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## No Do Overs: Don't Keep Your Hiring Managers in the Dark

By: Julie R. Rubin, Esq.

I couldn't figure out where I'd gone wrong, so I chalked it up to typical Baltimore humidity. I'd over done it at the farmers market as usual and ended up with a few dozen fresh eggs with no idea what to do with them until I remembered that my neighbor Jim adores meringues. I figured I'd do a Donna Reed and whip him up a batch. After letting them rest in the oven for hours to get that hallmark light crunch, I opened the oven door to find limp, sticky blobs. This was a "do over." Note to self: Meringues and humidity do not make happy bedfellows – keep window closed.

As I forlornly scraped the mess down the sink, my phone rang. "I'm coming," I sang to no one. "Hello?", I answered. "Hi, Julie. I hope you remember me." It was Fran Littleton, a woman I met just a few weeks before at a friend's birthday party. Fran is the CEO of a professional cleaning company that provides services for small commercial buildings and private residences. (Her company even does crime scene clean up. Ick.) During the housing boon, Fran had grown the company rather quickly. She had amassed about 400 residential contracts and 10 commercial contracts within the metropolitan area, and had grown to about 175 employees. The company had two base offices – one in Baltimore City and one in Annapolis. Baltimore was decidedly the larger of the two, from which 80 percent of her cleaning crews were deployed for services in the metropolitan area.

Fran had a mess even she couldn't clean up. She needed a lawyer. Fran's company had been served with a lawsuit for what she described as "something about revoking a job offer." "I don't understand this," she began, "I didn't approve anybody to be interviewed. And isn't Maryland an at-will employment state? How can I be sued for not hiring this lady?" She faxed me the lawsuit and we made an appointment for the following afternoon to discuss the facts and next steps.

In the last year, Fran had lost some of her residential contracts as homeowners tightened their belts to make do without luxuries like housekeeping services. Still more of her residential clients had reduced the frequency of Fran's cleaning services. Anticipating a long night before the sun would shine on the economy again, Fran's board of directors decided a round of layoffs

and a hiring freeze were necessary to keep the business out of harm's way. The board approved a lay off 12 employees based out of Baltimore – a fairly substantial percentage of her total employee pool.

Unbeknownst to Fran, the following week, Lila, the manager of the Annapolis branch and a vice president of the company – unaware of the board's decision – interviewed and offered a job to someone to replace an employee who relocated to Texas. The new employee was scheduled to start work in two weeks. When the office manager sent Fran the requisition form for final approval to bring on the new employee, Fran picked up the phone and told Lila about the layoffs and the hiring freeze. There was no way they could justify hiring someone when they had just laid off 12 people, Fran explained, and, in any event, a hiring freeze was in place by vote of the board. Fran instructed Lila to call the applicant and explain the situation. "Just tell her that we are very sorry, but circumstances do not permit us to take on a new employee." And did that, Lila did.

As you might imagine, the applicant was not so understanding. After Lila had offered her the job, the applicant quit her job as a cashier and assistant manager at a national grocery store chain – where she had worked for four years – because the job with Fran's company offered better wages and benefits. Making matters worse, when the applicant told Lila during the interview that she was unsure about quitting her long-time, stable job, given the economy, Lila encouraged the applicant by describing overtime and advancement opportunities in Fran's company. After hearing from Lila that the job was revoked, the applicant got a lawyer's opinion. Next followed the lawsuit.

Yes, Maryland is an at-will employment state. And, yes, that means the employer (or the employee) can terminate the employment at any time, for any reason, or no reason at all, so long as it doesn't violate public policy (all the no-nos you already know about, like termination on the basis of race, religion, etc.) So, how on earth could the applicant sue Fran's company for revoking the job offer? Much to Fran's chagrin, Maryland is one of several states, including Indiana, Mississippi, Vermont, California and Connecticut, that recognize a job applicant's rights under a legal theory known as negligent misrepresentation.

Here's the drill: an employer can be held liable for representations and statements made without reasonable care during job interviews and negotiations if the statements turn out to be false and the applicant has relied on those statements. This is negligent misrepresentation. In short, if you offer a job, the applicant accepts, and then you revoke the offer before the start date of the job, you may be liable.

Despite appearances, this theory does not undermine an employer's rights under at-will employment law. Employers are entitled to terminate an employee once employment begins. But a potential employer owes an applicant a legal duty to exercise reasonable care in the representations it makes during the interview – before the job begins. If an applicant relies on job interview statements that turn out to be false, or an accepted job offer is revoked before the start date, you could be liable. Intent has nothing to do with it. The ticket is what you knew or should have known, not whether you have a dark heart.

Here, the applicant informed Lila that she was hesitant to quit her long term, stable job in favor of a new job in a shaky economy. Lila emboldened the applicant with visions of higher wages, overtime and advancement – despite the fact that the company had just laid off 12 employees and was under a hiring freeze. As a result, the applicant accepted the job with Fran’s company and quit her job at the grocery store. And the grocery store wouldn’t hire her back either, so there were real money damages, not just a bruised ego.

“But Lila didn’t have any idea about the lay offs and the hiring freeze!”, Fran exclaimed. “This is ridiculous!” Lila may not have been informed about the board’s decisions, but Lila is a manager and an officer of the company. In the eyes of the law, as a member of management, Lila is the company. She may not have had actual knowledge of the lay offs or the hiring freeze, but the law imputes her with knowledge of these key events, or, at the very least, says she should have known.

A few weeks later, the matter settled at a fair price when the plaintiff found a job working as a receptionist (at a law firm of all places). I told Fran that she got lucky. The job applicant made a terrific plaintiff, especially considering the economy, and I had concerns that a judge or a jury would be sympathetic to her plight.

Fran could easily have avoided this mess if she had promptly informed Lila of the board’s decision. Particularly where a company has multiple offices, managers or departments, the key to steering clear of liability for job offer related negligent misrepresentation is to keep your managers – particularly those with authority to interview and make hiring decisions – informed of key facts that effect job offers and negotiations.

Fortunately for my neighbor Jim, I can make more meringues. But in law, there are no do overs.