

SMITH O'CALLAGHAN & WHITE
33 NORTH LA SALLE STREET
SUITE 3800
CHICAGO, ILLINOIS 60602

TELEPHONE (312) 419-1000 FACSIMILE (312) 419-1007 WEBSITE [WWW.SOCW.COM](http://www.socw.com)

**Clearing Up Misconceptions on the Relevancy and Admissibility
of a Party's Prior Crimes of Dishonesty
in Illinois Employment Litigation**

* **Laura A. White**

The legal rights of employers in defending against employment litigation are sometimes misunderstood in the pre-trial discovery stage when an employer probes into a suing plaintiff's background prior to the employment relationship at issue.

A frequent point of contention is whether an employer has the right through the pre-trial discovery process to determine whether, and to what extent, a plaintiff has engaged in prior criminal acts. There is a common misconception that such discovery is not legitimate and ultimately not relevant or admissible under governing law. However, there is a well-defined line of legal authorities from Illinois courts and administrative agencies finding that such pre-trial inquiries are within the legal rights of an employer and are admissible evidence. The law in Illinois is consistent with the weight of authorities in other jurisdictions around the United States.

The analysis of such pre-trial discovery begins with the well-established law in Illinois, as in most other jurisdictions, that evidence of conviction of a crime involving dishonesty is admissible to impeach the credibility of a witness. *People v. Montgomery*, 47 Ill. 2d 510 (1971) (adopting *Rule 609 of the Federal Rules of Evidence*, which provides that for the purpose of attacking the credibility of a witness, evidence of conviction of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment).

This rule has been adopted and is applicable in both criminal and civil cases in Illinois. *Knowles v. Panapoulos*, 66 Ill. 2d 585 (1977) (holding that *Montgomery* adoption of *Rule 609 of the Federal Rules of Evidence*, allowing admission of evidence of a crime of dishonesty or false statement to impeach the credibility of a witness, extends to and is applicable to both criminal and civil cases).

* Laura A. White is a partner with Smith O'Callaghan & White. She has extensive experience in successfully representing employers in employment litigation matters involving a wide range of issues. Her practice focuses on defending cases of alleged employment discrimination and wrongful discharge, in the federal and state courts, and before administrative agencies.

A prior conviction for attempted forgery, as an illustration, is a crime involving dishonesty and will be admissible to impeach the credibility of a plaintiff in a civil case. People v. Jacobs, 51 Ill. App. 3d 455 (4th Dist. 1977) (ruling that the lower court's decision to exclude evidence of a forgery conviction was an abuse of discretion, and stating that forgery is a crime involving dishonesty or false statement and such a conviction was intended by the rule set forth in Montgomery to be used to question a witness' credibility). See also, Torres v. The Irving Press, Inc., 303 Ill. App. 3d 151, 160 (1st Dist. 1999) (granting plaintiff a new trial where trial court committed reversible error by refusing to admit evidence regarding a key defense witness' prior conviction for misdemeanor theft, which it finds is a crime involving dishonesty: "Crimes involving deceit, fraud, cheating or stealing press heavily on the probative value side of the scale."). Id. at 160, quoting People v. Spades, 77 Ill. 2d 193, 203 (1979); Zivitz v. Greenburg, 1999 U.S. Dist. LEXIS 19160 *8-9 (N.D. Ill. 1999) (Conlon, J.) (denying defendants' motion to exclude evidence of a prior misdemeanor conviction for possessing false identification with intent to defraud and ruling as follows: "The convictions clearly entailed dishonesty or a false statement . . . [c]onclusory and speculative allegations of prejudice are not persuasive.").

The law in Illinois on this point is sometimes glossed over based on generalized assertions of undue prejudice – and, surprisingly, at the pre-trial stage and at trial, Illinois courts in some instances still view such evidence as not admissible. However, a close examination of Illinois appellate decisions establishes that the law is quite clear. A recent case is instructive. In Stokes v. City of Chicago, 333 Ill. App. 3d 272 (1st Dist. 2002), the Illinois Appellate Court reversed a jury verdict because the trial court committed reversible error when it refused to allow the City to introduce evidence of plaintiff's three prior burglary convictions to impeach his credibility. The routine facts involved competing testimony, not remarkable in trial practice, between the plaintiff and other witnesses as to whether an injury had occurred when plaintiff said he stepped in a hole on a city sidewalk or when other witnesses said he was playing basketball. The trial court had reasoned that the plaintiff's credibility had not been an issue. The Illinois Appellate Court disagreed. It succinctly – and one could argue correctly – put the issue to rest: "***It is a rare trial where a party's credibility will not be an issue. This was not one of them.***" Id. at 277 (Emphasis added).

From the viewpoint of the employer in employment litigation, that statement from the Illinois Appellate Court in a rather routine context would apply even more forcefully in a case arising in the area of employment litigation – where there is frequently competing testimony concerning multiple events, in varying workplace contexts, with the events transpiring at various points over long durations of time. And whereas the credibility of the employer is always at issue in employment litigation, the credibility of the suing party also must be given serious consideration by the fact-finder.

The administrative agency in Illinois charged with hearing claims of employment discrimination under the state anti-discrimination statute is consistent with the Illinois courts. The strong precedent of the Illinois Human Rights Commission on this point, which may be of surprise to certain practitioners, serves to highlight the potential use of prior criminal acts and the rights of employers in defending against employment litigation claims.

The Illinois Human Rights Commission has repeatedly relied upon evidence of crimes involving dishonesty to assist in making credibility determinations with respect to claims of employment discrimination and allows the use of such evidence to impeach a witness' testimony, including, most importantly, the testimony of the complainant bringing the charge. The following decisions favorable to employers on the point have been reported:

■ McGee and Friedrich Agency, Charge No. 1989SH0001, 1992 ILHUM LEXIS 685 (Ill. Hum. Rts. Comm. 1992) (affirming recommended order and decision that complaint and underlying charges be dismissed with prejudice, where judge allowed admission of evidence of complainant's theft and forgery convictions to attack complainant's credibility, and holding as follows: "Forgery, which is a felony, and theft, are both crimes involving dishonesty. A conviction for a felony or any crime involving dishonesty is admissible to impeach a witness' credibility.").

■ Franklin and Wal-Mart Stores, Inc., Charge No. 1989SP0093, 0013-0017, 1991 ILHUM LEXIS 73, (Ill. Hum. Rts. Comm. 1991) (affirming recommended order and decision that complaint be dismissed with prejudice, where testimony of complainant was entirely distrusted by the judge based on complainant's conviction of a crime of dishonesty (theft) and his false testimony concerning the conviction, stating that "a conviction for a felony or any crime involving dishonesty is admissible to impeach a witness' credibility.").

■ Wells and Office of the Clerk, House of Representatives, General Assembly of the State of Illinois, Charge No. 1988SF 0005, 1991 ILHUM LEXIS 70 (Ill. Hum. Rts. Comm. 1991) (affirming recommended order and decision that complaint and underlying charge be dismissed with prejudice, where complainant's conviction for a crime involving dishonesty (theft) (and a history of using aliases), rendered her testimony less credible than that of other witnesses).

There should be no real misconceptions about an employer's legal rights in issuing and pursuing discovery on a suing party seeking information on prior criminal matters. Convictions for a crime of dishonesty are relevant to the court or administrative proceeding, and admissible evidence in the court or administrative proceeding at trial or in pre-trial motions.

Smith O'Callaghan & White
www.socw.com

Laura A. White laura.white@socw.com