

Employer Liability
Dealer Loses Identity Theft Case Involving Employee

By Thomas B. Hudson

Let me get this straight. A fellow strolls into a dealership and asks for a job. In the process, he reveals that he has a criminal history. The criminal history isn't for bigamy, or underage drinking or selling a bit of a recreational controlled substance or for any of the many other things that a reasonable dealer might decide to ignore. No, my friends, this guy has been involved in forgery and theft by deception. But the dealership hires him anyway!

But that doesn't matter, right? This guy is going to be assigned to the job of tying balloons to the antennas of the cars over in the used car lot, where his criminal history won't matter. Right? Right??

Well, no. It turns out he will be involved in dealing with the dealership's customers and taking their credit information. I know you think I make this stuff up, but believe me, I couldn't if I tried. Here's the story from a recent court opinion.

Gregory Lukens shopped for a new car at Dunphy Nissan, and a new sales employee, Anthony Williams, assisted him. Williams had started work at Dunphy the previous day. He was hired on the spot after disclosing his criminal history for forgery and theft-by-deception (note to the General Manager - probably not your best hiring decision).

During the car purchase negotiations, Lukens signed a form granting the dealership permission to obtain his credit report, but he left the dealership without applying for credit because he could not reach agreement on the price of the car.

Shortly after this visit to the dealership, five fraudulent credit accounts were opened in Lukens' name. Because minor inaccuracies in the name and telephone number on these accounts matched the inaccuracies in the form Williams used to obtain his credit report, Lukens believed Williams was the source of the information used to steal his identity. Lukens was not required to pay the \$12,000 charged on the fraudulent accounts, but some evidence of the accounts remained on his credit report. Lukens sued Dunphy Nissan, Inc., for violating the Fair Credit Reporting Act and for invasion of privacy. The dealership moved for partial summary judgment.

The U.S. District Court for the Eastern District of Pennsylvania found that the FCRA applied to this case. The court reasoned that the FCRA governs the conduct of report users, such as Dunphy Nissan. The court ruled that Dunphy could be held vicariously liable for its employee's impermissible use of a consumer report under a theory of "aided in agency."

Although Williams' intentional misconduct might be viewed as outside the scope of his employment, the court observed that the "aided in agency" concept provided for liability where an employer aided the employee in accomplishing the tort through the existence of the agency relationship. The dealership not only gave Williams the authority to obtain credit reports, it also disregarded his relevant criminal history in doing so. The court concluded that the "aided in agency" concept applied in this case even though Pennsylvania has not adopted the concept.

On the question of whether a causal "nexus" (pointy-headed lawyer talk for "connection") existed between Williams' use of Lukens' credit report and the identity theft, the court found there was enough evidence that Lukens'

credit report was used in the theft to defeat the dealership's summary judgment motion. The court concluded that Lukens potentially suffered damages from having to place a security alert on his credit report, from the time spent in dealing with the situation, and from his emotional distress.

Note that this opinion did not deal with the ultimate question in the case - "is the dealer liable or not for its employee's misdeeds?" The court merely determined that the dealer was not entitled to a summary judgment on the issue of liability, which would have resulted in dismissal of the case. The matter will now proceed to trial or, more likely, to a settlement.

But as an afterthought, you have to wonder whether the dealer's "Privacy Safeguarding Policy" doesn't address the question of whether the dealer should employ in privacy-sensitive positions people with criminal records involving fraud, and theft by deception. And if it doesn't, shouldn't it? Another afterthought - in this case, the employee had fessed up to his criminal past, so the dealer actually knew about it. What if the dealer had simply hired the guy without bothering to do a background check on him. Would the court's decision be different? We'll have to wait another day for those answers. *Lukens v. Dunphy Nissan, Inc.*, 2004 WL 1661220 (E.D. Pa. July 26, 2004).