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What You Think You Know Can Hurt You: A Cautionary Tale About Internal Investigations.

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When an employee termination is on the table, employers know that a supporting investigation is important, as we recently discussed on GT's *The Performance Review* podcast, available here. A recent decision from the California Court of Appeal – *Garcia-Brower v. Premier Auto. Imps. of CA, LLC*, 55 Cal. App. 5th 961 (2020) – illustrates the point.

Tracey Molina applied to work at Premier Automotive Imports of California, LLC in January of 2014. On her job application, she chose not to disclose an expunged conviction for misdemeanor grand theft. That was entirely proper; such convictions need not be disclosed under California law. Premier's third-party background check service provided a report that disclosed no conviction. Relying on the application and report, Premier hired Molina in February 2014.

The next month, the Department of Motor Vehicles *incorrectly* informed Premier that Molina had an active (non-expunged) criminal conviction for grand theft. Premier decided to terminate Molina. At the termination meeting – and after the termination decision had been made – Molina tried to explain that her conviction had been dismissed. Premier did not change course. It terminated Molina for "falsification of job application." Several weeks later, the DMV corrected the error, providing Premier with a corrected background check showing that Molina's conviction had been expunged. Despite this new information, Premier did not rehire Molina.

The California Labor Commissioner sued Premier on Molina's behalf for (a) relying on a dismissed conviction to make the termination decision, in violation of Labor Code section 432.7, and (b) retaliating against her in violation of Labor Code section 98.6 for exercising her right not to disclose the conviction on her application. The matter went to trial. At the close of the Commissioner's case, Premier moved for nonsuit, arguing that both statutes required proof that Premier knew Molina's conviction had been dismissed when it decided to terminate her. Premier argued that when it made the termination decision it had, at most, inconsistent information regarding her conviction. That Molina informed Premier of the dismissal at the termination meeting was immaterial because, at that point, Premier had already made its decision. The trial judge agreed and granted the nonsuit.

The Court of Appeal reversed. It recognized that, for retaliation-based claims, the employee must

prove that the employer knew of the protected activity at the time of termination. But it held that because Premier had conflicting evidence regarding the conviction at the time of termination, the matter had to go to the jury.

Employers may sympathize with Premier. The DMV's letter was facially credible. And it is hard to fault Premier for trusting a government agency over a commercial provider on the issue of convictions, which are government records. Premier may have felt it had no time for a protracted investigation, given the seriousness of the charges. Premier management may not have been familiar with the ins and outs of expunged convictions. And, even if Premier should have considered Molina's input after the termination decision, it might have been reasonable for it to trust the DMV, which had no reason to lie, over Molina.

But Premier left more than a few stones unturned here that could have changed the outcome. Although the decision no doubt *felt* like it had to be made immediately, the company could have taken its time. It could have reached out to the DMV or the third-party background check provider for clarification. It could have spoken to Molina before the termination decision was made. When Molina raised new information at the termination meeting, it could have stopped to consider it. And, when it learned the DMV's information was false a few weeks after the termination, it could have re-hired Molina. Any of these steps may have kept Premier out of trouble—and, to be clear, a jury may yet find Premier did nothing wrong.

Of course, these observations are easily made by someone with more time, nothing at stake, and the benefit of hindsight. But that is precisely how termination decisions are judged. Like Premier, employers should expect that their termination decisions—often made quickly and sometimes with imperfect information—will be subject to similar scrutiny. The case is a good reminder that, whenever possible, an employer should slow down, plan, gather evidence, investigate every lead, and make a record. Employers will be second-guessed. A well-executed investigation can help employers make the right decision, and where necessary, show that the decision was made the right way.

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