HB

441

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 21, 1992 FURTHER REFERRALS:

Date of Committee Action: 3/9/92

The JUDICIARY Committee considered: HB 441

HOUSE BILL NO. 441 EMPLOYER'S LIABILITY FOR REFERENCE INFO

"An Act relating to the disclosure of information by an employer about the job performance of an employee or former employee."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title
[ ] have attached amendments(s)
[X] do pass
[ ] do not pass
[ ] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [X] fiscal note(s) _____

[ ] zero fiscal note _____ [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Jeff Ellis	X				
Kevin Pat Parnell	✓				
Mike Miller	X				
Terry Martin	✓				
Lee Greenhead	✓				
Mark Ashley	X				

Vice CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 441

Revision Date: _____
Title: "...disclosure of information by an employer about the job performance..."
Sponsor: Representative Gruenberg
Requestor: House Judiciary Committee

Department Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL [ ][ ][9][3]

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						

REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

This bill protects an employer, who acts in good faith, from liability for disclosing the job performance of an employee or former employee to a prospective employer. This protection would not shield an employer who provided information the employer knew was false or misleading, was given with a malicious purpose, or violated a civil right of the employee or former employee that is protected by Alaska's antidiscrimination laws under AS 18.80, or federal law. This bill will apply to all employers in the state and will not have a fiscal impact on the Department of Law.

Prepared by: Richard I. Pegues, Director (Richard I. Pegues)
Division: Administrative Services
Phone: 465-3672
Date: March 5, 1992

Approved by Commissioner: Charles E. Cole, Attorney General (Richard I. Pegues/FOR)
Agency: Department of Law
Date: March 5, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 441

Revision Date:
Title: An Act relating to the disclosure of information... about job performance
Sponsor: Gruenberg
Requestor: House Labor & Commerce

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 000 | 000 | 000 | 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUNDS	0.0	0.0	0.0	0.0	0.0	0.0
FEDERAL FUNDS						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/19/92

Approved by: Arthur H. Snowden, II, Administrative Director BY
Agency: Alaska Court System
Date: 02/19/92

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/92

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 441

Revision Date:
Title: Disclosure of job performance information
Sponsor: Gruenberg
Requestor: House Labor and Commerce

Department Affected: Administration
BRU: Personnel/OEEO
Component: Personnel/OEEO

COMPONENT SERIAL NO. 5 6

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)
This bill will not leave a fiscal impact on this division.

Prepared by: R. H. King, Director
Division: Personnel/OEEO
Phone: 465-4430
Date: February 18, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 2/19/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91
2/4906 kp/1

State of Alaska

House Majority Leader
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

Representative Max F. Gruenberg, Jr.
District 11
Spenard, Upper Midtown Anchorage

P.O. BOX V
JUNEAU, AK 99811
(907) 465-3718
465-4968/4986
(SESSION)

3111 C STREET, SUITE 440
ANCHORAGE, AK 99503
(907) 561-7621

MEMORANDUM

TO: All members
House Judiciary Committee

FROM: Rep. Max Greueberg

RE: Sponsor Statement HB 441
Disclosure of information by an employer

DATE: March 5, 1992

This bill is fashioned after a Florida Law which protects employers when giving references for former employees.

HB 441 presumes that an employer was acting in good faith, unless it is shown that the reference was knowingly false, deliberately misleading, was given with malicious purpose or violated the employees civil right.

Thank you.

te of Committee Action: 2/20/92

: LABOR AND COMMERCE Committee considered: HB 441

)USE BILL NO. 441 EMPLOYER'S LIABILITY FOR REFERENCE INFO

1 Act relating to the disclosure of information by an employer about the job performance of an employee former employee."

ECOMMENDATIONS: [ ] the same title
replaced with _____ [ ] a new title
[have attached amendments(s)
[do pass
[do not pass
[no recommendations
[individual recommendations
[additional referral to the _____ Committee

)OPTS: _____ letter of Intent

TACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[fiscal impact _____ [ ] fiscal note(s) _____

[zero fiscal note Administration; Courts [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
	✓				
	✓				
	✓				
	✓				

CHAIRMAN'S SIGNATURE

State of Alaska

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MEMORANDUM

TO: Representative David Finkelstein
Chair, House Labor and Commerce

FROM: Representative Max Gruenberg

DATE: February 7, 1992

RE: Scheduling of HB 441

I would very much appreciate it if you would schedule HB 441, "An Act relating to the disclosure of information by an employer about the job performance of an employee or former employee." as soon as possible.

HB 441 presumes that an employer was acting in good faith, unless it is shown that the reference was knowingly false, deliberately misleading, was given with malicious purpose or violated the employees civil rights.

If you have any questions, please call me or Stan Robbins, my Chief of staff, at ext 4968.

Thank you for your consideration.

State of Alaska

House Majority Leader
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HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE AFFAIRS
SPECIAL COMMITTEE
MILITARY AND VET. AFFAIRS
LEGISLATIVE COUNCIL

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(907) 561-7621

MEMORANDUM

TO: Representative David Finkelstein
Chair, House Labor and Commerce

FROM: Rep. Max Greueberg

RE: Sponsor Statement HB 441
Disclosure of information by an employer

DATE: February 19, 1992

This bill is fashioned after a Florida Law which protects employers when giving references for former employees.

HB 441 presumes that an employer was acting in good faith, unless it is shown that the reference was knowingly false, deliberately misleading, was given with malicious purpose or violated the employees civil right.

Thank you.

State of Alaska

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HOUSE JUDICIARY
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HOUSE STATE AFFAIRS
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MILITARY AND VET. AFFAIRS
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MEMORANDUM

February 19, 1992

To: Representative Max Gruenberg

From: Mark Handley MTH

Re: The Law of Defamation in the Context of Former Employee References

Defamation is a doctrine of the common law, that allows for the recovery of damages, from people who cause one to suffer a loss, by publication of a lie that injures to ones reputation. Any communication between two or more people can constitute publication. The defendant must have been at least negligent in regards to whether or not the statement was false.

If the defamatory statement would tend to injure one in his or her business or profession, as would be the case in most actions involving employer references, the injured party is not required to prove specific monetary damages.

There is a limited privilege in the common law that provides some protection to a person who defames someone when they are acting in the interest of others. The basic test is that the publication must be justified by the interest served and it must be called for by the a legal or moral duty or by generally accepted standards of decent conduct. This doctrine has been applied to cases involving statements by a former employer. However, the scope of this privilege is so vague that the best way for an employer to limit their exposure to liability for defamation is to refrain from making any negative statements about former employees.

SLANDER.TXT\MTH

Alaska State Legislature

Legislative Research Agency

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

February 20, 1992

MEMORANDUM

TO: Representative Max Gruenberg

FROM: Christine M. Cheff
Legislative Analyst

RE: **Employer Liability for Negative References**
Research Request 92.127

You asked for a copy of the new Florida law which provides immunity from liability to an employer who in good-faith discloses information about a former employee's job performance to a prospective employer. You also asked for a copy of any synopsis or analysis of the law.

Florida House Bill 497 became law on May 30, 1991, without the governor's approval (Attachment A).[1] According to a House Judiciary Committee analysis of the bill, prior to passage of this law employers had no explicit exemption from liability for good-faith disclosure (Attachment B). Various Florida court decisions however provided the impetus for introduction of legislation by recognizing an employer's *"qualified privilege"* in communicating information about a former employee, if given to a prospective employer in good faith and without malice. The judiciary committee analysis also suggests this new law complements Florida statutes which make falsification of an employment application a first degree misdemeanor. It is believed the combination of these laws enables employers to make better employment decisions from accurate information.

Also included with this memorandum are copies of three law review articles which may be of interest to you.[2] The articles were written during the late 1980s when the number of libel and slander cases filed by former employees against former employers was noticeably increasing. Employers consequently began to limit the amount of information disclosed about former employers in

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[1]Chapter 91-165.

[2]Wayne R. Wells, Robert Walter and Robert J. Calhoun, "Potential Employer Liability for the Disclosure of Employee Information," *Akron Business and Economic Review*, 1989, pp. 22-28. James B. Conroy, "Defamation in the Workplace: The Law of Massachusetts," *Massachusetts Law Review*, Summer 1989, pp.84-94. William A. Hancock, "Liability for Employment References," *Corporate Counsel's Quarterly*, October 1988, pp.1-27.

an effort to reduce the litigation risk. All three articles provide overviews of the legal principles of defamation, apparently the most common claim in such lawsuits, and offer suggestions for limiting employer liability.

We hope this information will be useful. Please let us know if we can be of further assistance on this or any other matter.

Attachments

ATTACHMENT A
State of Florida
Chapter 91 - 165
House Bill 497

CHAPTER 91-165

House Bill No. 497

An act relating to immunity from civil liability; creating s. 768.095, F.S.; providing former employers with immunity from civil liability in the good-faith disclosure of information regarding the job performance of former employees to prospective employers; providing an evidentiary standard; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 768.095, Florida Statutes, is created to read:

768.095 Employer immunity from liability; disclosure of information regarding former employees.—An employer who discloses information about a former employee's job performance to a prospective employer of the former employee upon request of the prospective employer or of the former employee is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith is rebutted upon a showing that the information disclosed by the former employer was knowingly false or deliberately misleading, was rendered with malicious purpose, or violated any civil right of the former employee protected under chapter 760.

Section 2. This act shall take effect July 1, 1991, or upon becoming a law, whichever occurs later, and shall apply to causes of action accruing after that date.

Became a law without the Governor's approval May 30, 1991.

Filed in Office Secretary of State May 28, 1991.

This publication was produced at a base cost of $25.75 per page for 1500 copies or $.0171 per single page for the purpose of informing the public of Acts by the Legislature.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

ATTACHMENT B
"Civil Liability/Former Employer"
House Judiciary Analysis
House Bill 497

DATE: March 23, 1991 as Reported to Clerk

HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: HB 497

RELATING TO: Civil Liability/Former Employer

SPONSOR(S): Glickman

STATUTE(S) AFFECTED: Section 768.095, Florida Statutes

COMPANION BILL(S): CS/S 866 (identical)

COMMITTEES OF REFERENCE:
(1) JUDICIARY
(2)
(3)
(4)
(5)

****

I. SUMMARY:

HB 497 immunizes a former employer, acting in good faith, from civil actions of a former employee for disclosing information regarding the former employee's job performance.

HB 497 creates no local or state fiscal impact.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Presently, Florida Statutes do not provide explicit immunity for an employer's good faith disclosure of information to a prospective employer regarding the job performance of a former employee. Courts in Florida have recognized, however, the common law principle that an employer has a defense of qualified privilege in communicating information about a former employee to a prospective employer if the communication is made in good faith. Boehem v. American Bankers Ins. Group, 557 So.2d 91 (Fla. 3d DCA 1990)(former employer's comment regarding an employee's sexuality was protected, statement did not reflect malice and was in response to an inquiry from a prospective employer); Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984)(statements made by student's father at school board meeting concerning performance of student's English teacher were qualified as privileged). Furthermore, an employer is protected by the First Amendment to the United States Constitution. So long as the information disclosed is truthful and is not confidential, an employer should be insulated from any kind of civil liability.

Under certain circumstances, the legislature has created criminal penalties for those individuals who falsify employment applications. For example, for positions related to Community Service for the Developmentally Disabled (Section 242.335, Florida Statutes), alcohol treatment centers (section 396.0427), and drug treatment centers (397.0716), the legislature has imposed the penalty of a first degree misdemeanor for any person who willfully, knowingly, or intentionally misrepresents qualifications. The extension of immunity for an employer's good faith disclosure of an employee's job performance may complement existing law by further ensuring that prospective employees truthfully complete employment applications.

B. EFFECT OF PROPOSED CHANGES:

HB 497 may encourage employers, who were hesitant to discuss a former employee's job performance, to provide prospective employers with a more open and complete disclosure of an employee's job performance.

C. SECTION-BY-SECTION ANALYSIS:

Section 1 creates section 768.095, Florida Statutes, to provide that an employer who discloses information regarding a former employee's job performance at the request of the prospective employer or the former employee, shall be immune from civil liability for such disclosure or its consequences.

Section 2 provides an effective date of July 1, 1991, or upon becoming law, whichever occurs later.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

As a result of HB 497, employers may feel more comfortable discussing a former employee's job performance with a prospective employer. The net effect is that employers will be able to make more informed employment decisions because the

employer should have more complete information relating to employment candidates.

3. Effects on Competition, Private Enterprise and Employment Markets:

None

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:
Prepared by: Staff Director:

Billy Buzzett Richard A. Hixson

CORPORATE COUNSEL'S QUARTERLY

VOLUME 4 NUMBER 4 OCTOBER 1988

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BUSINESS LAWS, INC.

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BUSINESS LAWS, INC.
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Liability for Employment References

by William A. Hancock, Editor, Business Laws, Inc.

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I. Introduction

There has been a lot of discussion recently about the liability we may incur in the context of giving employment references about our former employees to prospective employers. We have reviewed many recent cases in this area to illustrate the extent of liability and suggest what we can do to reduce it effectively.

This article is limited to one specific type of defamation — employment references to prospective employers. We find from examining the cases, however, that it is not a good idea to limit our counseling to only this factual situation. Indeed, many libel and slander cases arise not out of discharge and subsequent poor employment references, but rather out of excessive publication of the reason for the discharge to other employees and, in some cases, to third parties for whom there is no justification in disclosing the information.

One of the reasons we have limited the scope of this article is the growing concern, particularly in the defense industry, for the problem of people accepting bribes or kickbacks in connection with government contracts, being discharged, and then taking a job with another defense contractor only to begin the illegal bribery or kickback scheme all over again. In the hearings leading up to the recent statutory amendments to the Anti-Kickback Act, many spokes-

men for industry said that there was really nothing they could do about the lack of references being given by employers about their former employees. If they did spread the word about their dishonest employees, they would run substantial risks of defamation suits. One of the things we wanted to accomplish by our research was to determine whether or not these risks were exaggerated.

The conclusions of our research are as follows:

1. The general legal principles are not terribly adverse to employers. Virtually all courts recognize a ***qualified privilege*** for communications made from a former employer to a prospective employer. Viewed in the abstract, this privilege would assist us in structuring a set of guidelines that management could follow, resulting in little if any liability exposure. However, there are a few extreme cases which are difficult to counsel around. One Michigan case, for example, does not recognize any qualified privilege in this context.

2. An additional problem is the nature of the qualified privilege. It depends upon a jury finding that the person making the statements acted without ***malice.*** Any time your case is going to stand or fall on the jury's assessment of the employee's state of mind, you will have some risk of liability.

3. Still another problem is the cost of defending these cases. One employer estimated that it costs between $140,000 and $250,000 to defend one of these cases.

4. Perhaps the most important legal principle in the whole equation is the virtual absence of any degree of risk at all for ***keeping quiet.*** We have not found even a hint of possible liability for

— failing to give someone a reference letter;

— failing to give a reference even if it is specifically asked for by either the former employee or the prospective employer, or both; or

— failing to give a reference in a situation where the prospective employer hires someone who turns out to be a thief, even if we knew about this and were asked about it.

In other words, while the liability for giving employment references may have been somewhat overstated in recent articles, it is clear that there is *some*

liability for these references, as opposed to no liability for a hard and fast company policy of "no comment."

5. Even on the "no comment" policy, we would offer some cautions.

a. ***The rule must be consistently applied.*** We cannot give or refuse to give references selectively without running into potential liability on at least two theories. The first is the ***negative implication*** of giving four people glowing references and then when the fifth comes up, giving a "no comment" response. The second theory of liability is ***discrimination.*** It may turn out that all of the good references were given to white males and the "no comments" were given to members of protected classes. If the plaintiff can show this, the case will probably get to a jury.

b. In order to make the "no comment" posture work, it must be ***extensively communicated to all employees.*** When the employee applies for another job, he must know that any reference checks will be met with the "no comment" or another very limited response. A "very limited response" would consist of confirmation of dates of employment and verification of the fact that the employee is no longer with the company, without any discussion of the reasons for termination or whether or not the person is eligible for rehire.

In summary, if management asks for our advice on minimizing legal exposure for employment references, we should prescribe a clear, uniformly applied and widely distributed "no comment" policy. If management finds this policy unacceptable or wants a backup position available for use in a particular case, our suggestion is to recommend the use of ***a mutually agreed-upon statement.*** In other words, the employer and employee get together and agree on the statement that will be communicated to anyone who asks for the reference. However, this approach has some problems.

1. If you use it in a discriminatory or selective fashion, you could end up with some liability on that basis.

2. It is not entirely clear that an employee who consented to a mutually agreed-upon statement would thereafter be estopped from suing us on the basis of it. He could simply argue that his agreement to that statement was ***coerced*** and he did not have any effective options.

Our conclusion is that the mutually agreed-upon statement is a close second in the minimizing liability game. Its obvious problem is administrative hassle, but if you limit it to situations of discharge for cause, you could reduce that hassle to a manageable level. (***Note:*** You should define a discharge for cause to include a resignation where that resignation is not entirely voluntary.)

Following is a brief discussion of the general law of libel and slander as it applies to employment references, plus a selected assortment of cases dealing with employment references. We again point out that counseling in this area should not be ***limited*** to the employment reference context, since much of the litigation involves publication of the defamatory material to a wider scope of company employees than appropriate under the circumstances, or to third parties such as customers or suppliers.

II. General Legal Principles of Defamation

The basis of an action for defamation is an ***injury to reputation***. The traditional rule is that a defamatory statement is one which tends to harm the reputation of another so as to lower him in the estimation of the community, or to deter third persons from associating or dealing with him.

Historically, defamation has been broken down into libel (written) and slander (spoken), and then further divided into libel or slander *per se* and libel and slander which is not *per se*. The distinction is important because if the plaintiff can prove that the words are libelous or slanderous *per se*, he does not have to prove any specific damages. On the other hand, if the words are not libelous or slanderous *per se*, the plaintiff must prove specific damages such as loss of a business opportunity. This can be very difficult to do.

If the words taken by themselves without any additional evidence are defamatory, they are libelous/slanderous *per se*. If additional evidence is needed to show their defamatory nature, they are not libelous/slanderous *per se*. ***In most employment reference cases, the words are going to be defamatory per se*** (*e.g.*, the plaintiff was discharged for sleeping on the job, for sabotage, or for being untrustworthy, etc.).

For planning purposes, the distinction is not quite so important because once the court feels someone has been substantially defamed, it will usually apply the *per se* rule to prevent the plaintiff, who has clearly suffered a harm to his reputation but cannot prove any specific damages, from being denied

any remedy. This is particularly true in the business context, where definite monetary values are involved, as opposed to social situations where this may not be the case. Being an employee and earning a salary is a valuable right. If you communicate anything which makes it harder for another person to get or keep a job, the communication clearly is going to be found defamatory.

The key point to remember about defamation is that there is strict liability on the part of the defendant. All the plaintiff has to do is offer the statement as evidence, persuade the court to agree that it is defamatory, and prove that the defendant said or wrote it. Except in the case of public figures and the media, there is no requirement that the plaintiff prove fault, negligence, malice, or anything else. Of course, the plaintiff may voluntarily attempt to show these things to increase damages or get punitive damages. However, there is no requirement that he do so. The minute that the plaintiff shows that you made a defamatory statement, the burden shifts to you.

You then have the following possible defenses:

1. You can dispute the fact that the statement is defamatory or that you made it.

2. You can prove that the statement is true. (Truth is an absolute defense to defamation, but not to invasion of privacy claims.)

3. You can prove that you have a privilege, so that even if the statement is not true and is defamatory, you are not liable for damages because you have a legal excuse. Privileges may be absolute or qualified. Most states provide an absolute privilege — or something close to it — for statements to workers' compensation boards, unemployment bureaus, and similar bodies. However, there is only a qualified privilege for statements made to private parties. To meet the standard for qualified privilege, you must show that the person to whom the statements were made had a reasonable need to know the information.

4. You might also show that the plaintiff consented to the statement or waived any defamation claim.

5. Finally, you might prove that the employee who made the defamatory statement was not acting within the scope of his employment or authority. If you can prove this, then the individual may be liable for defamation but the company will not be.

III. Discussion of the Defenses

Is the statement defamatory? In the business context, the fact that there is a lawsuit or threatened suit is very likely to make this issue moot. Remember, the only requirement is that there be an injury to reputation. There are many articulations of the rule. Several follow:

> *Language is defamatory if it tends to expose another to hatred, shame, oblique, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons and to deprive him of their confidence and friendly intercourse in society.* (50 Am. Jur.2d 8, Libel and Slander.)

> *A defamation is the publication of anything injurious to the good name and reputation of another, or which tends to bring him into disrepute.* (Restatement of Torts Section 559.)

> *False oral or written words that tend to prejudice another in his business, trade, or profession are actionable without proof of special damage if they affect him in a manner that may, as necessary consequence, or does, as a natural consequence, prevent him from deriving therefrom that pecuniary reward probably otherwise he might have obtained.* (50 Am. Jur.2d, Libel and Slander, Section 102.)

If you state that an employee or agent has been terminated or has retired, that is generally held not to be defamatory *per se.* There are a number of cases on this point, and they serve to highlight the sensibilities of people who have been terminated involuntarily. The key is to simply state the fact that the person has been terminated or has resigned and not go into details.

Example: In *Haggblom v. S.S. Silberglatt, Inc.*, 212 N.Y.S. 2d 287 (1961), the plaintiff claimed that he was defamed by the following letter:

> *Due to reasons of health Mr. Victor Haggblom, who had been designated by us as Superintendent, has requested that he be retired from that position. Accordingly, we have granted the request.*

The plaintiff contended that this was defamatory because it kept him from getting another job. The court said that the only question before it was whether the writing disparaged the plaintiff in the way of his profession or trade. It said

that "upon any reasonable reading of the writing before us we are unable to conclude that it reflected adversely upon plaintiff's work. There is no proof that it did." (Note the distinction between libel *per se* and libel which is not *per se.* Here the remarks were certainly not libel *per se,* and plaintiff could not introduce any additional evidence to show that they had a defamatory effect.)

An interesting factor in the *Haggblom* case is the substantial dissent that agreed with the plaintiff. The dissent pointed out that words could be defamatory without being "bad." The dissent said:

> *It seems to us that in this case injury was properly found in the statement as to plaintiff's health and that the wrong was greatly compounded by the averment that he — a superintendent of heavy construction — had himself requested that he be retired from his position for reasons of health. The word "retired," in context, seems to us to smack of finality rather than to suggest a respite because of temporary disability. . . . It seems equally clear that a prospective employer having other job applicants available would be inclined to pass plaintiff by rather than to undertake an investigation into the truth of the report as to his request for retirement because of poor health.*

While the opinion did not so state, it appears that the defendant was simply trying to be "nice," and in fact, had requested the plaintiff to retire for reasons not stated in the case. In our experience, supported by quite a few cases, this is dangerous. If you fire someone — or the equivalent — and then make up a story as to why he left to try to avoid hurting anyone's feelings, you will more likely compound the problem rather than solve it.

This is true not only in this area but in the area of EEO as well. Thus, the counseling point of the *Haggblom* case appears to be that "the law" on a company's ability to notify those who have a need to know that someone is no longer with the company is fairly good, but if the former employee left other than of his own volition, it would be wise to take the following precautions.

1. Limit the number of people you tell to those with a need to know.

2. Make your statements as neutral as possible and avoid any "stigma" which could conceivably be attached to them. Keep in mind that

"stigma" is not synonymous with "bad" — it is simply anything which might make it harder for the person to get another job.

Prove the Statement Is True

The usual problem here is employee dishonesty where you may not be able to prove by legal standards that an employee did something, but the evidence against the employee is such that you are convinced. Truth is a defense. (Keep in mind that we are talking about state laws here, and there are some exceptions. Some states say truth is not a defense if there are bad motives involved.) Further, truth is a ***complete*** defense and completely avoids the necessity for talking about privileges. It is only if you have a statement which is either not true or which you cannot prove to be true (remember the burden is on you) that you must get into the privilege question.

Privileges — As we all remember from law school, there are certain "absolute privileges," such as the one Senator Proxmire enjoys on the Senate floor when he gives his "golden fleece" awards. However, most privileges are only qualified, and it is the qualified privilege which is going to protect the overwhelming majority of defamatory remarks which might be made in the employment context.

There are two practical problems in relying on privilege as a defense.

1. In many cases, the situation becomes emotional, and an employee really says something that is clearly not privileged either because unnecessary third parties are involved in the communication or because the words used, considered in the cool glow of hindsight, show some form of malice.

2. In some cases, the position of the plaintiff is such that, out of sympathy, the court finds "malice" in a communication which definitely was not intended to be malicious, and which, fairly read, could only be construed to be malicious by a court looking for a basis on which to impose some liability. (Examples *infra*.)

A qualified or conditionally privileged statement is one made in good faith on any subject matter in which the person communicating has an interest or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty. The duty may be moral or social as well as legal.

It appears to be generally accepted that employment references have a qualified privilege. The person inquiring has a legitimate need to know about the previous employment experience, and the person providing this information has a legitimate reason to communicate it to another employer.

Unfortunately, there are several problems with the qualified privilege.

1. It can be lost if the speaker has bad motives.

2. It can be lost if the speaker knew (perhaps in hindsight) that the statement was false.

3. It can be lost if the speaker made the statement without reasonable belief as to its truth.

IV. Specific Application of the Law to Employment References

There is no reason to suspect that the laws of defamation/libel/slander are any different in the employment reference context than they would be in any other situation. Therefore, the general legal principles stated in any libel/slander case would appear to be applicable to the employment reference situation. Nevertheless, in order to keep this article manageable, we have limited our discussion of specific cases to the employment reference situation.

Under the libel/slander laws, it appears that almost all reasonable employment reference situations would be subject to a qualified privilege. Following is a statement from an excellent article on the subject entitled, "The Letter of Recommendation Is a Privileged Communication," by Mr. George E. Stevens, appearing in Volume 16 of the *American Business Law Journal*, 1978 (footnotes omitted).

. . . Moreover a communication relevant to a prospective employee's conduct or character will be conditionally privileged if it is written or spoken by the one who is in a position to evaluate the person under discussion and is directed to one who is legitimately interested in such information. Thus, a reasonable statement to either a placement service or an agency hired by a company to investigate prospective employees is within the privilege. Protection is not limited to letters but also extends to telephone and face-to-face conversations, answers to questionnaires and evaluations on rating scales. Moreover, everyone in the chain of publication is entitled

to the privilege, including an employee who reads a company record over the telephone to an inquiring employer, and the privilege is not lost if the message is dictated to a secretary or stenographer or if it comes to the incidental attention of an employee in the office of the recipient. A statement from a former employer or other defendant who corrects an earlier communication after discovering facts which alter his opinion of the plaintiff also is privileged if made in good faith.

V. Illustrative Cases

We turn now to a selection of illustrative cases which have dealt with the question of liability for employment references. These are in no particular order, and none are suggested as providing the law of the land. This is a state law question, and there are differing views.

In a case where the employment reference is potentially defamatory, unless the former employer can prove the truth of the statement, the employer will be liable for defamation even if the statement was made without malice.

Harrison v. Arrow Metal Products Corp., 20 Mich. App. 590, 174 N.W. 2d 875 (1969).

In this case, the employee was discharged for allegedly stealing a pair of gloves, and when he applied for another job, he listed his previous employer on the application form. The prospective employer asked the former employer about the plaintiff's work record and was told that he had stolen company property. The Michigan Court of Appeals decided that, in this case, a previous employer must either refrain from making a defamatory statement or be prepared to prove it. The court said the following:

One unproven accusation could . . . become the basis for permanently depriving a man of his dignity, good name, self respect and right to earn for the support of himself and his family. Whether the employer publishes with malice or without it, the effect on the employee is exactly the same.

Editor's Comment: The *Harrison* case appears to be clearly a minority rule, but it illustrates the difficulties of trying to counsel companies/clients with operations in many different states. To be conservative, we almost have to take a "lowest common denominator" approach, and the *Harrison* court's admonition that we should either refrain from making defamatory statements or be prepared to prove them appears to be that lowest common denominator. Even at that, we should remember that truth is not a defense to invasion of privacy suits. We doubt whether any invasion of privacy could be alleged in a normal employment reference case where the prospective employer called for the reference. It could, however, be alleged if the initiative were on the part of the previous employer.

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Where a former employee requests that an evaluation previously prepared by the former employer be sent to a prospective employer, the former employer will not be liable in defamation for opinions expressed in the evaluation, since the employee requested the communication and the employer did not prepare it in anticipation of external disclosure.

Underwood v. Digital Equipment Corp., Inc., 376 F. Supp. 213 (D. Mass. 1983).

A former employee sued Digital Equipment Corporation for defamation because a personnel officer of the company indicated on the employee's record that ***his resignation was a "minor loss" to the company, and that he should not be rehired. The personnel officer had done this by checking two boxes on a standardized form*** which was photocopied and sent outside the organization at the request of the plaintiff.

The District Court of Massachusetts held that this did not amount to defamation. An employer is "entitled to its opinion of its employees." The court said that this company's expression of its opinion was made in a routine internal communication with no likely intended audience. The court denied any claim for defamation noting that there was no evidence that the employer "intended to or did photocopy this form and send it to an outside audience except at the request of the plaintiff."

Editor's Comment: Should we allow a policy of sending personnel documents like this outside the company even at the employee's request? It is not exactly clear what kind of documents were involved, or what the relevant state of the law may be. As a policy matter, however, we question whether it is a good idea to allow personnel documents to routinely be sent outside the company even if the subject of the document (the former employee in this case) is the one who requests that this be done. If state law requires that you disclose these documents, it might be better to send them to the employee and let him decide whether he wants to forward them to others.

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Defamatory statements about the plaintiff were not "invited" simply because plaintiff hired a private detective to investigate the reasons for his dismissal. Plaintiff had no way of knowing that the defamatory statements would be made by his former employer to the private detective.

***Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612 (Tex. App. 1984), *cert. denied*, 472 U.S. 1009.**

Larry Buck was a successful insurance salesman who generated over a half-million dollars a year in commissions for his firm, Alexander & Alexander. He was offered employment with the Frank B. Hall Company (Hall) in the spring of 1976 and accepted a position as salesman for Hall. His salary was to be $80,000 a year plus seven and a half percent commission.

Within a year, Buck had generated a substantial amount of money for Hall and brought several major accounts to the firm.

However, in October 1976, Buck was told that his salary was being reduced to $65,000 and other fringe benefits were being taken away from him. Hall's president, Mendel Kaliff, told Buck that his performance had been unsatisfactory. Kaliff also stated that if Buck could generate $400,000 in net income for Hall before June 1, 1977, Buck's salary would be reinstated retroactively.

In March 1977, at a meeting with Kaliff and Hall's vice-president, Lester

Eckert, Buck was fired. Buck then attempted to find a job with other insurance companies but was unsuccessful. He hired a private detective, Lloyd Barber, to find out why he was fired from Hall.

Barber approached Kaliff, Eckert, and Virginia Hilley (another Hall employee) introducing himself as a prospective employer of Buck, and asked about Buck's employment record. Barber tape recorded these discussions which took place on several occasions. Barber reported that:

> *Kaliff remarked several times that Buck was untrustworthy, and not always entirely truthful; he said Buck was disruptive, paranoid, hostile and was guilty of padding his expense account. Kaliff said he had locked Buck out of his office and had not trusted him to return. He charged that Buck had promised things he could not deliver.*

> *Eckert told Barber that Buck was horrible in a business sense, irrational, ruthless, and disliked by office personnel. He described Buck as a "classical sociopath," who would verbally abuse and embarrass Hall employees. Eckert said Buck had stolen files and records from Alexander & Alexander. He called Buck a "zero," "a Jekyll and Hyde person" who was "lacking in compucture [sic] or scruples."*

> *Virginia Hilley told Barber that Buck could have been charged with theft for materials he brought with him to Hall from Alexander & Alexander.*

These statements induced Buck to file a suit for defamation against the Hall company and Kaliff, Eckert, and Hilley individually.

Buck also secured the testimony of a prospective employer who had decided not to hire Buck based on a conversation with Eckert, in which Eckert told the employer that Buck did not meet his production goals. When the employer pressed for specifics, Eckert said he could not "go into it," and stated he would never consider rehiring Buck. The employer testified that these statements by Eckert led him to believe that there was something about Buck he had to know before he would consider hiring Buck.

Hall argued that the statements made to Barber were ***invited*** and, therefore, could not be the basis of a defamation suit by Buck. The court rejected this argument, pointing out that the evidence showed Buck had no idea why he was fired and could not have invited the defamatory statements since he did

not know they would be defamatory.

The court also found that the publication requirement had been met when the defamatory statements were made to Barber, although the Hall employees were unaware of Barber's true identity. "The publication is complete although the publisher is mistaken as to the identity of the person to whom the publication is made." (Citing the Restatement of Torts (2nd) Section 577 comment e (1977).)

The court also refused to overturn a jury finding that the statements were made with malice.

> *Here there was evidence that the relationship between Eckert and Buck was strained at best. Buck testified that Eckert was angered when Buck would not testify as Eckert wished in Alexander & Alexander's lawsuit against Eckert for breach of the noncompetition agreement Eckert had signed while employed by Alexander & Alexander. The men had disagreements over the management of Hall's Houston office. Eckert testified that his relationship with Buck deteriorated instantly when Eckert became office manager at Hall. Eckert said that he was constantly irritated by Buck's expense account reports; he was critical of Buck for berating members of Hall's office staff. Eckert expressed disapproval of Buck's "office politicking" and described the office relationship as a "constant hassle" and a "day-in-and-day-out battle." Eckert complained of having to "meet all of [Buck's] little whims." There was evidence that Eckert drew an annual salary of $39,000 with no profit sharing or commission benefits, while Buck, Eckert's subordinate, had a salary of $80,000 plus a sizeable commission incentive, profit sharing and expense benefits.*

There was also evidence that Buck had generated $308,000 for Hall in his first year with the company, and that the company had saved $75,000 by discharging him early.

The court said that although actual malice requires proof of subjective state of mind, the proof can be made by circumstantial evidence, and the evidence presented to the jury was sufficient for it to find malice.

Although Buck would not have to prove actual malice on his claim to recover, since he was not a public figure, establishing actual malice in this case resulted in a number of benefits to Buck.

1. He could collect exemplary damages (the jury awarded him $1,300,000 in exemplary damages and $605,000 in actual damages) since the jury found that Hall "acted with ill will, bad intent, malice or gross disregard to the rights of Buck."

2. Hall and Eckert could not claim that the statements by Eckert were qualifiedly privileged, since proof of actual malice destroys this privilege.

Hall also raised the defense that Eckert was not acting within the scope of his employment when he made the derogatory statements. Therefore, his acts could not be attributed to the company.

The court rejected this argument, holding that Eckert was acting within the scope of his employment when he defamed Buck.

> *Lester Eckert was executive vice president and head of Hall's Houston office. There is no dispute that Eckert was in fact the manager in charge of Hall's Houston office. Eckert took an active role in contract negotiations between Hall and Buck and served as a go-between for Hall's corporate attorneys with respect to Buck's employment contract. He took responsibility for working out some details of Buck's employment, including Buck's pension and life insurance benefits. He was familiar with the producers' salaries and commissions and was responsible for reviewing employees' production statistics and expense account reports. There was evidence that Eckert played an active role in making employment decisions and he was a member of Hall's executive committee. . . .*
>
> *Hall points to no evidence which shows that Eckert made the statements while he was not acting on Hall's behalf, or in his capacity as Hall's representative. There is no evidence which indicates that Eckert was not authorized to furnish information pertaining to a former employee, or that Eckert's authority as a manager was limited with respect to personnel decisions and activities. The evidence is uncontradicted that Eckert was furthering Hall's business when he uttered the slanderous words. There being no evidence to raise a fact issue as to Eckert's course and scope of employment, the court did not err in refusing to submit the tendered issue.*

Editor's Comment: The *Hall* case highlights several points. First, discharged employees are making increasing use of private detectives (or simply friends) to masquerade as prospective employers and tape record conversations with the former employer. Second, the case demonstrates the possible negative implications of the "no comment" response (in this case, "I can't go into it."). If you advise using the "no comment" response, you must also counsel your company/client to explain that company policy requires this response.

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Former employer's allegedly slanderous statement in an employment reference, made with malice, is actionable despite prior release of the claim by the former employee, because slander is a "quasi-intentional" tort and prior release of a claim for defamation is against public policy.

***Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816 (Fla. App. 1985).**

Edward Kellums was fired from his job at Freight Sales Center, Inc. Roger Roberts was the owner of Freight Sales. Kellums applied for a job with National Furniture Company and filled out an application form which authorized National to make inquiries about Kellums from his former employer. The release stated, "I . . . release all parties from all liability for any damage that may result from furnishing [reference information] to you."

National contacted Roberts. Roberts made some potentially slanderous statements. Kellums sued Freight Sales for slander. The trial court dismissed Kellums's suit based on the release contained in the National employment application which Kellums signed.

The appellate court reversed the grant of summary judgment in favor of Freight Sales. It noted that although former employers were ***qualifiedly privileged*** to give reference information, they must act reasonably and prudently in doing so. The court stated that ***a deliberate lie could not be qualifiedly privileged.***

Since there was a genuine issue as to whether the statements made by Roberts were true and reasonably made, the court may not grant summary judgment unless the release precluded the slander suit.

On the release issue, the court said that if Roberts committed an intentional tort by his statements, public policy would forbid releasing him from liability; and, slander may be considered a "quasi-intentional" tort. Since Kellums alleged that Roberts made the statements "knowingly and maliciously," summary judgment should not be granted because proof of malice at a trial on the merits would preclude the effect of the release.

Editor's Comment: This case could be used for illustration if management asks, "Can't we get our people to sign something to protect against this liability?" The answer clearly is no. The basic allegations in a defamation suit, if proved, would preclude any release.

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Slanderous statements made in an employment reference by an employee who is not authorized to give employment references cannot be attributed to the company in a suit against the company for defamation. The employee was not acting within his scope of employment or authority.

***Seifert v. El Paso Natural Gas Company*, 567 S.W.2d 77 (Tex. App. 1978).**

William Seifert was fired from his job with El Paso Natural Gas Company. Seifert had worked in El Paso's engineering department with another employee, Walter McGee.

McGee stated in a number of telephone conversations that Seifert was "untrustworthy, unethical and of very poor character and that he became so unreliable that El Paso Natural Gas Company fired him."

Seifert sued El Paso for slander based upon these statements by McGee. The trial court granted El Paso summary judgment because it determined that McGee was not acting within the scope of his employment when he made the statements.

The appellate court agreed that the applicable rule was as follows:

> "... *An action is sustainable against a corporation for defamation by its agent, if such defamation is referable to the duty owing by the agent to the corporation, and was made while in the discharge of that duty. Neither express authorization nor subsequent ratification is necessary to establish liability....*"

[Citing *Texam Oil Corp. v. Poynor*, 436 S.W.2d 129 (Tex. 1968).]

The court found no evidence that McGee was acting upon a duty owing to El Paso. In fact, the evidence showed that McGee was not authorized to make the statements:

> *The substance of the affidavits established the movant's position that McGee, when he made the statements, was not acting within the course and scope of his employment, that his duties with the Engineering Department never included that of furnishing information or recommendation to outsiders about former employees, and was wholly unrelated to his employment in the Engineering Department of the Gas Company.*

Since McGee's statements were not made pursuant to a duty McGee owed to El Paso, the company could not be held liable for them.

> ***Editor's Comment:*** This case points out the desirability of a well-publicized company policy providing that all employment reference requests be directed to a certain department (usually, the personnel office). Aside from the obvious advantage of increasing our ability to control what is said, we gain the option of arguing that the defamatory reference was made by someone outside the personnel department, and, therefore, this reference was unauthorized.

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Unsolicited employment reference by the manager of a company could not be attributed to the company in a suit for defamation by a former employee. The company had no existing policy of giving unsolicited employment references or assisting former employees in seeking new positions.

***Wagner v. Caprock Beef Packers Company*, 540 S.W.2d 303 (Tex. 1976).**

Lewis Wagner voluntarily left his job with Caprock Beef Packers Company where he had been supervised by Elmer Rabin, general manager at the plant. Wagner then made applications to several other packing plants.

Rabin found out about these applications and, on his own initiative, called the other packers and told them that Wagner was an alcoholic. Wagner sued Rabin and Caprock for slander.

The claim against Rabin resulted in a judgment in favor of Wagner. However, the court dismissed the claim against Caprock, holding there was no evidence that Rabin had acted within the scope of his employment when he made the statements upon his own initiative.

> *There is no evidence that Caprock charged Rabin with the duty of voluntarily assisting other meat packing plant employers in hiring of employees generally, or in the hiring of any former employees of Caprock; nor is there any evidence of any custom or practice of such unsolicited assistance on the part of one meat packing plant to another such plant, or of any benefit to Caprock in thus prejudicing the opportunity of Wagner for employment elsewhere....*
>
> *[T]here is no factual basis for the inference that Rabin's unsolicited calls were referable to or in discharge of any duty he owed Caprock, or that Caprock had conferred on Rabin such comprehensive and general power as to make Rabin its alter ego whose acts were the acts of the corporation.*

> ***Editor's Comment:*** The *Wagner* case shows us that references requested by the prospective employer and those simply volunteered are two very different situations. The latter references apparently are not privileged, even qualifiedly. The court held that the communications were made by the individual outside of his scope of authority and, therefore, were not attributable to the company. Can we rely on this holding? Based upon the facts, the decision obviously is correct; however, a slight deviation from this scenario (for example, past situations where references were volunteered) could tip the scales. See *Gengler v. Phelps* (below) for a discussion of a case in which the employer volunteered information and prevailed, basically because the employee gave permission for the prospective employer to seek references.

A former employer who receives an inquiry from a prospective employer has absolute immunity from damages in a slander suit when the former employee invites the alleged defamation and it concerns the employee's job capabilities. A former employer who volunteers allegedly defamatory information to a prospective employer is conditionally privileged for statements made about a former employee if made to one having an interest in the subject matter of the statements. The defamatory communication, however, must be made for the purpose of enabling that person to protect his own interests, and it must be reasonably calculated to do so.

***Gengler v. Phelps, et al.*, 589 P.2d 1056 (N.M. App. 1979).**

After Gengler, a nurse-anesthetist, was fired by Albuquerque Anesthesia Services, Ltd., she sought employment at Veterans Administration Hospital. On her written application, she gave permission for the Hospital to request a reference from her prior employer. Dr. Clark and Dr. Smith of the VA Hospital spoke with Dr. Phelps individually and on two separate occasions. Phelps told both Clark and Smith that Gengler lacked professional competence. Dr. Smith made the inquiry of Dr. Phelps, but Dr. Phelps volunteered his opinion of Gengler's competency to Dr. Clark. Based on these less than desirable references, Gengler was denied employment.

Gengler brought an action for slander against the company and Phelps, claiming that the statements made by Phelps to Smith and Clark were slanderous. The trial court directed a verdict in favor of the defendants. The appellate court affirmed. First, it ruled that Phelps's oral publications to Smith were absolutely privileged. In her application for employment with the VA, Gengler consented that inquiry be made of her qualifications. Dr. Smith called Dr. Phelps to solicit that information. The applicable rule in this instance is that one who invites the publication of defamatory words cannot be heard to complain of the resulting damage to that person's reputation. The privilege conferred by the consent of the person about whom the defamatory matter is published is absolute. It is not even affected by the ill will or personal hostility of the publisher or by any improper purpose for which the publication may be made.

The court went on to state that a former employer has absolute immunity from damages in a slander suit when the alleged defamation stems from an inquiry addressed to the former employer and concerns an employee's job capabilities. In the business and professional world, public policy necessitates

the disclosure of an employee's prior services when inquiry is made with the consent of the employee.

As to Phelps's oral publications to Clark, the court ruled that they were conditionally privileged. The general rule is that a former employer is conditionally privileged for statements made about a former employee if made to one having an interest in the subject matter of the statements. The defamatory communication, however, must be made for the purpose of enabling that person to protect his own interests, and it must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the employee's work comes within the privilege. One occasion giving rise to a conditional privilege consists of a good-faith publication in the discharge of a public or private duty. In this case, Dr. Phelps was morally and actively motivated, in good faith, to disclose his knowledge of Gengler's work as a nurse-anesthetist for the benefit and protection of the VA. Thus, the court concluded, Dr. Phelps acquired a conditional privilege. A conditional privilege may be lost, however, if it is abused. That will occur if the publication is made with malice. In this case, there was no evidence of malice. Therefore, the conditional privilege remained intact and shielded Phelps from liability.

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Slanderous statements about an employee made by a former employer to a present employer, which result in the employee's discharge, may result in liability of the former employer for both defamation and interference with contractual relation.

***Birl v. Philadelphia Electric Company*, 167 A.2d 472 (Pa. 1960).**

Joseph Birl was an employee of the Eureka Williams Company (Eureka). He had formerly been employed by Philadelphia Electric Company (Philadelphia).

A sales manager for Philadelphia, Hunter Lott, told Birl's supervisor that Philadelphia would never do business with Birl since he had left that company without giving notice. Birl was discharged from Eureka. He sued Lott and Philadelphia for interference with contractual relations and slander. The

trial court dismissed Birl's complaint.

Interference with Contractual Relations

The Pennsylvania Supreme Court stated that if Birl could prove that Lott *purposefully* interfered with Birl's employment, without justification, he could recover for interference with contractual relations.

> *In other words, the actor must act (1) for the purpose of causing this specific type of harm to the plaintiff, (2) such act must be unprivileged, and (3) the harm must actually result.*

The court concluded that Birl's complaint stated a cause of action against both Lott and Philadelphia, because it averred an "intentional or purposeful, and unprivileged, interference with Birl's contractual or business relationship, aimed at a severance of Birl from Eureka's employment...." Birl charged that Lott was acting within the scope of his employment, and on the behalf of Philadelphia, when the statements were made.

Slander

The trial court found that Lott's statements were not defamatory and, therefore, not actionable. The supreme court reversed this finding.

> *From* [the statement by Lott that Philadelphia would not deal with Birl because he had quit his job without notice] *the recipients of such communication could reasonably conclude that Birl lacked honor and integrity and was not a person to be relied upon insofar as his business dealings were concerned. That such an attack on Birl's integrity and honor might deter third persons from "associating or dealing" with him is too obvious for words and the recipients of such a communication could reasonably have been deterred from any future association or dealing with Birl. The second count sufficiently sets forth a cause of action in slander against both appellees.*

Editor's Comment: The *Philadelphia Electric* case highlights the increased liability for responding to a reference request after the requestor has apparently made an offer (even a conditional one) to the employee. Not only do we have potential defamation problems, but we may also face an "interference with contract" claim.

> ***Where an employer discharged employees on a false basis and those employees reported this basis to prospective employers for fear their former employer would report it anyway, the court will recognize "self-publication" of the defamatory termination grounds as if the statements had been made by the employer itself, and an action for defamation may be sustained.***

***Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W.2d 876 (Minn. 1986).**

Carole Lewis, Mary Smith, Michelle Rafferty, and Suzanne Loizeaux were sent to Pittsburgh by their employer, Equitable Life Assurance Society of the United States, located in St. Paul, Minnesota. The women were "loaned" to the company's Pittsburgh office to assist that branch in handling its office work backlog.

Each woman received $1,400 as a "travel advance" and was instructed to keep receipts of airline and hotel bills. No further instructions were given to them concerning their travel expenditures, and the instructions that they did receive were given by managers who were unfamiliar with the company's travel expenditures policy. Each woman used her entire travel advance during the two week trip.

When the women returned to St. Paul in October of 1980, each received a letter of commendation for her job performance in Pittsburgh. The women were also told, for the first time, that they would have to submit their daily expenditures from the trip. Each attempted to reconstruct her expenses as accurately as possible. After management had evaluated the expense records, the women were told that $200 from each of them would have to be returned to the company.

In November the company distributed a written policy for completing expense reports, which did not conform to the oral instructions the women had received prior to their trip. The women were requested to revise their expense reports to meet this new policy. They refused to make the changes because their initial reports had been honestly completed and, in their estimations, the expenses had been reasonably incurred.

In January the company distributed another expenditure policy and again requested the women to change their reports. They refused. The office manager

then asked each to pay the company back specific monies. Only one of the four women did so. Later the same day, all four were fired for "gross insubordination."

When the women applied for new jobs, their prospective employers wanted to know why they were terminated. The women believed that they must be honest in their answers and initially reported that they had been dismissed for "gross insubordination." Later, they tried to avoid these questions and one of the women misrepresented the circumstances of her termination.

The four women sued Equitable Life on various charges, including defamation. They claimed that because they were compelled to report Equitable's reason for their terminations, and because this reason was not true considering the underlying circumstances, that they were defamed in their reputations as honest employees and suffered long periods of unemployment and mental distress as a result of the company's wrongful act.

The court agreed with these claims. It ruled that it would recognize "compelled self-publication." When the company discharged the women on the false charge, and should have known that they would be compelled to republish this charge to prospective employers, the company, in effect, defamed the women the same as if it had published the false reason for termination itself. The court further found that the company acted with actual malice (ill will, or carelessly and wantonly to injure the plaintiffs); therefore, the qualified privilege extended to employment references would not apply to the case.

The women were awarded compensatory damages for the injuries they incurred as a result of the defamatory statement. However, the court found that punitive damages should not have been awarded because the public interest is not best served when employers, in fear of large damage awards for torts committed by employees, refuse to disclose reasons for terminations.

Editor's Comment: The "self-publication" concept is a difficult one to counsel around. Even a policy of "no comment" is not enough. You must, in addition, make sure that the policy is communicated to ***all employees*** so they cannot argue that they had to tell the prospective employer because they believed their former employer would reveal the information anyway. Even with these precautions, we can all envision situations where former employees may be able to get their cases to juries. Note that the *Equitable Life* case is not alone in its holding. *See McKinney v. County of Santa Clara* and *Grist v. Upjohn, infra.*

Consent or "invitation" of defamatory statements, where the plaintiff has reason to believe the statements will be defamatory, is not actionable in a subsequent claim for defamation.

Christensen v. Marvin, **539 P.2d 1082 (Ore. 1975).**

Shelia Christensen had been a teacher for four years, and her tenure was to be considered by the school board. She was informed that her contract would not be renewed and that she had received an unfavorable evaluation from the school superintendent. Christensen met with the superintendent and testified that she disagreed with his reasons for giving her a poor evaluation.

Christensen requested that the school board disclose the reasons for its decision not to rehire her. The board announced its reasons at a regular board meeting, stating that Christensen was consistently late and did not get along with parents or the other teachers. These statements were a matter of public record.

Christensen sued the school board and school district, claiming that the board's statements concerning her termination were defamatory.

The court dismissed her case. It ruled that because she had reason to believe the statements would be defamatory (she had previously discussed her evaluation with the superintendent), she consented to the publication of the defamatory statements and they became absolutely privileged. The court specifically noted that the board was required by law to give Christensen its reasons for not rehiring her. The court also pointed out that it was assuming the school board's statements were defamatory only for the purpose of evaluating Christensen's claim under the theory of consent.

Editor's Comment: Contrast this case with the "release" case (*Kellums, supra*). Releases rarely will be a defense to defamation, but ***consent*** (informed and after the fact) will. Submission of a discharge to arbitration will be consent to discuss the reasons for the discharge during the arbitration.

VI. Appendix

Sample Policy Statement — Employment References

The following sample company policy statement is designed to take into ac-

count the law on libel, slander, and defamation regarding employment references. The intention of the policy statement is to minimize legal exposure from adverse employment references. In order for the policy to be effective, it must be widely disseminated within the company and, of course, it must be actually followed.

Employment References

It is the policy of the company to keep confidential all matters relating to the employment or termination of employment of any employee or former employee. This policy is for the benefit of the company, to avoid possible claims for defamation, and also for the benefit of our employees, to preclude possible embarrassments or possible difficulties in obtaining future employment should termination of employment at our company be under circumstances which might possibly be adverse or detrimental.

1. All matters relating to the employment or employment history of any employee or former employee shall be confidential information, and no employee of the company is authorized to disclose any such information to any other person except as may be required or expressly permitted under applicable laws, such as inquiries from government agencies or by legal process.

2. No employee of the company is authorized to provide any employment references of any type to any other party.

   Any requests for such employment references shall be directed to (the personnel function) and shall be answered by the personnel function only by disclosing

   (a) the date of original hire, and
   (b) the date of most recent severance of employment.

   No other information shall be provided, including, but not limited to, the reason for termination of employment.

3. In answering any requests for information about employees or former employees, the requestor shall be informed that the reason for failure to provide any such information is because of this company policy.

4. This company policy statement shall be disclosed and explained to all employees at the time of their original employment, and copies shall be provided to them at their request.

5. Exceptions to this company policy statement shall be allowed only upon the written approval of the company's legal counsel and the company's personnel director.

Note: It is intended that very few exceptions to the policy will be made, and that such exceptions as are made will essentially be limited to the situations where the termination of employment is less than amicable and where the parties desire to reach a mutually agreed-upon statement which will be given to anyone who asks for it. Such statement will be signed by the employee and the company and should be provided to the personnel office so it can respond with the appropriate statement at the appropriate time.

If approved by the appropriate procedures, an immediate supervisor of an employee may provide that employee with a written "reference letter" or "letter of recommendation" provided that the terms of any such reference or recommendation letter will be approved by the company's legal counsel.

Editor's Note: The foregoing article was exerpted from a chapter discussing libel and slander in the employment context contained in our EMPLOYER'S GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY LAW (two volumes $143.00). That chapter contains discussion of approximately two dozen additional cases, some of which deal with employment references, and others of which deal with libel and slander in communications to others such as fellow employees, suppliers or customers.

Potential Employer Liability For The Disclosure of Employee Information

By Wayne R. Wells, Robert Walter and Robert J. Calhoun

The maintenance and dissemination of information related to current and former employees have rapidly emerged as areas that are ripe for potential litigation by employees who believe their employment records were improperly used. The rapid increase in the number of such lawsuits makes it essential that employers carefully review their current policies and procedures regarding the maintenance and use of such records to ensure that they are minimizing the risk of a successful lawsuit.

While conducting such a review, it is also important to remember that many potential lawsuits by former employees result from the conduct of other employees acting without guidance from management or even in direct contravention of established policies. As employers will generally be liable for the actions of their employees in employment information dissemination situations, it is also essential to ensure that all employees are properly trained and monitored to minimize potential liability.

POTENTIAL TYPES OF LAWSUITS

Generally, three legal theories have been used by employees to bring lawsuits against their employers for the improper use of their employment records: defamation, invasion of privacy, and negligence. It should be noted that these theories are not mutually exclusive, and the facts of any individual situation could potentially create a lawsuit based upon one, two, or all three theories.

Defamation

The most common type of lawsuit being filed by former or current employees for the improper use of employment data is defamation. Defamation suits filed by former employees against their former employers now constitute almost one third of all defamation actions [18].

The essential elements of defamation are: (1) that the communication must be

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false, (2) must be communicated to someone other than the individual, and (3) must cause harm to the individual's reputation [21].

Examples of the types of communications that have been considered defamatory, if false, are:

1. Describing an employee as "untrustworthy, untruthful, disruptive, paranoid, hostile . . ." [11];
2. Stating that an employee had been terminated for "gross insubordination" [15];
3. Stating that an employee was dismissed "for cause" [10];
4. Stating that an employee "suddenly resigned" [10];
5. Describing employees as "militant" [2]; and
6. Describing employees as having "emotional problems" [2].

It should be noted that some of the above statements were in writing and some were oral. Either type of communication can constitute defamation, with written communications being sub-catagorized as libel and oral communications as slander.

The simple fact that a defamatory statement is made does not necessarily subject the employer to liability unless the statement is false and not protected by a recognized legal privilege. Every state recognizes truth as a complete defense to a defamation action, regardless of how disparaging the information is [19, p. 739]. In addition, virtually all states recognize the need for employers to describe and transmit to others the reasons for discharging employees [14]. As such, they have granted employers a limited privilege that will protect such communications if the statements are made in good faith; for a legitimate purpose, and not inappropriately communicated. Practically, the existence of the privilege means that if the employer can establish that the communication was for a proper purpose, such as answering the request from a potential employer about an employee's reason for termination, and is done in good faith, which requires that the employer was not acting out of spite or ill will, and was not improperly disseminated, defamation can not be established [22].

Some examples of false statements that have subected an employer to a defamation action because they exceeded the protections of the conditional privilege are:

1. Statements made to prospective employers that a former employee was "a good kid that went bad" that were motivated by a desire to keep the employee from ever working in the industry again [8];
2. A letter from a company's personnel manager that stated the employee failed "to increase business," which was false and motivated by personal dislike [12];
3. A memo posted on a bulletin board visible to all other employees, as well as outsiders, that stated a former employee had altered insurance forms was held not to be privileged because it was too widely disseminated [1]; and
4. Careless and false statements from a former employer to a prospective employer that the employee had stolen a company car, customer lists, a sales manual, and price lists [4].

Assuming that a false statement has been made that damages the reputation of the employee and that the statement is not protected by the conditional priv-

llege, it is still not legally actionable unless it has been communicated to someone other than the employee. Traditionally, the element of communication (legally called publication) was only satisfied when the employer communicated the defamatory information to a third party other than the employee or other employees in the business. However, in recent years, many states have expanded the definition of publication to include intra-company communications and communications made by the employee-plaintiff.

Intra-company communications are recognized by most states as publication sufficient to bring a defamation suit. However, these states also apply the conditional privilege to such communications, meaning that the defamation action can only be successful if the false statement was improperly motivated, reckless, or too broadly disseminated [16].

Two cases addressing this issue of intra-company communications were *Luttrell v. United Telephone System, Inc.* [16] and *Babb v. Minder* [3]. In *Luttrell,* several management employees communicated between themselves that the plaintiff-employee was illegally recording telephone conversations, which was not true. The Court ruled that this was sufficient publication to satisfy that element of a defamation action, as "...damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside" [16]. The case was then sent back to the trial court to determine if the conditional privilege was exceeded or not. In *Babb,* the employee was discharged because of a communication between a corporate manager and a supervisor, in which the employee was accussed of "mooning" another employee at a company function. The Court held that this was sufficient communication to constitute publication, was damaging to the employee's reputation, and was not protected by the conditional privilege as it was a reckless statement because the manager relied upon an unconfirmed rumor and failed to investigate the truth or falsity of the charge.

The second area of expansion of the definition of publication in employment defamation litigation is a concept called "compelled self-publication." The traditional, and still majority, view is that if the defamatory communication is communicated by the plaintiff, there is no defamation action. However, some courts have held that when the employee is put in the position of having to disclose the defamatory information, this is similar to the employer having communicated the information and therefore is actionable as it satisfies the publication requirement of a defamation action.

An excellent example of the application of this concept is the case of *Lewis v. Equitable Life Assurance Society of the United States* [15]. In *Lewis,* some employees were fired for "gross insubordination," which, in fact, was not true. The employees were told of this reason in person, and the information was not given to anyone else by the employer. On subsequent job applications, the employees listed their reason for termination from the previous employer as "discharged for gross insubordination." Obviously, they were unable to secure new employment after disclosing this information.

In determining that the publication element of defamation was satisfied by the employee's self-publication, the Court said that since the employer could reasonably forsee that the employees would have to disclose this information in the future, or lie about the actual reasons for termination, it is effectively the same as if the employer had conveyed that information to potential employers. It is worth noting that the plaintiffs in *Lewis* were ultimately awarded $75,000 each.

As stated, this position is not followed in most jurisdictions in the United States. Currently only Minnesota, Kansas, California, Georgia, Michigan, and Missouri accept the concept of "compelled self-publication." However, the list of states adopting this view is growing despite the arguments that the concept will create many more employee defamation lawsuits, will allow employees to create their own publication by providing the defamatory information to potential employers, may affect an employer's willingness to accurately provide employees with the reason for their terminations, and may eliminate the ability of potential employers to obtain information, good or bad, from prior employers.

The implications of potential defamation suits by former or current employees are significant and require employers to consider implementing policies and procedures to protect themselves from the possibility of such actions. Possibilities include:

1. A method to ensure that only true statements are made about employees in any context, including termination interviews, intra-company communications, and external communications. Such a method should include periodic reviews of the files being maintained to ensure that all the information is accurate.
2. Following a "no comment" policy on the reasons for employee discharge or termination that would not allow any dissemination of the actual reason for discharge to the employee, other employees, or external contracts.

Invasion of Privacy

The second type of lawsuit being utilized by employees and former employees for the improper use of employee information is invasion of privacy. Generally for there to be a successful lawsuit for invasion of privacy, the employee must establish that the employer disclosed facts about the individual that were highly personal or intimate in nature and there was no legitimate business purpose for the disclosure, such as employee supervision or promotion evaluations [5]. It is important to remember that if there was such a disclosure, truth is not a defense, and there generally is no conditional privilege available to protect the employer. It should additionally be noted that intra-business communication is sufficient disclosure to constitute the "invasion," but there is no similar concept of "compelled self-publication" in an invasion of privacy lawsuit.

Examples of the types of disclosures that have been held to be invasions of privacy are:

1. The answers to an intra-corporate questionnaire reviewed by many managerial employees that asked highly intrusive questions about personal habits and lifestyles were considered invasions of privacy with no valid business purpose [9].
2. The circulation of a memo to numerous management employees that described an employee as "distraught and crying" and that a doctor had considered him "paranoid" was considered potentially an invasion of privacy unless the employer could establish a valid business purpose for the disclosure [5].

All invasion of privacy cases recognize that employers have a certain degree of freedom to obtain and utilize information relating to their employees. However, as the above situations indicate, there are limitations on employer conduct.

It is essential that employers consider the possibility of potential invasion of privacy suits when deciding what information to obtain and how to manage and disseminate that information.

An area that seems to hold a high potential for invasion of privacy lawsuits is in the collection, maintenance, and use of various employee test results including drug and polygraph tests. As many employers are beginning to extensively use such techniques to select and monitor employees, there will probably be a corresponding increase in the number of lawsuits claiming that the improper dissemination of test results is an invasion of privacy.

It should be noted that twenty-four states prohibit or limit the use of polygraph examinations in the employment context [6]. Employers must ensure that they are in compliance with state law before utilizing polygraph examinations. Failure to do so could subject those employers to criminal and civil actions. Similar limitations have not been imposed on private employer drug testing. Currently, there are virtually no governmental restrictions on a private employer's use of drug testing [17]. Therefore, private employers are generally free to implement drug testing programs, subject only to potential lawsuits alleging invasion of privacy.

The sparse case law addressing a private employer's use of drug testing seems to indicate that if drug testing is done in good faith for a valid business purpose and in a manner designed to minimize the indignity to the employee, the employer is not likely to be liable for invasion of privacy [6]. However, as this is a rapidly developing area, employers using drug testing should ensure that they stay informed on legal changes that may occur.

Employers who are using such techniques to select and monitor employees should also exercise extreme care in the use and dissemination of test results to ensure that anyone within the organization having access to such results has a clear and supportable business need for the data. Also, since the error factor on such tests, particularly drug tests, is relatively high, it would be advisable to not provide test results to anyone outside the organization. Some studies indicate that the most commonly used employee drug tests have a false positive result 28% to 35% of the time [13].

Negligence

One of the most common types of all lawsuits is for negligence. Generally, negligence means that the defendant did not use reasonable care under the circumstances, and the failure to use reasonable care injured the plaintiff.

In the employment information context, employers can become liable for negligence if reasonable care was not used in the collection, maintenance, and dissemination of employment data.

Two cases that demonstrate the types of factual situations that can give rise to a negligence action are *Bulkin v. Western Kraft East, Inc.* [18] and *Quinones v. United States* [20].

In *Bulkin*, an employee was terminated because of a reduction in the workforce, not for any reason related to his individual performance. Somehow, incorrect material was placed in his employment record that indicated he was terminated because his sales production had been poor. This information was provided to others who inquired as to the reasons for termination. Ultimately, the court concluded that the employer was negligent in the preparation, maintenance, and dissemination of this information.

The facts were similar in *Quinones*. Quinones was an employee of the Federal Government who had received excellent evaluations, had been promoted numerous times, and had received many commendations. He resigned from the government rather than accept a transfer to another location. Information provided to potential employers indicated that his performance had been substandard, he was incompetent, and he had been the subject of disciplinary action. Obviously, he was unable to find other employment. The negative information was apparently obtained from another employee's records. The Court ultimately determined that this is the type of conduct that will give rise to an action for negligence.

It is obvious from these and similar cases that there is potential for liability when incorrect and damaging information is provided to others about current or former employees. Although negligence requires a showing of the failure to use reasonable care, the fact that incorrect information was provided will normally be sufficient to substantiate the action unless the employer can demonstrate the utilization of procedures designed to ensure that such mistakes will rarely happen. The growing number of negligence lawsuits for the careless storage and dissemination of incorrect information should prompt all employers to review the procedures used to maintain such records in order to ensure that the possibility of incorrect information being maintained or disclosed is minimized. Such procedures should also include a periodic review of records designed to find and correct any incorrect material. If such policies are implemented, they should be adequate to eliminate the possibility of a successful negligence lawsuit, as they should establish that the employer took reasonable care to ensure that incorrect information was not maintained in employee records. If such reasonable care can be established, the plaintiff-employee would not be successful in a negligence action.

CONCLUSION

The number of lawsuits against employers for the improper preparation, maintenance, use, and dissemination of information is rapidly increasing. Therefore, it is essential that employers take all possible steps to insulate themselves from successful litigation. At a minimum, all employers should review current procedures and policies to ensure:

1. That only accurate factual information is being maintained on employees,
2. That derrogatory information be clearly substantiated before being circulated, either internally or externally,
3. That responses to requests for information are consistently either not honored or great care is taken to ensure that the information provided is accurate and not of a highly intrusive nature,

4. That terminated employees are either given the true reason for termination or given no reason at all, and
5. That the results of various employee testing or monitoring programs are very selectively used, with dissemination only to internal sources that clearly have a valid business purpose for the information.

REFERENCES

1. *Abofreka v. Alston Tobacco Co.*, 341 S.E. 2d 622 (S.C. 1986).
2. *Austin v. Torrington Company*, 810 F.2d 418 (4th Cir. 1987).
3. *Babb v. Minder*, 805 F.2d 749 (7th Cir. 1986).
4. *Becker v. Alloy Hardfacing and Engineering Co.*, 390 N.W. 2d 374 (Minn 1986).
5. *Brett v. International Business Machines Corporation*, 392 Mass. 508 (1984).
6. Brunn, Lisa. "Privacy and the Employment Relationship." *Houston Law Review*, 25, 2 (March, 1988), 380-418.
7. *Bullin v. Western Kraft East, Inc.*, 422 F. Supp. 437 (E.D. Penn 1976).
8. *Circus, Circus, Hotels, Inc., v. Witherspoon*, 657 P.2d 101 (Nev. 1983).
9. *Cort v. Bristol-Myers Co.*, 431 N.E. 2d 908 (1982).
10. Dube, Lawrence E. "Employment Preferences and the Law." *Personnel Journal*, 66, 2 (February, 1987), 87-91.
11. *Frank B. Hall and Co. v. Buck*, 678 S.W. 2d 612 (Tex. App. 1984).
12. *Frankson v. Design Space International*, 394 N.W. 2d 140 (Minn. 1986).
13. Gompel, Joanna C., and Kevin B. Zeese. "Are Employers Overdosing on Drug Testing?" *Business and Society Review*, 56; 3 (Fall, 1985), 34-38.
14. *Houston Belt and Terminal v. Wherry*, 548 S.W. 2d 713 (Tx. 1986).
15. *Lewis v. Equitable Life Assurance Society of the United States*, 389 N.W. 2d 876 (Minn. 1986).
16. *Luttrell v. United Telephone System, Inc.*, 833 P.2d 1292 (Kan. 1984).
17. Moriarty, Leo. "Should Employers Be Legally Permitted to Require Drug Testing of Employees? A Qualified Affirmative." *Western State University Law Review*, 14, 2 (Spring, 1987), 603-16."
18. Prentice, Robert A., and Brenda J. Winslett. "Employee References: Will A No Comment Policy Protect Employers Against Liability for Defamation?," *American Business Law Journal*, 25, 2 (Summer, 1987), 208.
19. Prosser, William L., and W. Keeton. *Handbook of the Law of Torts*. St. Paul, Minnesota: West Publishing Co., 1983.
20. *Quinones v. United States*, 492 F.2d 1269 (3rd Cir. 1974).
21. *Restatement (Second) of Torts*, Section 558-559, (1977).
22. *Stuempges v. Parke, Davis and Co.*, 297 N.W. 2d 255 (Minn. 1980).

Measuring the Eminence of Business Schools: A Longitudinal Analysis

By Frank R. Urbancic

University business schools compete directly with each other for scarce resources. Today, the competitive struggle for faculty, students, and respectability rages, and it is more intense than ever [3]. The increased attention to the quality of higher education and research in schools of business has led to direct comparisons among the schools and their programs. The comparative results provide universities with information that is helpful in attracting good students, qualified faculty, research facilities, and external financial support.

Inevitably, comparisons of business schools and programs have led to the formulation of institutional rankings. These rankings have been based on various criteria, including: peer ratings of faculty and programs [1, 4]; page counts of faculty articles in selected journals [9]; number of articles in major journals [15, 17]; and journal article citation analysis of faculty research contributions [2, 7]. In the aforementioned approaches, except for the peer rating method, primary reliance has been placed on articles published in scholarly journals as a basis for evaluating business faculty and their institutional affiliations. The importance attributed to published articles suggests that another relevant criterion for comparing business schools is faculty representation on the editorial review boards of major journals.

The editorial review process serves as a quality control system for research by providing a peer assessment of the value of potential research contributions. The substantial amount of control that journal editors have as the "gatekeepers of science" has been emphasized by Crane [6] and Kerr, Tolliver, and Petree [13] in their respective studies of the factors that affect the selection of articles for publication in scholarly journals. Formal recognition that certain institutions have substantial control responsibilities according to their representation on editorial boards was also evident in a recent study by Williams [16] that indicated that journal policies regarding the acceptability of research may perpetuate an institutional dominance by certain schools based on the composition of editorial staffs.

Academicians recognize that an important indication of a faculty member's eminence is provided by an appointment to the editorial board of a significant scholarly journal [8, 11, 12]. Accordingly, the collective appointments of a business school's faculty to journal editorial boards are capable of providing a measure of eminence for the school as a whole relative to other business schools. Therefore,

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Defamation in the Workplace: The Law of Massachusetts

BY JAMES B. CONROY

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Introduction

An unprecedented wave of litigation is flooding the courts with libel and slander claims based on negative job reviews, unfavorable employment references, derogatory termination interviews and other forms of workplace defamation.[1] Reacting to the costs as well as the risks of such lawsuits, many employers have reduced their employees' performance evaluations to meaningless generalities, imposed strict censorship on interoffice communications and stopped giving references altogether. This is a loss for everyone concerned. The free exchange of information in the workplace is just as important to able employees as it is to their employers. More broadly, consumers are the ultimate beneficiaries when hiring, firing and promotion decisions are made on the basis of well-informed judgments.

At the same time, employees should have ample means to seek legal redress when their employers disparage their reputations without just cause. Few injuries are as thoroughly ruinous as the undeserved loss of one's good name, and the consequences may be particularly devastating on the job and in the marketplace.

For centuries, the common law of defamation has struggled to maintain an appropriate balance between these competing values. "On the one hand, the tort law of this Commonwealth has long recognized a right of redress to one who suffers injury to his reputation by the publishing of a defamatory falsehood. On the other hand, freedom of expression is guaranteed...."[2]

Following a brief review of libel and slander in general, this article focuses on the manner in which the law of Massachusetts balances these competing rights and values in the workplace.[3] Typically, employees' defamation claims are precipitated by 1) an unfavorable evaluation; 2) an allegation of workplace misconduct; 3) a derogatory comment in a company publication; or 4) an unflattering reference. This article reviews Massachusetts law governing all four scenarios, suggests how employers may be counselled to avoid inappropriate defamatory communications and discusses ways and means to reconcile more justly the conflicting interests which the law of defamation must balance in the workplace.

I. Basic Law of Defamation

A. *Elements of a Cause of Action*

Defamation consists of a false and unflattering statement communicated to one or more individuals about another.[4] Written defamation is libel. Oral defamation is slander. In either case, the plaintiff must prove all five of the essential elements of both torts:

1. Suits brought by employees against their employers now account for about one third of all defamation actions. *Wall Street Journal*, at 33, col. 4 (October 2, 1986).

2. *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 855 (1975).

3. For a full review of Massachusetts defamation law, *see* 37 J. Nolan, *Massachusetts Practice* §§91–104 (1979).

4. *McAvoy* v. *Shufrin*, 401 Mass. 593, 597 (1988).

First, the statement at issue must be "defamatory," classically defined as "words which would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community."[5] Accusing an employee of misfeasance or malfeasance on the job is defamatory *per se*,[6] as is any publication which would tend to deter others from doing business with him.[7]

Second, since causes of action for libel and slander protect the plaintiff's reputation rather than his own peace of mind, the defamatory remark must be "published" to someone other than the one defamed.[8] Berating an employee when no one else is present, no matter how unfairly or energetically, cannot give rise to a defamation claim.[9] However, internal communications closely confined within a single business entity may well support a cause of action.[10] Because an unfavorable intra-corporate evaluation, report or casual conversation can have devastating consequences for the maligned employee, "[t]he argument that a communication between agents of the same corporation is not a communication to a third person is not impressive in dealing with such a subject as defamation...."[11]

Third, the defamatory statement must refer specifically to the plaintiff or be reasonably discernible as such.[12] Heavily veiled references to "certain parties" may not be actionable, but a suggestion that "a certain head of the Accounting Department is skimming from the till" leaves no room for doubt about the wrongdoer's identity.[13]

Fourth, the remark must be false. Although the plaintiff bears the burden of alleging falsity, under Massachusetts law it is up to the defendant to prove truth as an affirmative defense.[14] Even if a written defamatory statement is *true*, it may still be actionable if the defendant published it maliciously in a conscious effort to ruin the plaintiff's reputation without lawful reason.[15]

For all libel and most slander claims, nominal damages may be awarded without proof of actual injury;[16] but to recover compensatory damages, a plaintiff must prove genuine harm.[17] Typical general damages include lost reputation and resulting mental anguish.[18] Special damages may also be recovered when pleaded and proved.[19] However, where a multi-count complaint alleges defamation among other causes of action, only one recovery may be had for a single injury, no matter how many theories support it.[20]

Corporations,[21] sole proprietorships[22] and other business entities are accountable for defamatory statements made by their agents or employees acting within the scope of their employment. Employers are also directly liable for any defamatory statements which they expressly authorize.[23] Furthermore, employers are liable for any statements made by their agents or employees while acting within their actual or apparent authority.[24]

5. *Stone*, *supra* n.2, 367 Mass. at 853.

6. *Lyman* v. *New England Newspaper Pub. Co.*, 286 Mass. 258, 262 (1934).

7. *A.F.M. Corp.* v. *Corporate Aircraft Management*, 626 F.Supp. 1533, 1551 (D. Mass. 1985).

8. *Brauer* v. *Globe Newspaper Co.*, 351 Mass. 53, 56 (1966).

9. *Comerford* v. *West End Street Railway Co.*, 164 Mass. 13, 15 (1895).

10. *Bander* v. *Metropolitan Life Insurance Co.*, 313 Mass. 337, 348–49 (1943).

11. *Id.*

12. *MiGi, Inc.* v. *Gannett Massachusetts Broadcasters, Inc.*, 25 Mass. App. Ct. 394, 396 (1988).

13. *McCallum* v. *Lambie*, 145 Mass. 234, 238 (1887).

14. *McAvoy*, *supra* n.4, 401 Mass. at 597. In *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775–78 (1986), the Supreme Court held that in a libel case against a media defendant, the first amendment required that plaintiff bear the burden of proving falsity, and thus a state common law rule (similar to Massachusetts'), imposing the burden of proof on this issue on the defendant, was unconstitutional. In *McAvoy*, *supra*, the SJC did not decide whether *Hepps* applied in a case involving a nonmedia defendant. 401 Mass. at 597 n.4.

15. G.L.M. c.231, §92. However, in *Materia* v. *Huff*, 394 Mass. 328, 333 n.6 (1985), the Supreme Judicial Court held that this element of the statute is constitutionally invalid where the plaintiffs are public figures or public officials. The Court left open the issue of whether the same constitutional infirmity applies to actions brought by private plaintiffs. *Id.*

16. 37 J. Nolan, *Massachusetts Practice*, §99 at 125–26 (1979), and cases cited.

17. *Stone*, *supra* n.2, 367 Mass. at 860–61. Loss of prospective employment resulting from a defamatory reference has always been compensable. *E.g.*, *Doc* v. *Grew*, 220 Mass. 171, 176 (1915); *St. Clair* v. *Trustees of Boston University*, 25 Mass. App. Ct. 662, 665 n.2, *review denied*, 402 Mass. 1104 (1988). In a significant new development, however, the Appeals Court recently declined to disturb an award of damages for the loss of a job the plaintiff already held. In *Mendez* v. *M.S. Walker, Inc.*, 26 Mass. App. Ct. 431, 432 (1988), the plaintiff had worked for the defendant company as an employee at will. He was fired after the company's president told his supervisor that he had stolen company property. Although the plaintiff had only filed a defamation claim, asserting no cause of action for "wrongful termination" in any of its forms, the jury awarded damages for the loss of his job. On appeal, the defendant argued that the plaintiff's injuries resulted from the discharge rather than the slander and because the discharge was not unlawful in itself, the plaintiff's lost income, as opposed to his lost reputation, should not have been considered in assessing damages. The Appeals Court declined to consider this argument, solely because it had not been raised below. *Id.* at 435. Certainly, holding that lost wages are compensable whenever an employee is fired because of a defamatory accusation would radically transform the doctrine of employment at will. For a related discussion of *Mendez*, see *infra* notes 91–94 and accompanying text.

18. *Stone*, *supra* n.2, 367 Mass. at 860.

19. *Id.*

20. *See, e.g.*, *St. Clair*, *supra* n.17, 25 Mass. App. Ct. at 665 n.2 (where plaintiff lost a job opportunity after defendant defamed him in a reference, separate damages could not be awarded *seriatim* on theories of slander and intentional interference with advantageous relations).

21. *E.g.*, *Galvin* v. *New York, New Haven & Hartford Railroad Co.*, 341 Mass. 293, 296 (1960).

22. *E.g.*, *Pion* v. *Caron*, 237 Mass. 107, 111 (1921).

23. *E.g.*, *Mills* v. *W.T. Grant Co.*, 233 Mass. 140, 145 (1919).

24. *Ezekiel* v. *Jones Motor Co.*, 374 Mass. 382, 391 (1978); *Bander*, *supra* n.10, 313 Mass. at 348.

B. *Protected Expressions of Opinion*

Most of this article addresses employers' defamatory statements of *fact* about their employees; statements of pure *opinion* are immune from liability in the first instance. "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[25] In sharp contrast, "there is no constitutional value in false statements of fact" and falsely defamatory factual statements enjoy no sanctuary under the first amendment.[26]

Whether a statement is one of fact or opinion is a question of law if reasonable persons could not decide the matter differently; but the issue is for the jury if the statement could reasonably be understood either way.[27] The best test seems to be whether the remark is susceptible of proof. A statement is factual if it can be proved, at least theoretically, to be true or false; it is an expression of opinion if it is subjective or open to speculation.[28] To say that John Smith is unfit for promotion may be a protected expression of opinion; to say that John Smith has stolen the company blind is an actionable statement of fact.[29] The court must consider not just one word or phrase but the entire statement in context, giving weight to the circumstances, the medium of dissemination, the audience, and any mitigating or cautionary terms that the publisher may have included.[30] Epithets deemed opinionated when uttered in the heat of a confrontational labor dispute might be taken as statements of fact when spoken calmly and with due reflection.[31]

Even an expression of otherwise unadulterated opinion may support a cause of action if it implies a basis in undisclosed fact.[32] Liability may come from saying too little rather than too much. Simply describing one's employee as an alcoholic may give him grounds to sue because the statement implies undisclosed evidence of excessive drinking; but noting that the employee had wine with dinner and concluding that he is an alcoholic is a protected expression of opinion based on disclosed, nondefamatory facts.[33]

Surely, an employer is entitled to its opinions of its employees, particularly when those opinions are imprecise and cannot be characterized as statements of particular facts.[34] Whether specific individuals should be hired, fired, promoted or demoted are "inherently subjective questions which rely as much on an assessment of [the company's] needs as on the plaintiff's capabilities."[35] Accordingly, to the extent that they neither express nor imply false statements of fact, evaluations and references ought to be protected absolutely as statements of pure opinion.

C. *Absolute and Conditional Privileges*

The law also provides absolute privileges for a narrow category of defamatory statements of fact. An absolute privilege is a license to defame, providing a complete defense even for statements which were maliciously motivated, known to be false, and published indiscriminately with reckless disregard for the rights of the person defamed.[36] Accordingly, absolute privileges are only justified in the most compelling circumstances. In Massachusetts, they are strictly confined to statements made in the course of litigation,[37] legislative proceedings,[38] or adjudicative agency hearings.[39] This is a measure of the paramount value which the law assigns to the free flow of information through the courts and the legislature. "[I]t is more important that witnesses be free from the fear of civil liability for what they say than that a person who has been defamed by their testimony have a remedy."[40]

Although no absolute privilege exists beyond the halls of government, conditional privileges are recognized in other settings where the law takes a more bal-

25. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974).

26. *Id.* at 340.

27. *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 709 (1987), *cert. denied*, 108 S.Ct. 1121 (1988).

28. *Cole* v. *Westinghouse Broadcasting Co., Inc.*, 386 Mass. 303, 310–12, *cert. denied*, 459 U.S. 1037 (1982).

29. *Id.* Although the accusation of theft would be actionable, defendant should prevail upon proof of the accusation's truth or a reasonable basis for belief in its truth.

30. *Id.* at 309.

31. *Id.* at 310. In *Tosti* v. *Ayik*, 386 Mass. 721, 723 (1982), the SJC stated that "[f]ederal labor law preempts State libel law to the extent that defamatory statements made in the context of a labor dispute are actionable only if made with knowledge or their falsity or with reckless disregard of the truth." The federal standard does not completely "preempt" state law so much as modify it to conform to first amendment standards. In some circumstances federal labor law may fully preempt state law—that is, remove the availability of a state law claim and consign a union worker to the remedies available under her collective bargaining agreement. This occurs when an employee's state law claim depends for its resolution on interpretation of the labor contract. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). In most circumstances, however, unionized workers may pursue defamation claims without relying on the union contract. *E.g.*, *Linn* v. *Plant Guard Workers*, 383 U.S 53 (1966).

32. *King, supra* n.27, 400 Mass. at 713.

33. *Myers* v. *Boston Magazine Co.*, 380 Mass. 336, 339 (1980).

34. *Underwood* v. *Digital Equipment Corp., Inc.*, 576 F.Supp. 213, 217 (D. Mass. 1983), applying Massachusetts law and quoting *Cole, supra* n.28, 386 Mass. at 312 (no cause of action where plaintiff's employer opined after plaintiff's resignation that his departure was a "minor loss" and he should not be rehired).

35. *Underwood, supra* n.34, 576 F.Supp. at 217.

36. *Ezekiel, supra* n.24, 374 Mass. at 385; *Mezullo* v. *Maletz*, 331 Mass. 233, 236 (1954).

37. *E.g., Aborn* v. *Lipson*, 357 Mass. 71, 72–73 (1970).

38. *E.g., Sheppard* v. *Bryant*, 191 Mass. 591, 594–95 (1906).

39. *E.g., Stepanischen* v. *Merchants Dispatch Transportation Corp.*, 722 F.2d 922, 932 (1st Cir. 1983). Originally, only defamatory statements deemed pertinent to the proceedings in which they were made were absolutely privileged. *E.g., Hoar* v. *Wood*, 44 Mass. 193, 197 (1841). But appropriately liberal constructions of what may be pertinent have so eroded that limitation as to strip it of all effective meaning. *E.g., Aborn, supra* n.37, 357 Mass. at 73.

40. *Aborn, supra* n.37, 357 Mass. at 72. It is curious that the law provides an absolute privilege only in settings where lawyers, legislators and judges ply their trades.

anced view, seeking not only to encourage uninhibited speech but also to guard against licentious defamation. Like absolute privileges, conditional privileges are created by circumstances. "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest."[41]

Unlike absolute privileges, however, conditional privileges are lost when abused. It has long been understood that people should be insulated from liability for what they say "when the cause or occasion of the publication is such as to render it proper and necessary for common convenience and the general welfare of society that the party making it should be protected from liability...*provided* it is made in good faith, and without a willful design to defame."[42] A conditional privilege is lost when the publisher's conduct or motives are inconsistent with the rationale which justifies the privilege.[43] The defendant has the burden to prove the existence of circumstances giving rise to a privilege.[44] The burden then shifts to the plaintiff to prove that the privilege was abused.[45]

One form of conditional privilege is created when publisher and recipient have a common interest and the communication is reasonably calculated to further it.[46] Among such conditionally privileged occasions are situations in which the publisher and the recipient share a legitimate business interest in the information exchanged.[47]

II. The Employer's Privilege

The employer's privilege is "a natural corollary" of these broader principles.[48] It is rooted both in self-interested rights and in disinterested duties. To protect themselves, employers are entitled to candid assessments of the people they hire and entrust with their affairs. To protect those who work for them, employers are not only allowed but required to investigate sexual harassment, invidious discrimination and other workplace misconduct. To protect outsiders, employers have a dispensation if not a duty to tell the unvarnished truth when asked to give references. None of these rights and duties can be discharged with due diligence unless employers are reasonably protected from liability while pursuing them. Accordingly, "[a]n employer has a conditional privilege to disclose defamatory information concerning an employee when the publication is reasonably necessary to serve the employer's legitimate interest in the fitness of an employee to perform his or her job."[49]

The following discussion reviews the four most common scenarios giving rise to the employer's privilege and the three basic ways in which it may be lost through abuse.

A. *Privileged Occasions*

1. *Employee Evaluations*

The common law has long recognized that employers are entitled to accurate information about their employees' strengths and weaknesses.[50] Accordingly, employers and their managers are conditionally privileged to communicate frankly about the skills, performance and qualifications of their personnel. Standing alone, an unfavorable evaluation disseminated among legitimately interested persons will not support a defamation claim.[51] Nor does it matter whether the evaluation comprises a formal review[52] or a spontaneous critique of an employee's perceived shortcomings.[53] In either event, the employer's interest in assessing and communicating about the employee's fitness to do her job lends the privilege its legitimacy.[54] Beyond assessments of an employee's diligence, abilities and performance, appraisals of his character as well as his physical and mental health are also conditionally privileged, so long as they reasonably relate to his employment.[55]

Typically, an employee's reviews are prepared and disseminated entirely within the organization which employs her. But so long as two or more business entities share a common interest in the conduct and performance of each other's personnel, representatives of Company A enjoy a conditional privilege to make pertinent, unflattering comments to appropriate persons in Company B about the latter's employees.[56]

41. *Humphrey* v. *National Semiconductor Corp.*, 18 Mass. App. Ct. 132, 133, *review denied*, 393 Mass. 1102 (1984), *quoting Restatement (Second) of Torts* §594, at 263 (5th ed. 1977).

42. *Gassett* v. *Gilbert*, 72 Mass. 94, 97 (1856) (emphasis supplied).

43. *Doane*, *supra* n.17, 220 Mass. at 180.

44. *Humphrey*, supra n.41, 18 Mass. App. Ct. at 134 and cases cited.

45. *Id.*

46. *Sheehan* v. *Tobin*, 326 Mass. 185, 190–91 (1950); *Humphrey*, *supra* n.41, 18 Mass. App. Ct. at 133.

47. *Bratt* v. *International Business Machines Corp.*, 392 Mass. 508, 512–13 (1984); *Petitioner, Retailers Commercial Agency, Inc.*, 342 Mass. 515, 520 (1961); *Restatement (Second) of Torts* §594, comments e and f, at 265–66 (5th ed. 1977).

48. *Foley* v. *Polaroid Corp.*, 400 Mass. 82, 94–95 (1987).

49. *Bratt*, *supra* n.47, 392 Mass. at 509.

50. *Id.*; *Dexter's Hearthside Restaurant, Inc.* v. *Whitehall Co.*, 24 Mass. App. Ct. 217, 222, *review denied*, 400 Mass. 1104 (1987).

51. *McCone* v. *New England Telephone & Telegraph Co.*, 393 Mass. 231, 235–36 (1984) (remarks about employees contained in poor evaluations found privileged even though company policy required low ratings for a predetermined percentage of the workforce in order to achieve a "bell shaped curve" reflecting top to bottom ranges of performance and ability).

52. *E.g.*, *id.* at 232–33.

53. *E.g.*, *Foley*, *supra* n.48, 400 Mass. at 94.

54. *Bratt*, *supra* n.47, 392 Mass. at 509.

55. *Id.* at 516–17. The privilege should apply with equal force to evaluations of persons applying for positions as well as those who already have them. In either scenario, the employer has an equally legitimate interest in a frank evaluation.

56. *Humphrey*, *supra* n.41, 18 Mass. App. Ct. at 133–34 (a conditional privilege protected Company A's Regional Sales Manager who wrote to the President of Company B, expressing dissatisfaction with three of the latter's salesmen who sold Company A's products).

2. *Investigations of Misconduct in the Workplace*

An employer has "obvious and legitimate interests in determining the validity of an accusation of unlawful conduct leveled against [its] personnel."[57] So long as the employer acts upon such charges in good faith, with appropriate circumspection, and with reasonable cause to believe that they may be true, he is privileged to ask questions, make allegations and issue reports without fear of liability.[58]

Again, this aspect of the privilege is grounded not only in the employer's own interests but also in those of others. Employers are more than entitled to investigate workplace wrongdoing; they are bound by law to do so. For example, under Massachusetts law, as well as Title VII of the Civil Rights Act of 1964,[59] employers have an affirmative duty to maintain a workplace free of sexual harassment and intimidation[60] and to investigate sexual harassment charges.[61] Under the Federal Occupational Safety and Health Act ("OSHA"),[62] the employer's mandate to maintain a safe working environment includes a duty to investigate substance abuse and other safety hazards and discipline employees who violate OSHA regulations.[63] Even under traditional common law principles, employers are charged with a duty to maintain a safe environment for persons entering the workplace and may be held liable for their employees' violence.[64]

The privilege to conduct prudent, discreet and well meaning investigations of employee misconduct recognizes the employer's legitimate interest "in protecting its employees, in preserving employee morale, in promoting sound and efficient business operations and in insuring the highest level of professional conduct."[65] Workplace wrongdoing would rarely be addressed with appropriate dispatch if employers and their agents were likely to incur liabilities in the course of reasonable efforts to prevent or stop it. Indeed, failure to investigate alleged wrongdoing might even be deemed a form of acquiescence.[66]

3. *References*

"Where inquiries are made as to the character and capabilities of a former servant, the occasion is a privileged one. Of that there is no question. It is the typical case of a privileged occasion."[67]

The privilege to give unfavorable employment, credit and character references without undue liability benefits the recipient rather than the publisher. In knowingly passing off a dishonest, violent or incompetent employee on an unsuspecting prospective employer, the party giving the reference may do nothing to harm herself. Indeed, she may rid herself of a bad apple or, better yet, foist him off on a competitor. However, this is a disservice not only to the miscreant's new boss but also to his new coworkers and members of the public who will interact with him or pay for his work. An employer who tells the whole truth as she fairly sees it when asked for a reference by a legitimately interested party performs a public service. "Giving information as to the character and capabilities of a former servant...is not a legal obligation enforced by law...[but] [t]he law recognizes its existence as a social obligation which cannot be performed unless it creates a privileged occasion."[68]

Indeed, the day may not be far off when a past employer may be held liable for a falsely *favorable* reference. Massachusetts is among many jurisdictions which have recognized a cause of action for "negligent hire," rendering employers liable for their employees' crimes or negligence on the job where the employers were careless in screening them.[69] Third party complaints against past employers who failed to report such proclivities when asked if any existed may not be far behind.

Finally, most references are given with the express or constructive consent of the person defamed; and consent is a defense to libel or slander.[70] After asking for a reference from her former boss or supervisor or listing him as a reference in her application, a plaintiff is poorly positioned to complain when the result is not to her liking.[71] The privilege also applies, however, when the reference is given at the initiative of the prospective employer[72] or even with no solicitation at all, so long as the recipient is legitimately interested.[73] By implication, a defendant employer has been held protected even where a person asking about the defendant's former employee was not genuinely interested in hiring him, but was merely posing as such to elicit information. So far as the

57. *DiSilva* v. *Polaroid Corp.*, 1985 Mass. App. Div. 1, 4, 45 F.E.P. Cases 639 (Dist. Ct. 1985). This is a particularly thorough and well-considered Appellate Division opinion.

58. *Galvin, supra* n.21, 341 Mass. at 296, and cases cited; *DiSilva*, 1985 Mass. App. Div. at 4, and cases cited.

59. 42 U.S.C. §2000e *et seq*; G.L.M. c.151B §§4(1),16A; c.214, §1C; *College-Town. Division of Interco., Inc.* v. *M.C.A.D.*, 400 Mass.156, 163–67 (1987).

60. E.E.O.C. Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.11 (1988).

61. *College-Town. Division of Interco., Inc., supra* n.59, 400 Mass. at 163–67 and cases cited; *DiSilva, supra* n.57, 1985 Mass. App. Div. at 4–5.

62. 29 U.S.C. §651 *et seq*.

63. 29 U.S.C. §654(a); *Floyd S. Pike Electrical Contractor, Inc.* v. *OSHA*, 576 F.2d 72, 76 (5th Cir. 1978).

64. *See, e.g., Hobart* v. *Cavanaugh*, 353 Mass. 51, 52–53 (1967) (owner of service station held liable for station attendant's assault on a customer); *Rego* v. *Thomas Brothers Corp.*, 340 Mass. 334, 335 (1960) (employer of construction worker held liable for his attack on an intruder who interfered with his removal of boulders from a worksite).

65. *DiSilva, supra* n.57, 1985 Mass. App. Div. at 4.

66. *Id.* at 5 n.3.

67. *College-Town Division of Interco., Inc., supra* n.59, 400 Mass. 163–67; *Doane, supra* n.17, 220 Mass. at 176.

68. *Id.* at 177.

69. *Foster* v. *The Loft, Inc.*, 26 Mass. App. Ct. 289, 290, *review granted*, 403 Mass. 1102 (1988) (subsequently settled and dismissed); Silver, "Negligent Hiring Claims Take Off," 73 *A.B.A.J.* 72–78 (1987).

70. *Christopher* v. *Akin*, 214 Mass. 332, 334–35 (1913).

71. *Childs* v. *Erhard*, 226 Mass. 454, 456 (1917); *Billings* v. *Fairbanks*, 136 Mass. 177, 178 (1883).

72. *Burns* v. *Barry*, 353 Mass. 115, 118–19 (1967).

73. *See e.g., Gassett, supra* n.42, 72 Mass. at 99 (agents of a charity

defendant knew, the inquiry was legitimate and the privilege was preserved.[74]

Of course, it is up to the plaintiff to prove that the defendant gave any defamatory reference at all.[75] Where no direct evidence exists that the defendant or any of its agents actually did give the plaintiff a poor review, "[w]ithout impermissible speculation, inferences to that effect could not be drawn merely from [the former employee's] lack of success in obtaining other employment."[76]

4. *Company Publications*

General circulation newspapers and magazines are conditionally privileged to report the news and make fair comment on any subject of public interest.[77] The same conditional privilege covers publications distributed to limited groups who share a common interest.[78] This category includes bulletins, newsletters and other house organs which employers produce for employees. These should enjoy the same news and commentary privileges that cover more expansive journals. Because internal publications are a vehicle for employers to communicate with employees, they should also be covered by the employer's broad privilege to communicate with those who share an interest in the company's affairs.

B. *Losing the Privilege Through Abuse*

The employer's privilege protects free speech, promotes meritocracy in the workplace and serves other legitimate public interests, all by protecting well-intentioned communications among persons entitled to make and receive them. But along with the employer's protection from undeserved liability comes a corresponding diminishment of the employee's protection from unwarranted vilification. The common law's recognition of the employer's privilege constitutes a judgment that its benefits outweigh its costs. That rationale evaporates and the privilege is lost when an employer abuses it by "failing to confine itself to the purposes for which the law granted the privilege."[79]

The following discussion reviews the three principal forms of abuse through which the privilege may be destroyed.

1. *Knowing or Reckless Falsity*

When an employer discloses defamatory information about his employee in a privileged situation, the statement "may turn out not to be true...[but] [t]ruth or falsehood is not material if there is no abuse of the privilege or if no actual malice is shown."[80] Nevertheless, the privilege is meant to protect mistakes, not reckless or intentional falsehoods. It is settled that employers' false accusations are not privileged when they did not act on "their honest belief in the truth."[81] The employer need not prove that his statements were true; the employee must prove them false and demonstrate that the employer had no fair grounds for believing them.[82] Certainly, proof that the employer actually knew his statement was false has always been sufficient to defeat the privilege.[83]

On the other hand, an equally venerable principle permits an employer to communicate information that he has not verified. One old opinion goes so far as to say that in giving a reference about a former employee, an employer

> would not do his whole duty if he should confine his answer to facts which he knows to be facts of his own knowledge. Nor would he do his whole duty if he should confine himself to giving information which he has fully investigated. Indeed [so long as he informs the party making the inquiry that the information is unverified and of uncertain trustworthiness] he would fail in doing his full duty if he should omit to impart any material information which has come to him, even if he has not attempted to investigate it at all.[84]

An employer does not forfeit his privilege simply through negligent failure to determine the truth of what he said unless there is evidence that he actually disbelieved it "or that his belief was not reasonably grounded."[85] The employer must actually know that the statement is false, or disseminate it with "reckless disregard" for whether it is true or not.[86] The rationale for this heightened degree of protection stems from the very nature of a conditional privilege. Simple negligence gives rise to liability where no privilege exists. Therefore, "[t]o apply the negligence standard to a conditional privilege would defeat the concept [of a privileged communication] and its objective of promoting the free flow of

were privileged to issue unsolicited public warnings about a dishonest former employee who continued after her discharge to collect contributions which she kept for herself; the charity's "private interest and their duty to the public alike required that such notice should be given, if they believed the facts stated in it to be true, and acted honestly and in good faith in making the publication").

74. *Burns, supra* n.72, 353 Mass. at 119.

75. *Mailhoit v. Liberty Bank & Trust Co.*, 24 Mass. App. Ct. 525, 527 n.3 (1987).

76. *Id.*

77. *E.g., Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 74–75 (1979), *cert. denied*, 444 U.S. 1060 (1980).

78. *E.g., Sheehan, supra* n.46, 326 Mass. at 191.

79. *Bander, supra* n.10, 313 Mass. at 343. For a recent review of cases discussing the conditional nature of the privilege and the ways in which it may be lost, *see Judd v. McCormack*, 27 Mass. App. Ct. 167, 173–76 (1989).

80. *Dexter's Hearthside Restaurant, Inc., supra* n.50, 24 Mass. App. Ct. at 222–23; *Burns, supra* n.72, 353 Mass. at 119.

81. *Gassett, supra* n.42, 72 Mass. at 99.

82. *Id.*

83. *E.g., Childs, supra* n.71, 226 Mass. at 457.

84. *Doane, supra* n.17, 220 Mass. at 177–78.

85. *Foley, supra* n.48, 400 Mass. at 95–96.

86. *Bratt, supra* n.47, 392 Mass. at 515–16. The term of art for a knowing or reckless publication of a false and defamatory communication is "actual malice," which does not necessarily entail ill will or hatred, the term of art for which is "specific malice." (*E.g. Stone, supra* n.2, 367 Mass. at 867). These and other variations on the "malice" theme have injected much confusion into an already tangled area of the law.

information to further a legitimate private or public interest."[87]

"Reckless disregard for the truth" cannot be comprehensively defined. Indeed, the standard seems to shift with the type of privilege at issue. At least where the defendant draws his privilege from the fact that he defamed a public figure or public official, a finding of recklessness requires evidence that he not only failed to verify the statement but actually doubted it himself. "That information was available which would cause a reasonably prudent man to entertain serious doubts is not sufficient."[88] The standard is subjective; it must be proved that the defendant himself mistrusted what he said.[89] Further, plaintiffs must prove such recklessness not merely by a fair preponderance, but by clear and convincing evidence.[90]

However, in *Mendez* v. *M.S. Walker, Inc.*, the Appeals Court applied a very different standard in considering whether an *employer* had forfeited his privilege.[91] In *Mendez*, the employer had accused his employee of stealing. The court suggested neither that the employer had no basis for believing this, nor that he had actually entertained serious doubts. On the contrary, he had watched the employee load what appeared to be a carton of the company's goods into the trunk of his car.[92] Notwithstanding, where the employer's suspicions were "easy and relatively sure of verification," his failure to investigate them deprived him of his privilege when they turned out to be false.[93] In sum, the court permitted a finding of recklessness based on what the employer *should* have doubted, not on what he did doubt: "Reckless disregard does not necessarily imply that the charge has a flimsy basis...Recklessness can also be shown by a failure to verify in circumstances where verification is practical and the matter is sufficiently weighty to call for safeguards against error."[94]

There is little to distinguish such a broad definition of "knowing and reckless falsity" from simple negligence. In either case, defendants are required to act "reasonably in checking on the truth or falsity...of the communication before publishing it."[95] It is difficult to reconcile *Mendez* with prior decisions of the Supreme Judicial Court.[96] Indeed, just one year before *Mendez*, the Appeals Court itself held that "[s]imple negligence, want of sound judgment, or hasty action will not cause loss of the privilege."[97]

Further uncertainty results from other case law exonerating employers from liability for defamation despite their failure to verify suspicions of criminal wrongdoing before publishing them. In *Arsenault* v. *Allegheny Airlines, Inc.*,[98] the United States District Court for the District of Massachusetts applied Massachusetts law and held that where an employer had reason to believe what he wrote when he wrote it, his letter suggesting that a certain employee had aided and abetted misuse of company funds retained its privileged status even though the putative thief was later acquitted of larceny.[99] Similarly, in *Foley* v. *Polaroid Corp.*, even *after* a male supervisor was acquitted of sexually assaulting a female employee, the Court held that a Polaroid executive was privileged to tell a colleague that he remained convinced of the accused man's guilt where no evidence existed that he did not believe it.[100]

Notwithstanding the fine lines between mere negligence and recklessness, broad general principles can be drawn from the foregoing cases. First, statements of pure opinion about an employee's conduct, character or performance are never actionable so long as they imply no undisclosed facts and no evidence exists that they were not genuinely believed when made. Second, where defamatory facts are at issue, the publisher's actual belief in their truth and the absence of recklessness in holding and expressing that belief will generally preserve the privilege; but if ready means are available to confirm or refute the validity of the charge with little or no expense or delay, failure to do so may vitiate the privilege. Third, an employer need not believe charges of misconduct in order to reveal them to legitimately interested parties while making reasonable inquiries. Finally, even false and unsubstantiated hearsay may be privileged so long as the employer identifies it as such and does not vouch for its truth or reliability.

2. *Malicious Motivation*

Apart from the content of the communication, the privilege may be lost through malicious motives. "Malice, which destroys the defense of privilege, must be taken to mean that the defamatory words, although spo-

87. *Bratt, supra* n.47, 392 Mass. at 515 n.11.

88. *Stone, supra* n.2, 367 Mass. at 867–68.

89. *Id.*; *McAvoy, supra* n.4, 401 Mass. at 599.

90. *Stone, supra* n.2, 367 Mass. at 870.

91. 26 Mass. App. Ct. 431, 433–34 (1988).

92. *Id.* at 434. When confronted with this evidence, the employee claimed that the carton contained not company goods but his own property. He invited his supervisor to inspect the carton and satisfy himself of the employee's innocence. The supervisor declined. *Id.*

93. *Id.*

94. *Id.* at 433–34.

95. *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 36 (1985), *quoting Restatement (Second) of Torts* §580B comment g (5th ed. 1977).

96. *E.g., Petitioner, Retailers Commercial Agency, Inc., supra* n.47, 342 Mass. at 522, *quoting Pecue* v. *West*, 233 N.Y. 316, 322, 135 N.E. 515, 517 (1922) ("the conduct which would destroy a qualified privilege must be 'more than mere negligence or want of sound judgment' and there must be 'more than hasty or mistaken action'").

97. *Dexter's Hearthside Restaurant, Inc., supra* n.50, 24 Mass. App. Ct. at 223.

98. 485 F.Supp. 1373 (D. Mass.), *aff'd*, 636 F.2d 1199 (1980), *cert. denied*, 454 U.S. 821 (1981).

99. *Id.* at 1380.

100. 400 Mass. 82, 94–96 (1987).

ken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege but were spoken out of some base ulterior motive."[101] The privilege exists to advance legitimate interests, not as a pretext for giving vent to grudges, prejudices or personal rivalries. Even valid accusations may be unprivileged if made for invalid reasons.[102]

Where an occasion would otherwise be privileged, the employee has the burden of proving improper motivation.[103] Often, this is not easy, particularly because a combination of proper and improper purposes will not defeat the privilege. So long as the "motivating force" is legitimate, ill will is immaterial.[104] Nonetheless, circumstances may support an inference of nefarious motives even if the defendant does not admit them. The jury may be permitted to decide whether ill will was the motivating force or merely coincidental where evidence suggests that the person who defamed the employee disliked him,[105] was his rival,[106] bore him a grudge for some previous incident,[107] vilified him angrily or cursed or shouted at him,[108] maligned him repeatedly,[109] needlessly did so in the presence of others,[110] or sought to retaliate against him for exercising lawful rights.[111]

On the other hand, the privilege is not defeated by the mere fact that the communication was intemperate.[112] Although the employer expressed himself more vehemently than he might have, he may testify that his motives were legitimate, leaving the jury to find the truth.[113] Even if a defamatory statement was tinged with hostility, so long as it was made to serve a legitimate end, the privilege remains.[114] It is neither surprising nor blameworthy for an employer to be irked about an employee's misfeasance or malfeasance. Certainly, juries should be cautioned not to confuse the intensity of concern which justifies the employer's privilege with the "malice" which negates it. An employer or his agent is not acting maliciously simply by doing his job.[115]

Given the endless diversity of circumstances, the simplest statement of the rule is that "the defendant is not liable if he spoke the words in good faith under the right or duty which the occasion created, and that he is liable if he spoke the words from some other motive."[116]

3. *Recklessly Excessive Publication*

Even with the purest of motives and the highest regard for the truth, an employer may still lose his privilege by recklessly giving "excessive publicity" to a defamatory communication. This form of abuse lies neither in the publisher's ill will nor in his mendacity but in his amplification of the slander or libel beyond what is reasonably necessary. An excessive publication may say more than is required to advance a legitimate purpose, say it more often or more loudly than is needed, or gratuitously spread it beyond the circle of persons entitled to hear it.[117] The plaintiff has the burden of proving excessive publication.[118]

In the early cases, juries were permitted to infer from such excesses that the employer's real purpose was to injure the employee maliciously rather than to serve a legitimate end.[119] But in *Galvin* v. *New York, New Haven & Hartford Railroad*,[120] the Supreme Judicial Court broke new ground and held that the privilege may be lost even without actual or imputed malice, if the publication is "so unreasonable or excessive as to constitute an abuse of the privilege."[121]

In *Bratt* v. *International Business Machines Corp.*,[122] however, the Court cut back on the *Galvin* rule and held that even "unnecessary, unreasonable or excessive" publication will not destroy the privilege unless the defendant acted recklessly. Even under the older holdings, the mere fact that bystanders may have overheard a slanderous remark would not destroy the privilege;[123] but *Bratt* goes much further and appears to require *scienter*: the publisher must know that he is publishing excessively before the privilege is lost. The Court in *Bratt* cited the commentary accompanying §604 of the *Restatement (Second) of Torts*, which suggests that there is no excessive publication so long as the

101. *Dexter's Hearthside Restaurant, Inc.*, *supra* n.50, 24 Mass. App. Ct. at 223.

102. *See, e.g., Ezekiel, supra* n.24, 374 Mass. at 390 (employer had no privilege to accuse employee of stealing company property where it was motivated by his prior industrial accident claims and a desire to rid itself of those who make them); *Bander, supra* n.10, 313 Mass. at 344 (where motivated by a desire to humiliate an employee and "make an example of him," employer had no privilege to vilify him as a "forger" and a "disloyal disgrace" after he testified to a congressional committee that the company signed policyholders' names to board of directors election ballots without their consent).

103. *Ezekiel*, 374 Mass. at 390.

104. *Id.* at 391, and cases cited.

105. *Grindall* v. *First National Stores, Inc.*, 330 Mass. 557, 559 (1953); *Doane, supra* n.17, 220 Mass. at 176.

106. *Childs, supra* n.71, 226 Mass. at 457.

107. *Grindall, supra* n.105, 330 Mass. at 559; *Childs, supra* n.71, 226 Mass. at 457.

108. *Grindall, supra* n.105, 330 Mass. at 559; *Pion* v. *Caron*, 237 Mass. 107, 110 (1921); *Doane, supra* n.17, 220 Mass. at 181; *Robinson* v. *Van Auken*, 190 Mass. 161, 166 (1906).

109. *Bander, supra* n.10, 313 Mass. at 345.

110. *Galvin, supra* n.21, 341 Mass. at 298; *Grindall*, 330 Mass. at 559.

111. *Bander*, 313 Mass. at 344; *Ezekiel*, 374 Mass. at 384–89.

112. *Atwill* v. *Mackintosh*, 120 Mass. 177, 182–83 (1876).

113. *Childs, supra* n.71, 226 Mass. at 457.

114. *Sheehan, supra* n.46, 326 Mass. at 195.

115. *DiSilva, supra* n.57, 1985 Mass. App. Div. at 6.

116. *Doane, supra* n.17, 220 Mass. at 180.

117. *See infra* notes 125–27.

118. *Foley, supra* n.48, 400 Mass. at 95.

119. *E.g., Christopher, supra* n.70, 214 Mass. at 334; *Atwill, supra* n.112, 120 Mass. at 183; *Brow* v. *Hathaway*, 95 Mass. 239, 242–43 (1866).

120. 341 Mass. 293, 298 (1960).

121. *Id.*

122. 392 Mass. 508, 513–17 (1984).

123. *E.g., Billings* v. *Fairbanks*, 136 Mass. 177, 179 (1883).

publisher: (a) reasonably believed that he was pursuing proper means to communicate with a legitimately interested recipient; or (b) made a merely "incidental" publication to unprivileged persons in the ordinary course of business; or (c) made a remark which unprivileged persons overheard simply because they were on the scene.[124]

However, at least three different scenarios continue to exist in which the privilege may be lost through excessive publication. First, the employer may say too much, disclosing more facts or indulging in more hyperbole than legitimate ends require.[125] Second, the employer may rebuke the employee too often or with too much enthusiasm.[126] Third, the employer may lose his privilege through indiscretion, recklessly spreading the defamation to persons who are not legitimately entitled to hear it.[127] Conversely, however, a plaintiff will not be heard to complain if he was the one who insisted on airing the matter in front of bystanders.[128]

The privileged circle expands and contracts from case to case. It generally includes the plaintiff's supervisors,[129] the company's attorneys,[130] its security personnel (at least in cases of alleged misconduct),[131] persons whose jobs involve employee relations,[132] clerical workers who type and transmit sensitive letters and memoranda,[133] and any other necessary or legitimately desirable participant in the evaluation, investigation or other activity that renders the communication privileged.[134]

III. Summary Judgment

"In the area of defamation, summary judgment procedures have been described as particularly appropriate because 'the stake here....is free debate....The threat of being put to the defense of a lawsuit...may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.' "[135] To be sure, persons who may have lost their good names unjustly through malicious or reckless vilification are entitled to make their cases to a jury; but some judges are inappropriately reluctant to dispose of frivolous claims summarily. There is ample support for a more decisive approach in the appellate decisions. Time and again, summary dismissals of defamation claims have been affirmed where the plaintiff produced no specific evidence sufficient to overcome the defendant's privilege.[136]

In employment cases, it is more than clear that a plaintiff states no defamation claim if he points to no specific facts suggesting that the employer abused his privilege.[137] "A party against whom summary judgment is sought is not entitled to a trial simply because he has asserted a cause of action to which state of mind is a material element. There must be some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim."[138] If the record contains no evidence that the employer recklessly abused its privilege, summary judgment for the employer should be appropriate. Though *Bratt* v. *International Business Machines Corp.* was not decided on summary judgment, its theme is important to many summary judgment cases: "*Whatever* the manner of abuse, recklessness, at least, should be required" to state a claim.[139]

Particularly when all of the circumstances have been disclosed and the record is replete with depositions, affidavits and other documentary evidence, the court may well have all it needs to award summary judgment, even when motive, intent or state of mind is at issue, so long as the plaintiff can point to no specific evidence from which a jury would be permitted to infer abuse of privilege.[140] Merely suggesting, without more, that an employer or its agent may have been hostile to the plaintiff because of some unrelated event is not enough to defeat a properly supported motion.[141] "[W]here it is unlikely that the plaintiff will succeed on the merits of his claim, courts have been more willing, within the area of libel than elsewhere, to grant sum-

124. *Bratt, supra* n.47, 392 Mass. at 515 n.11.

125. *E.g., Sheehan, supra* n.46, 326 Mass. at 193–94 (a union magazine might legitimately report that members of the brotherhood assaulted a business agent but an unsubstantiated embellishment suggesting the victim was "old enough to be their father" was excessive); *Brow, supra* n.119, 95 Mass. at 243 (employer may accuse employee of theft if circumstances warrant such a charge but he may not accuse her of unchastity for good measure; no allegations can be made which are "not appropriate to the legitimate objects of the occasion").

126. *See, e.g., Bander, supra* n.10, 313 Mass. at 344 (where executive heatedly condemned on three different occasions employee who gave unwelcome congressional testimony, such "expressions so often repeated in a manner so unrestrained were unnecessary in order to secure the benefit of the privilege"); *Doane, supra* n.17, 220 Mass. at 177 ("if there is great excess in repeating what he has heard there is evidence that the defendant was not acting within the privilege which the occasion gave him but outside it").

127. *E.g., Galvin, supra* n.21, 341 Mass. at 298 (the privilege was lost where the employer's agent loudly and repeatedly accused employee of theft before a growing crowd of onlookers, even after employee asked that the inquiry continue in private).

128. *Christopher, supra* n.70, 214 Mass. at 334–35.

129. *E.g., McCone, supra* n.51, 393 Mass. at 236.

130. *E.g., DiSilva*, 1985 Mass. App. Div. at 6.

131. *Id.*

132. *E.g., Mendez, supra* n.17, 26 Mass. App. Ct. at 433.

133. *E.g., Arsenault, supra* n.98, 485 F.Supp. at 1377.

134. *Bander, supra* n.10, 313 Mass. at 336.

135. *Cefalu, supra* n.77, 8 Mass. App. Ct. at 74, *quoting Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

136. *E.g., Pritsker* v. *Brudnoy*, 389 Mass. 776, 783 (1983); *Myers, supra* n.33, 380 Mass. at 337; *MiGi, Inc., supra* n.12, 25 Mass. App. Ct. at 398.

137. *McCone, supra* n.51, 393 Mass. at 236.

138. *Dexter's Hearthside Restaurant, Inc., supra* n.50, 24 Mass. App. Ct. at 223.

139. *Bratt, supra* n.47, 392 Mass. at 515 (emphasis supplied).

140. *Arsenault, supra* n.98, 485 F.Supp. at 1378–81.

141. *Driscoll* v. *Boston Edison Company*, 25 Mass. App. Ct. 954, 956 (1988) (rescript).

mary judgment."[141] With the preservation of free speech and the uninhibited sharing of information at stake, there is ample reason for such liberality.

IV. Staying Out of Trouble

No employer can immunize itself from defamation litigation, but prudent management can reduce the errors, excesses and carelessness which most often produce it.

First, with respect to references, the most cautious policy is to give none at all. Many companies invariably respond to reference requests with nothing more informative than the title, job description and employment dates of the person about whom the inquiry is made. This is the safest course; but it poorly serves the common interest. At some point, an uninformative reference may even produce a lawsuit for contributing to another employer's "negligent hire." Straightforward opinions about a former employee's work, work habits and character are well protected by the employer's privilege, so long as they are reasonably based and rendered without unseemly vitriol. Certainly, companies that do give only name, rank and serial number in response to requests for references should do so uniformly, so that good performers will not be penalized by inferences to the contrary and poor performers cannot argue that no reference is a good reference.

Second, evaluations, investigations of misconduct, references and similar matters should be coordinated by persons sensitive to the issues discussed in this article. In larger organizations, all such matters should be referred to the personnel department. In smaller ones, at least one senior manager should be trained and directed to coordinate them.

Third, sensitive communications should be strictly confined to those who need to know. When references are given, employers should take precautions to ensure that the inquiring party is who he claims to be and is legitimately interested. Internally, oral reviews should be delivered behind closed doors and no employee should be dressed down in front of others. Written evaluations should be typed by trusted secretaries (or the persons who write them) and delivered to their subjects in hand. Employers should either destroy copies of written references, investigatory reports and evaluations after the event or should keep them under lock and key. Similarly, care should be taken to limit access to data stored in computer systems.

Fourth, no reference, evaluation or report should contain any information not reasonably related to the employee's fitness to perform his job.

Fifth, all investigations, evaluations, and references should be scrupulously fair, discreetly conducted and carefully considered. Employees charged with wrongdoing should be permitted to explain themselves, confront their accusers and challenge any allegations before they are made to or in the presence of persons other than authorized investigators.

Finally, employers should closely screen all press releases, newsletters, and other publications. Editors and managers should think more than twice before publishing derogatory material unless its accuracy is unimpeachable and the necessity for its publication is clear.

Conclusion

Reduced to its essence, the law of defamation generously protects employers from incurring unfair liability in the course of legitimate efforts to obtain information about the talents, ability, conduct and performance of their employees while protecting the employees from malice, reckless falsity or reckless indiscretion. While the balance may not be easily struck in a particular case, the governing principles are likely to produce just results when applied with care and reason.

142. *Cefalu, supra* n.77, 8 Mass. App. Ct. at 74, *quoting Herbert v. Lando*, 568 F.2d 974, 979 n.16 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979).