HB

441

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
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 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 oisclosing 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 — Phone: 465-3672
Division: Administrative Services — Date: March 5, 1992
Approved by Commissioner: Charles E. Cole, Attorney General
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: 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
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1992 LEGISLATION
POSITION PAPER
DEPARTMENT OF ADMINISTRATION

Division Personnel/OEEO **Bill Number** HB 441

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

Position Statement: Explain briefly what bill does, its impacts and Department's position, i.e., a) support, b) do not support, c) neutral or d) oppose.

Position:

The Department of Administration supports HB 441.

What the Bill Does:

This bill protects employers and former employers from liability when disclosing information about the job performance of an employee or former employee in good faith. Disclosure is presumed to be in good faith, but may be rebutted by showing that the information was knowingly false or deliberately misleading, was given with a malicious purpose, or violated a civil right that is protected under AS 18.80 or under a federal law.

Impact of the Bill:

This bill will assist the State both as an employer or former employer and as a prospective employer.

As an employer or former employer, this bill will provide a rebuttable presumption of good faith for supervisors to disclose job performance information when approached to provide a reference for an employee or former employee. This provision will clarify the ability of supervisors to provide that information based on their personal experience without reference to formal records protected by AS 39.25.080.

As a prospective employer, the State should be able to secure more accurate and useful information on candidates for State positions. The same protection provided to State supervisors will be provided to other employers in providing information to the State.

APPROVED:

Director R. H. King **Division** Personnel/OEEO

Signature Richard P. King **Date** 4/1/92

Commissioner Nancy Bea Usera

Signature N Bea Usera **Date** 4/1/92

Rev. 01/28/91

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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

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MEMORANDUM

TO: All Members
Senate Labor and Commerce Committee

FROM: Representative Max Gruenberg Mgf

DATE: April 9, 1992

RE: Support of HB 441

I would very much appreciate your support HB 441, "An Act relating to the disclosure of information by an employer about the job performance of an employee or former employee.".

HB 441, is modeled after a Florida law that passed in 1991 and was mentioned in State Legislatures magazine. 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
COMMITTEES
HOUSE JUDICIARY
HOUSE RULES
HOUSE STATE 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. It allows for the recovery of damages from people who cause one to suffer a loss by the publication of a lie that causes injury to one's 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 lawsuits 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 makes a defamatory statement if that person was acting in the interest of others. This common law privilege 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

Defamation in the Workplace: The Law of Massachusetts

BY JAMES B. CONROY

James B. Conroy received his J.D. degree, magna cum laude, from the Georgetown University Law Center. He is a junior partner in the Litigation Department at the Boston law firm of Nutter, McClennen & Fish where he concentrates much of his practice in employment litigation.

CONTENTS

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. Shuman*, 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.E.M. Corp.* v. *Corporate Aircraft Management*, 626 F.Supp. 1553, 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.*, *Doane* 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 *seriatum* 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. *Chilis 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." 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 Fecue* 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."[142] 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).

ALASKA STATE LEGISLATURE
HOUSE BILL NO. 441

HISTORY IN THE HOUSE

1992

Read first time and refe d to:
2/5 L&C, JUD

L&C RPT CS( ) New Title
2/19 4 DP ~~0~~ DNP ~~0~~ NR ~~0~~ AM
FN 2 0FN Previous FN

JUD RPT CS( ) New Title
3/9 6 DP 0 DNP 0 NR 0 AM
FN 0FN 2 Previous FN 0

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

4/1 Read second time
CS( ) Adopted

Amended

4/1 Advanced

4/1 Read third time

Return to second for specific amendment

4/1

PASSED	EFD Same ___ or
Yeas 34	Yeas
Nays 0	Nays
Excused 2	Excused
Absent 4	Absent

___Intent adopted

Reconsideration
Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

___Intent adopted

4/1 Reported correctly engrossed
Signed by Speaker, to the Senate

Kristin Green
Chief Clerk of the House

HISTORY IN THE SENATE

1992

4/2 Read first time and referred to:
L&C, JUD

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ Rules Calendar(___) CS ___AM ___Other
___New Title ___Same Title ___Previous FN
___FN ___0FN

Read second time

___ CS Adopted (___) ___New Title
___Amended ___Advanced

Read third time

___ Letter of Intent adopted
___ Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HB