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2011 ISSUE 4

EXPUNGING CRIMINAL RECORDS: HOW COMPLIMENTARY LAWS CAUSE CONFUSION AND CONCEALED DANGERS FOR EMPLOYERS

BY BRIAN M. KESTER

Picture this. In 1991, Robert Reformed, then an aimless 19-year-old high school dropout, decided to spend a perfectly pleasant Friday evening tipping some cows in Bovine County. After driving around the countryside for hours looking for the perfect pasture, Robert finally settled on a farm owned by Farmer Humorless, the owner of twenty prize-winning Holstein heifers. Having been under siege in recent weeks by ruffians who enjoy knocking over his cows while they sleep, Farmer Humorless had posted "No Trespassing" and "Keep Out" signs throughout his property. Disregarding these warnings, Robert jumped over the barbed wire fence and made a beeline to Bessy, a 1,400 pound trophy just waiting to be knocked to the ground. Just as he got into his three-point stance, right between the head and hindquarters, Robert saw flashing red and blue lights. Farmer Humorless apparently grew suspicious of his 1974 AMC Gremlin cruising past the

property several times in the wee hours of the morning and called the sheriff, who arrived just in time to stop this senseless assault on poor Bessy. Sheriff Bythebook, also a local dairy farmer, arrested Robert rather than just letting him go with a warning. The charge—trespassing after being forbidden in violation of Okla. Stat. tit. 21, § 1835—constituted a misdemeanor in Oklahoma. After reading Robert his rights, Sheriff Bythebook hauled Robert to the county jail.

Robert's parents, wanting him to reflect on what he had done and where he was heading in this life, let him stew overnight in jail before finally posting his bail the next morning. Once released, Robert spent the next few weeks agonizing about what the judge had in store for him.

Before doling out Robert's sentence, the judge reviewed his record to determine the proper punishment. Overall, even though Robert made a series of bad decisions, he was a good kid who just needed discipline and

guidance. He was young and had no criminal history. Robert did not physically hurt anyone during his crime, and, fortunately, no harm had come to Bessy. Considering all these things, the judge imposed a deferred sentence. Under the terms of this sentence, Robert had to serve one year on probation, provide 50 hours of community service, and pay restitution and other costs. The judge told Robert that if he abided by the terms of the sentence and stayed out of trouble, he would order an expungement of his guilty plea.

In the following year, Robert did abide by the conditions of the deferred sentence. In fact, it was during this time that he started to turn his life around. He quadrupled what the judge required of him, working 200 hours at the local food bank. He also went back to school, first getting a GED, then a bachelor's degree, then a master's, and finally his doctorate degree in education admini-

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OKLAHOMA'S PIONEER IN LEGAL EXCELLENCE



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stration. With his guilty plea expunged and his life back on track, Robert began his career in the education system, giving back to his communities by finding inventive and exciting ways to keep at-risk kids in school and engaged in their education and future.

Fast forward to 2011, and we find Dr. Robert Reformed seeking a superintendent's position with Thorough School District, a small school district in rural Oklahoma. As part of its application packet, the school district required Dr. Reformed to complete a questionnaire that inquired about any former criminal history, including suspended sentences, deferred judgments, and expunged records. Since his attorney in 1992 had told him that receiving an expungement of his guilty plea essentially meant that the record never existed, Dr. Reformed marked "no" to these questions. Unfortunately for Dr. Reformed, Thorough School District somehow found out about the decades-

old trespassing arrest. The question now becomes what the school district can and cannot do with this information. In Oklahoma, this question turns on what type of expungement actually took place.

The most common type of expungement in this state is the type described above. When the person who received this type of sentence completes all the requirements attached to it, and when the court makes a ruling recognizing the same, the judge will discharge the defendant with prejudice without making a judgment of his guilt. Okla. Stat. tit. 22, § 991c(C). In addition, the judge will also issue an order that directs the verdict or plea of guilty or plea of nolo contendere to be expunged from the criminal record. *Id.* Pursuant to such an order, all references to the defendant's name are deleted from the docket sheet, the filing's public index is deleted, marked-out or obliterated, and information con-

cerning the expunged record cannot be revealed or released except by order of the court. *Id.*

This type of expungement, while certainly of great value to those defendants who accomplish the terms of their sentences, does have its limits. Namely, while it expunges adverse pleas and verdicts, it does not inherently expunge other information such as arrest records and similar non-court documents. This means that even though the court has no record of the case, the record may still exist in other places, such as at the police department that made the arrest. Additionally, even though these records are deemed "expunged," they do not fall within the category of "sealed" for inquiry purposes. Due to the shortcomings of this type of expungement, those persons who qualify should also seek an additional form of expungement, which seals all the records re-

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OFFICIAL 2012 STATE OF OKLAHOMA HOLIDAYS

In an amended executive order by Governor Mary Fallin, issued on June 17, 2011, the following dates are to be observed as holidays by the State of Oklahoma. Oklahoma law requires you to post an agenda a minimum of 24 hours in advance, excluding Saturdays, Sundays, and state declared holidays. Therefore, the state declared holidays for 2012 are as follows:

- Monday, January 2, 2012 (New Year's Day)
- Monday, January 16, 2012 (Martin Luther King, Jr. Day)
- Monday, February 20, 2012 (President's Day)
- Monday, May 28, 2012 (Memorial Day)
- Wednesday, July 4, 2012 (Independence Day)
- Monday, September 3, 2012 (Labor Day)
- Friday, November 12, 2012 (Veterans Day)
- Thursday and Friday, November 22 and 23, 2012 (Thanksgiving Holiday)
- Monday and Tuesday, December 24 and 25, 2012 (Christmas Holiday)



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lated to case, from the point of arrest forward.

While the less common form of expungement is certainly superior to the more common form, at least from the defendant's standpoint, only certain types of defendants committing certain types of crimes are eligible to obtain this more complete expungement. For instance, this avenue is available for, among others, those defendants actually acquitted of the crime, those who have their factual innocence proven by DNA evidence, and those convicted of a misdemeanor who have not had any misdemeanor or felony charges pending against them for the past ten years. Okla. Stat. tit. 22, § 18.

Even though a person qualifies for this form of expungement does not mean the records automatically disappear. Instead, the person must bring a court action in civil court to take advantage of this type of expungement. As outlined by Okla. Stat. tit. 22, § 19(B)-(C), in order to rule in the person's favor, the court must find that the harm to the person outweighs the public interest of retaining these records. Upon such a finding, the court will order these records, in whole or in part, to be "expunged," which for purposes of this expungement statute means that they will be "sealed." *Id.*; Okla. Stat. tit. 22, § 18. Such an order seals not only any remaining court records but also the relevant records of those agencies involved in the case, including the arresting police department, the district attorney, and the Oklahoma State Bureau of Investigation. *Id.*

Once sealed, the person and all agencies involved in the underlying matter may respond that no such action ever occurred and that no such records ever exist. Okla. Stat. tit. 22, § 19 (D).

For employers, educational institutions, and local government agencies, such as Oklahoma school districts, this second form of expungement plays a crucial role in how they may conduct their application and interview processes in three key ways. First, under Oklahoma law, these entities cannot require an applicant, "in an application or interview or otherwise," to disclose any information contained in these sealed records. Okla. Stat. tit. 22, § 19 (E). Second, if ever presented with such a question, any applicant who has had his criminal records sealed under this process can either refuse to answer the question or can answer it in the negative. *Id.* Third, these entities cannot deny this person's application solely because the person refused to disclose information contained in the sealed records or because the applicant answered in the negative. *Id.*

Because there are two types of expungement of criminal records, and because not all expunged records are sealed, the case with Thorough School District could result in several different outcomes. Assume first that Dr. Reformed, even though he could have taken advantage of the second form of expungement, trusted his attorney's interpretation of the statutes and never followed

through with seeking the second type of expungement. In this scenario, because he never filed a civil court action to seal all his criminal records, the court documents alone would be expunged (but not sealed), and his other criminal documents, such as arrest reports, would be available for potential employers to find. In this situation, Thorough School District could lawfully reject Dr. Reformed's application either because of his criminal history or because he in effect lied on his application, even though he was relying on imperfect information from his attorney.

Now assume that Dr. Reformed got wind of better advice and did file a civil court action in 2004 to have his entire criminal record expunged. Assuming he was successful in that action, Dr. Reformed would have the lawful right to state that he was never arrested for the cow-tipping incident of his youth. Moreover, Thorough School District could not deny his employment application solely because he stated he was never arrested, nor could they require him to provide information contained in these sealed, expunged records. Doing so would violate Oklahoma law. Okla. Stat. tit. 22, § 19(E).

Based on the above scenarios, one can see how delicate this process becomes when presenting potential employees with a criminal history questionnaire. Under one set of facts, an employer can freely ask about ex-



"Due to this ambiguity created by the legislature's use of the term 'expunged' in two very different situations, we recommend that school districts and other employers steer clear of this potential powder keg by dropping the term completely from their criminal history questionnaires."

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ANNOUNCING RFR'S *THE COMPENDIUM*

The Compendium is a Rosenstein, Fist & Ringold e-mail publication that addresses current special education law issues. *The Compendium* is designed to provide current and accurate information regarding current special education law issues. It is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with special education law issues should be sought.

The Compendium is available to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *The Compendium* with your friends and colleagues. We think you will find it to be informative and helpful with the difficult task of operating our educational institutions. To be added to *The Compendium* e-mail distribution list, please send an e-mail to Bo Rainey at borainey@rfrlaw.com. Help us make *The Compendium* an asset to you.

RFR SPEAKER SHOWCASE

Karen Long is chairing the Oklahoma Bar Association's School Law Seminar that will be held on April 19, 2012, at the Oklahoma Bar Association Center, 1901 North Lincoln Boulevard, in Oklahoma City. Karen will be one of the presenters at the seminar and will be speaking on the subject of child exploitation.

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punged records and can even deny an application solely upon finding out about information stemming from information relating to an expunged court record. Under a slightly different set of facts, but involving the same individuals and the same underlying action, an employer could not even require an applicant to provide any information contained in the expunged records, and it certainly could not deny the application solely because the applicant either refused the answer to the question or because the applicant denied the arrest ever took place, despite the fact that the employer somehow knows differently.

Due to this ambiguity created by the legislature's use of the term "expunged" in two very different situations, we recommend that school districts and other employers steer clear of this potential powder keg by dropping the term completely from their criminal history questionnaires. One simple way to do this is by changing current questionnaire questions that read, for example: "Have you ever been convicted or pleaded guilty or no contest to a felony? [This question includes criminal cases involving

a 'deferred sentence,' 'deferred judgment' and any 'expunge of the records,']" into, "Have you ever been convicted or pleaded guilty or no contest to a felony? [This question includes non-sealed criminal records involving a 'deferred sentence' or 'deferred judgment.']" By making this minor modification, school districts and other employers will still be able to gain as much information as possible while simultaneously avoiding the possibility of asking about potentially protected information.

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Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

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