatment).” Along those lines, the court found that the complaint stated a viable claim of disability discrimination both with respect to the decision to deny her an extension of her employment and the rescission of the employment offer in 2011.

IMPACT OF CRIMINAL HISTORY ACT

The principal takeaway from the case is the impact of the Criminal History Act. Dutch Wonderland will undoubtedly assert that it did not withdraw the offer because of Hoffman’s arrest record, but because of concerns about her credibility. But it appears as though the employment application did not inquire about arrests, only convictions, of which there does not appear to be any evidence. Even if it had, it is doubtful that Dutch Wonderland could have taken action for the arrest, whether it was verified or not. •