ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
6972 HOUSE JUDICIARY

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.

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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

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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.

• • •

***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.

• • •

***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.

• • •

***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.

• • •

***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.

• • •

***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.

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# 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

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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).

HB

443

(7)

# HOUSE COMMITTEE REPORT

Date Referred: February 5, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 2/26/92

The JUDICIARY Committee considered: HB 443

HOUSE BILL NO. 443 CHANGING NUMBER OF JUDGES IN 4TH DISTRICT

"An Act increasing the total number of superior court judges from 30 to 31, increasing the number of superior court judges in the fourth judicial district from five to six, and decreasing the number of district judges in the fourth judicial district from four to three; and providing for an effective date."

RECOMMENDATIONS: [ ] the same title
be replaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[X] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[X] fiscal impact Court System (Trial Courts)
[X] zero fiscal note Admin (2), Law

APPROVES PREVIOUS: (Dept/Date)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) _____

| SIGNING DO PASS | DP | OTHER RECOMMENDATIONS | DNP | NR | AM |
|---|---|---|---|---|---|
| J. Ellis | X | Dave Donley | | X | |
| | | Mike Miller | | X | |
| | | Terry Martin | | ✓ | |
| | | Kim Pat Brown | | ✓ | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | | | | |
| | | Dave Donley | | | |

Dave Donley
CHAIRMAN'S SIGNATURE

# FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill No. HB 443

Revision Date:
Title: An Act increasing the total number of superior court judges...
Sponsor: Judiciary by request
Requestor: Judiciary

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 | 118.4 | 118.4 | 118.4 | 118.4 | 118.4 | 118.4 |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | 7.8 | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS & CLAIMS | | | | | | |
| TOTAL OPERATING | 126.2 | 118.4 | 118.4 | 118.4 | 118.4 | 118.4 |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUNDS | 126.2 | 118.4 | 118.4 | 118.4 | 118.4 | 118.4 |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | 126.2 | 118.4 | 118.4 | 118.4 | 118.4 | 118.4 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 | 2.0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary)

See attached fiscal analysis.

Prepared by: C. S. Christensen III, Staff Counsel
Division: Alaska Court System
Phone: 264-8228
Date: 02/06/92

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System
Date: 02/06/92

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

**Alaska Court System**

**Fiscal Impact of Adding a Superior Court Judge and Deleting a District Court Judge in the Fairbanks Trial Courts**
**HB 443**

**Personal Services**

| | Salary | Benefits | Total |
|---|---|---|---|
| Cost difference between a Superior Court Judge and a District Court Judge | | | $22,812 |
| Law Clerk I, Fairbanks, permanent full-time, 13D | 36,684 | 14,156 | 50,840 |
| Secretary II, Fairbanks, permanent full-time, 12B | 31,824 | 12,896 | 44,720 |
| Total Personal Services | | | 118,372 |

**Equipment** *(one-time cost)*

| | |
|---|---|
| Office equipment for Law Clerk (personal computer, desk, chair, statutes and filing cabinet) | 4,100 |
| Office equipment for Secretary (personal computer, desk, chair, and filing cabinet) | 3,700 |
| Total Equipment | 7,800 |
| Total Costs | $126,172 |

# FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 443

Revision Date: _____
Title: "...increasing superior court judges... decreasing...district judges in the fourth...district..."
Sponsor: House Judiciary by Request
Requestor: House Judiciary Committee

Department Affected: Department of Law
BRU: Prosecution
Component: Fourth Judicial District

COMPONENT SERIAL | | | 8 | 8 |

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.)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: February 24, 1992

Richard L. Pegues /for/

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: February 24, 1992

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

Rev 10/07/91

# CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 443

This bill amends AS 22.10 and AS 22.15 to increase the number of superior court judges in the fourth judicial district from five to six, and to decrease the number of district judges in the fourth judicial district from four to three. The bill will have the effect of increasing the time available to hear felony trials and decreasing the time available to hear misdemeanor trials, to the extent that the time of the two positions involved will be or has been spent on criminal matters. If the time to be spent hearing felony trials is evenly offset by the time that was previously spent hearing misdemeanor trials, there should not be a fiscal impact for the Department of Law.

# FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 443

Revision Date:
Title: "An Act increasing the total number of superior court judges from 30 to 31."
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1 6 3 1

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:

ANALYSIS: (Attach a separate page if necessary.) This bill eliminates a district court judge position and adds a superior court judge position in the fourth judicial district.

Fiscal impact is likely to be minimal as concerns the Public Defender Office in that location.

Prepared by: John Salemi, Public Defender
Division: Public Defender Agency
Phone: 279-7541
Date: February 12, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 2/21/92

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

# FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 443

Revision Date:
Title: An Act increasing the number of Superior Court judges . . . and decreasing the number of District Court judges
Sponsor: House Judiciary
Requestor: House Judiciary

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy

COMPONENT SERIAL NO. 4 3

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: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy
Phone: 274-1684
Date: February 13, 1992

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 2/18/92

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

Rev 10/07/91
1/LEG92/4406b.kp/1

ARTHUR H. SNOWDEN II
Administrative Director

Alaska Court System

303 K STREET
ANCHORAGE, ALASKA
99501

(907) 264-0547
FAX (907) 276-6985

February 18, 1992

The Honorable Dave Donley
Chairman, House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

Dear Representative Donley:

I am writing to urgently request that the Judiciary Committee schedule House Bill 443, relating to the number of judges in the fourth judicial district, at its earliest possible convenience. As you know, this bill was introduced at the request of the Alaska Supreme Court. Its purpose is to correct an imbalance in the number and type of judges in the fourth judicial district.

At the present time, the superior court for the fourth judicial district is authorized to have five judges (including four in Fairbanks and one in Bethel), while the district court is authorized to have four (all in Fairbanks). HB 443 would upgrade one of the district court positions to a superior court judgeship, thus reducing the number of district judges to three, and increasing the number of superior court judges to six.

The supreme court is requesting this statutory change because it believes that the superior court workload in the fourth judicial district is excessive for five judges, and that the changes proposed by HB 443 represent the most practical way to address this problem.

At the present time, the five superior court judges sitting in the fourth judicial district are averaging 60 work hours each per week. They are being assisted by a pro tem judge brought out of retirement, as well as by two district judges who are hearing superior court cases in a pro tem capacity. In spite of this tremendous effort, the superior court has been unable to keep pace with its workload. Because of the high trial rate in the district, we have come close to losing criminal cases that could not be heard in a timely manner. An additional superior court judge is essential.

The reduction in the number of district judges reflected in this upgrade will necessarily cause some strain on the district court. However, the supreme court is cognizant of the fiscal problems facing the state at the present time. It has chosen to pursue this course of action so as to have as little fiscal impact on the state as possible.

A judicial upgrade in the fourth judicial district is essential if the superior and district courts are to operate efficiently, and provide an adequate level of service to the community. Please let me know if I can provide any additional information.

Sincerely,

Arthur H. Snowden, II
Administrative Director

HB

444

(7) HOUSE COMMITTEE REPORT

3-20-92

Date Referred: February 26, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 3-18-92

The JUDICIARY Committee considered: HB 444

HOUSE BILL NO. 444 REVOKE DRIVER'S LICENSE IF USE FALSE I.D.

"An Act relating to licenses issued to drivers and to revocation of a license to drive."

RECOMMENDATIONS: be replaced with CS HB 444 (JUD)

[ ] the same title
[X] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____
[✓] zero fiscal note Law

APPROVES PREVIOUS: (Dept/Date)

[✓] fiscal note(s) Public Safety 2-26-92
[ ] zero fiscal note(s) _____

| SIGNING DO PASS | DP | OTHER RECOMMENDATIONS | DNP | NR | AM |
|---|---|---|---|---|---|
| [illegible] | - | Dave Dowley | | | X |
| Terry Mortier | ✓ | (Concur with Rep. Hawley) | | | |
| Lewis Pat Parnell | ✓ | | | | |
| | | Jay Ellis | | X | |
| | | | | | |
| | | Mike Miller | | | X |
| | | | | | |
| | | Mark Hawley | | | X |
| | | Good Bill - Amend fees to cover increased costs - not to raise an additional $400,000 | | | |
| | | | | | |
| | | | | | |

Dave Dowley
CHAIRMAN'S SIGNATURE

# FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 444 (Trans)

Revision Date: _____
Title: "...relating to fees for identification cards... revocation of a license to drive..."
Sponsor: Representative Choquette
Requestor: House Judiciary

Department Affected: Department of Law
BRU: Prosecution
Component: All

COMPONENT SERIAL [ ][ ][ ][ ]

Expenditures/Revenues: (Thousands of Dollars) 85 through 91

| 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 | 0.0 | 0.0 | 0.0 |
| CAPITAL | | | | | | |
| REVENUE FUND SOURCE: | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| FEDERAL FUNDS | | | | | | |
| OTHER FUND SOURCE: | | | | | | |
| TOTAL | | | | | | |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

This bill amends AS 18.65 and AS 28.15 to increase the fees for identification cards issued by the Department of Public Safety, and to increase the fees for a non-commercial driver's license, instruction permit, and a duplicate license or permit. The bill also establishes an administrative revocation process for the use of a driver's license as fraudulent or false identification, which is prohibited by the state's alcoholic beverage control laws.

This bill is not expected to have a fiscal impact on the Department of Law, because revocations would be handled administratively by the Department of Public Safety.

Prepared by: Richard I. Pegues, Director — Phone: 465-3672
Division: Administrative Services — Date: March 10, 1992
Approved by Commissioner: Charles E. Cole, Attorney General — Richard I. Pegues /for/
Agency: Department of Law — Date: March 10, 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. CSHB 444(TRANS)

Revision Date: 3/9/92 Department Affected: Public Safety

Title: An Act relating to licenses issued to drivers and to revocation of a license to drive

BRU: Motor Vehicles

Component: Driver Services

Sponsor: Representative Choquette

Requestor: House Judiciary

COMPONENT SERIAL NO. | | 5 | 0 | 0 |

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

| OPERATING | FY 93 | FY 94 | FY 95 | FY 96 | FY 97 | FY 98 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | 134.5 | 134.5 | 134.5 | 134.5 | 134.5 | 134.5 |
| TRAVEL | 0 | 0 | 0 | 0 | 0 | 0 |
| CONTRACTUAL | 56.7 | 56.7 | 56.7 | 56.7 | 56.7 | 56.7 |
| SUPPLIES | 1.5 | 1.5 | 1.5 | 1.5 | 1.5 | 1.5 |
| EQUIPMENT | 24.7 | 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 | 217.4 | 192.7 | 192.7 | 192.7 | 192.7 | 192.7 |
| CAPITAL | 0 | 0 | 0 | 0 | 0 | 0 |
| REVENUE FUND SOURCE: | 593.5 | 593.5 | 593.5 | 593.5 | 593.5 | 593.5 |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | 0 | 0 | 0 | 0 | 0 | 0 |
| FEDERAL FUNDS | | | | | | |
| OTHER FUND SOURCE: | 217.4 | 192.7 | 192.7 | 192.7 | 192.7 | 192.7 |
| TOTAL | 217.4 | 192.7 | 192.7 | 192.7 | 192.7 | 192.7 |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | 3 | 3 | 3 | 3 | 3 | 3 |
| PART-TIME | 0 | 0 | 0 | 0 | 0 | 0 |
| TEMPORARY | 0 | 0 | 0 | 0 | 0 | 0 |

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared By: Juanita Hensley Phone: 465-4335

Division: Motor Vehicles Date: 3/9/92

3/9/92

Approved by Commissioner: Richard L. Burton

Agency: Department of Public Safety Date: 3/9/92

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

Rev 10/7/91

This bill will require the Division of Motor Vehicles to place a holographic symbol on every driver's license in a further attempt to prevent alteration or duplication of a driver's license. This bill also requires the revocation of the driver's license of any person under the age of 21 who uses a false driver's license in an attempt to gain entry to purchase alcohol. The Division of Motor Vehicles processes approximately 200,000 driver license and ID card transactions yearly. The present cost to produce a license is 85 cents per card. To place a hologram on the license will increase the cost from 85 cents to $1.10 thus increasing the overall contractual cost to DMV an additional 50.0 a year.

The Alcohol Beverage Control Board reports that approximately 500 to 700 licenses are confiscated and referred to their agency by liquor establishments when a person under 21 is attempting to purchase alcohol. The department receives approximately 1,500 licenses each year that are surrendered or confiscated by law enforcement. The 1,500 licenses includes the 500 to 700 that are surrendered to the ABC Board.

In order the handle the 1,500 additional license revocations a year, and provide due process for the person, one full-time Driver Improvement Specialist/Hearing Officer, and two full-time Document Processor IIs will be required. The duties of these positions are detailed in the attached request for new positions. The personal services cost for a Driver Improvement Specialist is 53.6; the personal services cost for the Document Processor II positions is 70.0; an additional 10.8 is needed for overtime expenses associated with reinstatement of revoked driver's licenses. The total for personal services is 134.5. The overtime pay is requested in lieu of a Motor Vehicle Representative III position, as the workload required to reinstate the offenders' driver's licenses will be borne by all of the Motor Vehicle Field offices throughout the state.

To revoke 1,500 additional driver's licenses a year takes over 30 processing steps per revoked license. It is estimated that 25% of all persons referred to DMV for a license revocation will request an administrative hearing. Each hearing takes approximately 20 minutes to one hour to conduct. All of the 30 processing steps varies in the time it takes to complete each step. Complete accuracy is essential, as an error of entry onto a record could result in civil liability to the State. It takes approximately 20 minutes per applicant to reinstate a revoked driver's license; the person must make a new application for the driver's license or permit, take all of the required tests, and if the person is under the age of 18 a parent or guardian must give consent for the driver's license or permit, file the SR-22 (Certificate of Insurance) and pay the reinstatement fee. All of these steps total approximately 400 hours of additional workload for the Motor Vehicle Field office personnel.

Under existing law, each person whose license has been revoked must pay a $100 fee when applying for reinstatement of his or her driver's license. Assuming that 90 percent of the minors who are eligible for reinstatement will comply with the reinstatement requirements, approximately 135.0 will be generated annually as program receipts.

This bill increases the fees for driver's licenses, permits and identification cards. The fee increases are as follows:

(1) driver's license from $10.00 to $12.00
(2) instruction permit from $ 3.00 to $5.00
(3) duplicate license or permit from $3.00 to $5.00
(4) school bus endorsment permit from $3.00 to $5.00
(5) identification card from $5.00 to $10.00

These fee increases will generate approximately 458.5 in revenues from the increase of the license fees and an additional 135.0 in reinstatement fees.

DETAIL

| | | FY93 |
|---|---|---|
| 100 | PERSONAL SERVICES<br>1 Driver Improvement Spec 53.6<br>2 Document Processor II 70.1<br>Overtime MVR III Field Office 10.8 | 134.5 |
| 200 | CONTRACTUAL<br>Hologram inlaid driver license pouch 50.0<br>Postage and tolls 2.5<br>Telephone line fees .5<br>Conference Call and long distance fees 3.7 | 56.7 |
| 400 | SUPPLIES<br>Routine Office Supplies | 1.5 |
| 500 | EQUIPMENT<br>3 Computer Terminals<br>3 Network Line Hook-ups<br>3 Desks<br>3 Chairs<br>3 5-Drawer File Cabinets | 24.7 |
| | TOTAL | 217.4 |

| Position Title | Number of Positions | Range/Step | Bargaining Unit |
|---|---|---|---|
| Driver Improvement Specialist | 1 | 16-A | GGU |

| Time Status | Staff Months | Location | Election District |
|---|---|---|---|
| PFT | 12 | Anchorage | |

| Type of Expenditure | | Amount |
|---|---|---|
| 1 | 2 | 3 |
| Salary* | 37.3 | |
| Benefits* | 16.3 | |
| Premium Pay (Included in Above) | | |
| Other | | |
| Total Personal Services | | 53.6 |
| Travel | | 0 |
| Contractual | | 2.2 |
| Commodities | | .5 |
| Equipment | | 8.2 |
| Other | | 10.8 |
| Total Cost | | 75.3 |

| Funding Source For Total Cost | | |
|---|---|---|
| Federal Receipts | 1002 | |
| G.F. Match | 1003 | |
| General Fund | 1004 | |
| Program Receipts/GF | 1005 | |
| I-A Receipts | 1007 | |
| CIP Receipts | 1061 | |
| Other | | |

* Personal Services Salary and Benefits Costs are from PACS calculations.

Justification

This position will conduct administrative hearings involving the revocation of a minor's driver's license and/or privilege to drive. It will prepare the file, send notice to parties advising of the date and time of the hearing, conduct the hearing, prepare the file for appeal, enter license action onto the minor's driving record, and handle all correspondence associated with this program.

REQUEST FOR NEW POSITION

AGENCY Department of Public Safety

BRU Motor Vehicles

COMPONENT Driver Services



Revised Date

FY 93

1/92) RFNP

| Position Title | Number of Positions | Range/Step | Bargaining Unit |
|---|---|---|---|
| Document Processor II | 2 | 8-B | GGU |

| Time Status | Staff Months | Location | Election District |
|---|---|---|---|
| PFT | 12 each | Juneau | |

| Type of Expenditure | | Amount |
|---|---|---|
| 1 | 2 | 3 |
| Salary* | 46.3 | |
| Benefits* | 23.8 | |
| Premium Pay (Included in Above) | | |
| Other | | |
| Total Personal Services | | 70.1 |
| Travel | | 0 |
| Contractual | | 4.5 |
| Commodities | | 1.0 |
| Equipment | | 16.5 |
| Other | | 0 |
| Total Cost | | 92.1 |

| Funding Source For Total Cost | | |
|---|---|---|
| Federal Receipts | 1002 | |
| G.F. Match | 1003 | |
| General Fund | 1004 | |
| Program Receipts/GF | 1005 | |
| I-A Receipts | 1007 | |
| CIP Receipts | 1061 | |
| Other | | |

* Personal Services Salary and Benefits Costs are from PACS calculations.

Justification

These positions would handle the necessary paperwork and computer entry onto the minor's record. Among other duties, the positions will send out letters advising the person of the dates of the license revocation, prepare files for hearing officer after the person has requested a hearing, file, close files out, sanitize for microfilm, microfilm, enter microfilm documents for microfilm retrieval, enter license revocation data. It is estimated that these positions will handle approximately 1,500 license revocation files a year.

REQUEST FOR NEW POSITION

AGENCY Department of Public Safety

BRU Motor Vehicles

COMPONENT Driver Services



Revised Date

FY 93

(1/92) RFNP

# Alaska State Legislature
# House of Representatives


**INTERIM**

3111 C Street
Anchorage, Alaska 99503
(907) 561-2032

**SESSION**

P.O. Box V
Juneau, Alaska 99811
(907) 465-2995


## Representative Dave Choquette

**M E M O R A N D U M**

DATE: March 2, 1992

TO: Rep. Dave Donley, Chairman
House ~~Judiciary~~ Committee

FROM: Rep. Dave Choquette

RE: CS HB 444 (Transportation), "An Act relating to fees for identification cards and certain motor vehicle licenses; to licenses issued to drivers and to revocation of a license to drive; and providing for an effective date."

---

I would appreciate your scheduling HB 444 for a hearing by the House Judiciary Committee at the Committee's earliest convenience.

This legislation, which attempts to address the problem of minors using fraudulent drivers' licenses to purchase alcohol, passed out of the Transportation Committee on February 25 with 5 do passes (Reps. Mackie, Foster, G. Phillips, Leman, and Hudson). HB 444 is consensus legislation introduced as a result of meetings I had with Mothers Against Drunk Driving (MADD), the alcohol industry, and the Alcohol Beverage Control Board.

Please note that HB 444 would have a positive fiscal impact as it would contribute between $300,000 and $400,000 a year in excess program receipts to the general fund.

I've attached my position paper, which summarizes the major components of the bill, the fiscal note, and letters of support from MADD, the West Anchorage High School PTSA, the Municipality of Anchorage's Health and Human Services Commission, the Alaska Wine and Spirits Wholesalers Association, the Anchorage Restaurant & Beverage Association, and the Bristol Bay Area Health Corporation. In addition, I've enclosed an editorial supporting this legislation from the Anchorage Daily News.

If you have any questions, please have your staff contact Josh Fink in my office.

Your timely consideration is appreciated.

Alaska State Legislature
House of Representatives

INTERIM
3111 C Street
Anchorage, Alaska 99503
(907) 561-2032

SESSION
P.O. Box V
Juneau, Alaska 99811
(907) 465-2995

Representative Dave Choquette

SPONSOR'S POSITION STATEMENT FOR CS HB 444 (TRANSPORTATION):

AN ACT RELATING TO LICENSES ISSUED TO DRIVERS &

TO REVOCATION OF A LICENSE

Alcohol abuse is a severe problem in Alaska, impacting individuals, families, and communities throughout our State. In fact, Alaska ranks 4th in the nation for per capita alcohol consumption. Alaska also has one of the highest rates of fetal alcohol syndrome, with more than 30 infants born each year with alcohol related impairments.

Nationally, while drug use among teenagers is down, teenage alcohol consumption is increasing. In Alaska, alcohol is associated with a majority of the vehicular deaths of teenagers. In 1990, there were 180 accidents caused by alcohol impaired minors, and these accidents resulted in 6 deaths.

The results of a 1988 report done by the University of Alaska, Anchorage, indicate that 75% of all Alaskan youth in grades 7-12 have tried alcoholic beverages, and alcohol and drug use was a contributing or causal factor in the crimes of 48% of all youth who were detained or placed on probation in Alaska. Another 1990 study indicates that 45% of males and 33% of females of driving age in grades 10-12 have driven after drinking.

Many of these underage drinkers are getting their alcohol through the use of fraudulent driver's licenses. Since 1989, nearly 6,000 fake IDs have been turned over to the Alcohol Beverage Control Board (A.B.C. Board), most of which were fraudulent driver's licenses. I believe it is a safe assumption this number represents only a fraction of the fake IDs in circulation.

Over the interim I worked with Mothers' Against Drunk Driving (MADD), the alcohol industry, the Department of Motor Vehicles, and the A.B.C. Board to address this problem. Together we developed HB 444.

Alaska law already prohibits the use of a fraudulent driver's license or any other fraudulent ID to purchase alcohol, and bans the sale of alcohol to minors. However, the law clearly has not been effective. Most minors don't even know what the penalties are for using a fraudulent ID to purchase alcohol.

Consider that of the nearly 6,000 IDs confiscated since 1989, only 87 cases have been prosecuted, and the average sentence of those convicted has been 20 hours of community service and a $100 fine.

Clearly, Alaska's underage drinkers don't consider the law a real deterrent.

We can effectively impress upon teenagers and 20-year-olds the grave consequences of using a fraudulent driver's license to go drinking by taking their car keys away. Nothing will get their attention faster.

HB 444 would require the Department of Motor Vehicles to automatically revoke driving privileges for 6 months when a peace officer, which includes A.B.C. officials, determines a minor has used a driver's license as fraudulent identification to purchase alcohol. For a second offense, revocation would be for either one year or until the person's 21st birthday, whichever is longer. This would be an administrative action, so revocation would not have to go through the court system. Teenagers and 20-year-olds would see that the penalty is substantial and administered immediately.

In order to ensure due process rights are protected, persons losing their license would have 7 days after receiving notice that their privilege to drive was to be revoked to request an administrative review. During this 7 days their notice of the Department of Motor Vehicles intent to revoke their driving privileges would serve as a temporary license.

In addition, HB 444 would require that holograms be put on drivers' licenses and State IDs issued by the Department of Public Safety. This would raise the cost of producing a license or State ID from $0.85 to $1.10 a piece, but would make it much more difficult for minors to tamper with or make driver's licenses or State IDs.

Lastly, HB 444 would enact minor, but long overdue fee increases for a drivers' license, a duplicate drivers' license, and a State ID.

If enacted, HB 444 should provide an effective deterrence for minors considering using a fraudulent driver's license to purchase alcohol, and go a long way towards alleviating some of the problems associated with alcohol abuse and use by minors.

**BILL NO:** CSHB 444(TRANS) **DATE:** March 6, 1992

**TITLE:** An Act relating to fees, licenses, and to revocation of a license to drive

**CONTACT:** Juanita Hensley
Division of Motor Vehicles
465-4335

POSITION PAPER - Department of Public Safety

This bill amends current law by requiring that a holographic symbol be placed on driver's licenses and identification cards to help prevent illegal alteration or duplication. This bill also adds a new section to Alaska's motor vehicle driver's license law to require an administrative revocation of the driver's license of any person under the age of 21 who uses a driver's license as fraudulent or false identification in an attempt to gain entry or to purchase alcohol from a liquor establishment.

The Division of Motor Vehicles processes approximately 200,000 driver's license and ID card transactions yearly. The present cost to produce a license or ID card is 85 cents per card. To place a hologram on the license or ID card will increase the cost from 85 cents to $1.10, thus increasing the contractual costs for DMV an additional 50.0 a year.

The Alcohol Beverage Control Board reports that approximately 500 to 700 licenses a year are confiscated from persons under 21 attempting to purchase alcohol and sent to their agency by liquor establishments. An additional approximately 1,000 licenses and ID cards a year are confiscated by law enforcement officers from persons attempting to use an altered license, or attempting to use another's license, to gain entry into a liquor establishment in an attempt to purchase alcohol. These licenses are surrendered to the Department. To offset the costs associated with the revocation of an additional 1,500 driver's licenses a year, the fees for identification cards, driver's licenses, and instruction permits have also been raised slightly.

Consumption of alcoholic beverages by minors in Alaska is a serious problem. The Department of Public Safety supports this bill as an attempt to more effectively enforce current restrictions upon minors' access to liquor establishments.

Richard L. Burton
Commissioner

# MEMORANDU 1

# State of Alaska

DEPARTMENT OF REVENUE

TO: Josh Fink
Legislative Aide To Rep. Dave Choquette
Alaska State Legislature

DATE: February 05, 1992

FILE NO.

TELEPHONE NO: 277-8638

THRU: Patrick L. Sharrock
Director, ABC Board

SUBJECT: Altered/Fake Driver's License and Indentification card Cases Investigated By A.B.C. Staff

FROM: William R. Roche
Enforcement Supervisor

Since we started aggressively pursuing the use of false driver's or identification cards by underage persons in 1989, eighty seven (87) cases have been filed with the District Attorney for prosecution. A review of those cases disclosed that the District Attorney is charging the following violations of Alaska statutes:

A.S. 04.16.049(a)(1) Access of persons under 21 to licensed premises;

A.S. 04.16.060 Purchase by persons under the age of 21;

A.S. 11.46.510 Forgery;

A.S. 11.56.210 Unsworn Falsification;

A.S. 11.16.110 Complicity;

A.S. 11.46.570 Criminal Impersonation;

A.S. 11.56.800 Making a False Report;

A.S. 18.65.310 Identification Cards; and A.S. 28.35.135 Unlawful to knowingly make false statement, application or certification.

The actual charges filed against a specific individual depend on the circumstances surrounding the incident.

During 1991 more than 560 ID cards and drivers licenses were seized by the employers of licensed businesses and turned over to A.B.C. Investigators. During 1989 and 1990 nearly 10 times that number were seized. There has been a decline primarily attributable to aggressive enforcement and cooperation from licensees.

STATE

WALTER J. HICKEL, GOVERNOR

**DEPARTMENT OF REVENUE**

*ALCOHOLIC BEVERAGE CONTROL BOARD*

650 W. 7TH AVE
ANCHORAGE, ALASKA 99501-6698

March 11, 1992

The Honorable Dave Choquette
Alaska State House of Representatives
State Capitol
Juneau, AK 99801-1182

RE: HB 444

Dear Representative Choquette:

This letter intends to express the Alcoholic Beverage Control Board's support for Section 1 of HB 444 concerning drivers' licenses. As indicated in Enforcement Supervisor Bill Roche's memo of February 5, liquor licensees have been plagued by and exposed to myriad incidents of altered or fraudulent identification presented by underage persons for purchase of alcoholic beverages or entry to licensed premises. According to the board's information, an identification card or drivers license that displays a holographic symbol cannot be altered. The board believes that any measure, such as requiring a holographic symbol, that can deter or reduce alcohol abuse by underage persons is a benefit to licensees and the public.

The board does not have a position on Section 2 of the bill

If you have any questions, please do not hesitate to call.

Sincerely,

Patrick L. Sharrock
Director, ABC Board
(907) 277-8638

92-045

STATE OF ALASKA ★ DEPARTMENT OF HEALTH & SOCIAL SERVICES

**House Bill 444**

Section 1 includes a provision for a holographic symbol to be included on each Alaska Driver's License. The purpose of this symbol is to prevent illegal alteration or duplication of the license especially as used by minors to obtain alcohol.

Section 2 adds provisions for revocation of a driver's license if a "fake ID" is used to purchase liquor. On a first offense, the license is revoked for six (6) months; on a second offense, the license is revoked until the driver turns 21 years of age. This section also provides for administrative review of the revocation.

The addition of the hologram on the driver's license would make the creation of a "Fake ID" much more difficult. "Fake IDs" are commonly used by teenagers to purchase alcohol in package sale stores. At this time, there is little consequence to this behavior. "Fake IDs" are confiscated and turned over to the Alcohol Beverage Control Board. Passage of this legislation would send a clear message about the seriousness of drinking and driving.

Drinking and driving is a very serious action with oftentimes fatal consequences. Teenagers are often unaware of the effects of alcohol on their bodies; they may be unaware of the impacts on peripheral vision, depth perception and reaction times. Teenagers do not have a long history of driving and consequently do have the automatic responses which occur from driving for a number of years. This combination of inexperience with driving and the effects of alcohol on their bodies, makes drinking and driving exceedingly dangerous.

Even if teenagers do not drink and drive, the fact that the current laws provide for little consequence for use of a "fake ID" in purchasing alcohol reduces the risk of such behavior. If the stakes were higher, and the underage person knew his/her driver's license would be revoked if a "fake ID" were used to purchase liquor, fewer teenagers may be willing to take such a risk. Driving is one of the most important privileges of being a teenager, and is one most people would not want to jeopardize.

We strongly support this legislation.

Loren A. Jones — 2/21/92
Loren A. Jones, Director — Date

PP 92-16

Theodore A. Mala, MD, MPH — 3/12/92
Theodore A. Mala, MD, MPH, Commissioner — Date

SCOTT & WESLEY GERRISH
MEMORIAL

# MADD

ANCHORAGE, ALASKA
CHAPTER

MAILING ADDRESS:
755 West 4th Avenue, Box 821
Anchorage, AK 99501

(907) 258-MADD

BUSINESS ADDRESS
755 West 4th Avenue, Suite 804
Anchorage, AK 99501

February 17, 1992

Representative Choquette
House of Representatives
P.O. Box V
Juneau, Alaska 99811

Re: House Bill 444

Dear Representative Choquette,

The Anchorage Chapter of MADD supports HB 444. The problem of juveniles using false identification to obtain alcohol and then driving is an on-going one. Making licenses more difficult to alter by adding a holographic symbol is an excellent way to address the problem. The stiff penalties for using a false identification are also critical to keeping juveniles who are likely to drink, off the road.

Its time to start holding juveniles accountable. Taking away their driving privileges will certainly get their attention.

We strongly endorse this legislation.

Sincerely,

Susan

Susan Humphrey-Barnett

ANCHORAGE - RESTAURANT BEVERAGE - ASSOCIATION
ARBA

401 K Street Anchorage, Alaska P.O. Box 104839 Anchorage, Alaska 99510
(907) 272-8133 Fax: (907) 277-8640

February 13, 1992

Rep. Dave Choquette
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Representative Choquette:

ARBA members voted unanimously to endorse the passage of House Bill 444 at our general membership meeting last night. We believe that this legislation will help to curb the problems resulting from underage drinking in our society. Our Association has long been concerned with this problem and felt that legislation should be pursued. In the fall of 1991 we held several meetings with the Alaska Wine and Spirits Wholesalers Association and developed a joint position paper, representing the entire beverage alcohol industry in our state. This position paper was published in the Jan.-Feb. issue of TOAST, the statewide industry magazine (copy attached). House Bill 444 addresses several of the points we raised in that document and we appreciate your efforts in developing this legislation.

Other states are acting on this issue; Oregon adopted legislation penalizing underage drinkers with loss of drivers license for one year, a $500. fine, and/or 100 hours of community service. Also, the underage person can be held liable for any damages the licensee sustains as a result of their attempt to purchase alcohol. On a national level, the White House Office of National Drug Control Policy released a report January 28 proposing a national campaign against underage drinking. The report recommends that states should "... automatically revoke the drivers license of a minor who commits an alcohol related offense or uses false identification to purchase alcohol."

Our Association strongly endorses House Bill 444 and has asked me to express our sincere appreciation to you.

Sincerely,

Carol Wilson

Carol Wilson
Executive Director

# Municipality of Anchorage

**Municipal Health & Human Services Commission**

825 "L" Street

P.O. Box 196650 • Anchorage, Alaska 99519-6650

*Tom Fink, Mayor*

Telephone: (907) 343-4674


February 21, 1992

FEB 25 1992

Representative David Choquette
State Capitol
Juneau, AK 99801-1182

Dear Representative Choquette,

The Municipality of Anchorage Health and Human Services Commission has reviewed HB 444 and enthusiastically supports it.

We endorse this measure which would make it more difficult for adolescents to alter the date of birth recorded on their driver's license. It is clear that many adolescents easily obtain liquor by altering and presenting a fraudulent license. The provision allowing the administrative revocation of a drivers license of an adolescent illegally obtaining alcohol would be a major deterrent! Passage of HB 444 will have an immediate impact on reducing fatal motor vehicle accidents among teenagers and young adults which is the leading cause of death among this age group.

The Commission is deeply concerned about the destructive effect of alcohol on our community. If we can provide further support for this bill, please call our staff, Michael Huelsman, at 343-6718.

Sincerely,

Dick Towell

Richard Towell, Chair
Municipal Health and Human Services Commission

cc: Helen D. Beirne, Ph.D., Director
Municipality of Anchorage
Department of Health and Human Services

Representative David Choquette
Pouch V (MS 3100)
Juneau, Alaska 99801

Dear Representative Choquette:

The Parent Teacher Student Association of West Anchorage High School applaud your efforts to deter minors from purchasing alcohol by your introduction of House Bill 444.

Teenagers are becoming increasingly more sophisticated in their efforts to falsify ID's. The incorporation of a holographic symbol onto a driver's license to prevent illegal alteration or duplication would be a major step in helping to erradicate this increasing problem.

The illegal purchase and consumption of alcohol by minors has become a major concern and problem not only in Alaska but nationwide. We concur that the fear of losing their driver's license will cause teenagers to think twice before they use a fake ID to purchase alcohol.

Your ideas and current bills under legislative consideration are a responsible approach and a creative beginning to solving a potentially deadly situation among our young people. You have our support!

Thank you,

Susan Sullivan

Susan Sullivan,
PTSA President
West Anchorage High School
1700 Hillcrest Drive
Anchorage, Alaska 99517

CC: All members Alaska State House
All members Alaska Senate

# BRISTOL BAY AREA HEALTH CORPORATION

P.O. BOX 130 • DILLINGHAM, ALASKA 99576

(907) 842-5201 or (907) 842-5202


February 19, 1992

Representative Dave Choquette
P.O. Box V
State Capitol
Juneau, AK 99811

Dear Representative Choquette:

The Bristol Bay Area Health Corporation was given the opportunity to provide input in the draft form of HB 444. In response to your request we would like to be on record in support of this piece of legislation.

Alcohol abuse has been identified by our regional health corporation as the number one community health concern. HB 444 will have the potential for addressing accountability and consequences to underage drinking.

The arduous task of identifying possible solutions in an effort to address this identified health concern are supported wholeheartedly by the BBAHC.

Please feel free to contact Vivian Echavarria, Health Education Director, who would be available to entertain any questions you may have. Her number is 842-9347.

Thank you for your support.

Sincerely,

BRISTOL BAY AREA HEALTH CORPORATION

Christine DeCourtney

Robert J. Clark
Chief Executive Officer

RJC/mm

cc: BBAHC Executive Committee
Christine DeCourtney, Acting C.O.O.
Representative George Jacko
Senator Fred Zharoff
Vivian Echavarria, Health Education

# A·W·S·W·A

## *Alaska Wine and Spirits Wholesalers Association*

February 19, 1992

Rep. Dave Choquette
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Choquette:

The members of the Alaska Wine and Spirts Wholesalers Association strongly support your House Bill 444 concerning Alaska Drivers Licenses and the use of Holograms.

Both AWSWA and CHARR are working together with the Alaska Professional Bartending School to produce a training video which will address identifying and dealing with the issue of under 21 purchases.

The Hologram in itself will reduce the number of falsified identification cards, but the key to the long term success of this program is the addition of penalties for persons caught using illegal identification cards.

Please let me know if there is any way we can help you in assuring this important issue. Attached is a copy of our industry position on under 21 alcohol consumption.

Sincerely,
ALASKA WINE AND SPIRTS WHOLESALERS ASSOCIATION

Steve Pedersen
President

SP/km

360 "K" STREET, ROOM 24 · ANCHORAGE, ALASKA 99501 · TELEPHONE (907) 279-3610

# REGAL ALASKAN HOTEL
ANCHORAGE

February 19, 1992

Representative Richard Foster
Chairman, House Transportation Committee
Alaska State Legislature
Fax # 465-3242

Dear Representative Foster,

The Anchorage Restaurant Beverage Association (ARBA) members voted unanimously to endorse passage of House Bill 444 at our general membership meeting last week. Underage drinking is a real problem and we feel that this bill is an important step in trying to control this plague.

I have enclosed a position paper developed in conjunction with the Alaska Wine and Spirits Wholesalers Association. This position paper was published in the January/ February issue of TOAST magazine, the Alaska industry publication. House Bill 444 addresses several of the points we raised.

Our association strongly endorses House Bill 444. We appreciate your efforts and hope this bill will proceed forward so it will be a little tougher to buy alcohol if you are underage, as well as pay a stiffer penalty if you are caught.

Sincerely,

Michael C. Neely
President
Alaska Restaurant Beverage Association

sp

THE FOLLOWING PAGES MAY
NOT FILM LEGIBLY BECAUSE OF
THE POOR QUALITY OF THE ORIGINAL

# Alaska's Beverage Alcohol Industry's Position On Underage Drinking

Much national media attention has been focused recently on the problem of underage drinking in our society. And in our own state of Alaska the press extensively covered the story of two lives taken in a traffic accident last summer which was caused by an underage drinker.

As parents, as citizens, and as involved members of the business community, we are seriously concerned with the impact this problem has on all our lives. The combined membership of the Alaska Wine and Spirits Wholesalers Association and the Alaska Cabaret, Hotel, Restaurant, and Retailers Association (CHARR), representing the beverage alcohol industry, is resolved to be part of the solution to this societal problem.

We wish to be forthright about our point of view as an industry. We advocate the concept of responsible decision making about alcohol use and the responsible use of the products we sell.

Persons under the age of 21 who attempt to purchase or consume alcohol are not making a responsible decision. They fail to consider fully the consequences of such an illegal action. They fail to make responsible use of beverage alcohol. And such irresponsibility has an impact on us all, in some cases, a tragic impact.

While we as an industry cannot provide a total solution, there are some actions we can take that will contribute to it. As we reaffirm our commitment to be responsible purveyors of a regulated product, we also pledge to undertake the following steps:

1. A Public Awareness Campaign

Through graphic point of sale materials we wish to raise the level of public consciousness of the underage drinking issue as well as to send a message to those under 21 seeking to purchase alcohol that we do not want their business. Parents of teenagers need to be reminded of the consequences of illegal use of alcohol. It is not just a case of "sowing wild oats;" the use of alcohol by persons under 21 is breaking the law.

2. Lobbying for Enforcement of Existing Law

The State of Alaska Statutes controlling alcoholic beverages are some of the most progressive of all 50 states. But our excellent laws are of little use if there is no enforcement effort. In our state, the Alcohol Beverage Control Board is established as a regulatory agency; enforcement is a function of police agencies. We will demand of our state and local government officials that police agencies be given the necessary direction to enforce the current law. If we as a society are sincere in our expressed concern for underage drinking, then our governmental bodies as our representatives must give this issue priority when providing direction and allocating resources to our police agencies. If we as a society are serious, if we mean what we say about the problem of underage drinking, then the underage drinker must pay a penalty for breaking the law.

3. Lobbying for Improvement of Existing Law

Although our state laws are very progressive, we see two areas where change could significantly affect the underage drinking problem for the better. First, the penalties set for underage drinkers are the traditional fine and/or jail sentence for this misdemeanor. We believe that in addition, the courts should have the option of diversionary penalties such as community service and/or counseling programs. One of the best penalties, we feel, is to delay, suspend, or revoke the driver's license for an alcohol-related violation by a person under 21. This penalty is directed at the underage drinker and can serve as a real deterrent for teenagers.

The second area that requires change concerns the difficulties face in preventing the use of false IDs. The State of Alaska must take steps to combat this problem by issuing drivers' licenses and identification cards that cannot be altered, duplicated, or counterfeited. Such technology is readily available and is already widely used by banks issuing credit cards. The state of New Jersey currently uses a "latent security image" to eliminate the alteration, duplication, and counterfeiting of drivers' licenses. We believe Alaska should also be a leader in taking this progressive step.

Article XXI of the U.S. Constitution grants states the right to regulate and control distribution and sale of alcohol beverages. We hope that our efforts will lead our local and state governments to exercise this right, adopting measures to curb underage drinking and lessen its impact on our society.

# National Restaurant Association Forecast

—Eating place sales in the state of Alaska are expected to reach $610.1 million in 1992, up 7.7 percent from 1991.

—Eating place sales in the Pacific region which includes our state of Alaska plus California, Hawaii, Oregon and Washington are projected to total $37.5 billion in 1992 — 6.3 percent higher than recorded in 1991.

—Foodservice sales on a national level are expected to reach $262.0 billion in 1992 — a 5.6 percent increase over 1991. Real sales after adjusting for inflation, are projected to advance 1.9 percent which reflects an anticipated modest improvement in the nation's economy. Eating place sales are projected to grow $171.0 billion in 1992.

—Food and drink purchases for the foodservice industry are forecast to reach $99.1 billion in 1992.

State and regional outlook for 1992

The improved but modest economic growth projected for the nation overall should also be seen in the Pacific states which includes our state of Alaska along with the states of California, Hawaii, Oregon and Washington. Economic growth in our region will be aided by such diverse industries as electronics and high technology, aerospace, lumber, agriculture and tourism.

Total regional employment is expected to grow 2.7 percent to 22.7 million persons in 1992, this compares with a lower 2.1 percent increase in national employment. Disposable personal income will advance at a 3.3 percent pace after adjusting for inflation, higher than the national rate of 2.4 percent.



***END***

# Pioneer Bar & Liquor Store, Inc.

CHRISTINE M. TENGS
*President*

141-143 Second Ave.
Post Office Box 190
Haines, Alaska 99827
(907) 766-9101 Business
(907) 766-2474 Office
(907) 766-3374 FAX

March 6, 1992

Representative Dave Choquette
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Representative Choquette:

I would like to go on record as strongly supporting House Bill 444, which would require Alaska State Drivers' Licenses to bear a holographic symbol (making them harder to alter) and would provide penalties for use of false drivers' licenses.

In July of 1990, a young man (6 months short of 21) used a fake I.D. to purchase from our liquor store. A few hours later he totalled his Toyota pick-up and died in the crash. It didn't matter to his parents that he broke the law 9 times that night. It also didn't matter that he had shown 8 of our employees I.D. that met the requirements of Title 4. Nor did it matter that he had oversize tires, wore no seatbelt, had a reputation for speeding and had purchased and consumed alcohol in the presence of his parents. They filed a civil liability suit against us and the Alaskan Liquor Store, where he also bought that night. Across the table from us during his deposition, the young man's father said we were entirely to blame for his son's death.

In January of 1992, we settled the lawsuit for $37,500. Although we felt we could win the case, this amount was less than half of what it would have cost us to see it through, even with the most favorable results. The total financial cost of over $120,000 we spent defending ourselves pales next to the emotional toll it took on not just my family and the family of the clerk on duty that night, but on the whole town.

During the course of this lawsuit, I did extensive research on my own in order to save legal fees. I interviewed many of the young man's friends, all of whom were most open and helpful. What I discovered is this: Perfect fake I.D.'s are inexpensive and easy to obtain. Using one is not considered a serious offense, but a rite of passage into adulthood. They haven't a clue that what they're doing has consequences, because up till now, there really haven't been any consequences.

I can't thank you enough for introducing this bill. It's time people started taking responsibility for their own actions. If our youth want to pretend they're adults, let them pay an adult price.

Very truly yours,

Christine M. Tengs

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# *NCADD FACT SHEET: ALCOHOLISM AND ALCOHOL-RELATED PROBLEMS*

Alcoholism is a primary, chronic disease with genetic, psychosocial and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic: impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences and distortions in thinking, most notably denial.[1]

## THE SOBERING FACTS: AN OVERVIEW

- **Despite a decline in per capita consumption of alcohol during the 1980s, overall alcohol-related morbidity did not decline.**[2]
- **As many as 10.5 million Americans show signs of alcoholism or alcohol dependence, and another 7.2 million show persistent heavy drinking patterns associated with impaired health and/or social functioning.** By 1995 alcohol-dependent adults will number 11.2 million, with the number of persistent heavy drinkers remaining stable.[3]
- **Alcoholism and related problems cost the nation an estimated $85.8 billion in 1988, $27.5 billion more than illicit use of other drugs.** 39% is attributed to reduced productivity and 33% to mortality losses.[4]
- **An alcohol-related family problem strikes one of every four American homes.**[5]
- **Twin and adoption studies have provided evidence for the genetic transmission of vulnerability to alcoholism.**[6]
- **An average of 300 people died each day in 1987 from alcohol-related causes—a total of 105,095. Each victim lost 25.9 years of life on the average.**[7]
- **Fetal alcohol syndrome (FAS) is one of the top three known causes of birth defects with accompanying mental retardation--and the only preventable cause among those three.** FAS can be prevented by abstaining from alcohol consumption during pregnancy.[8] *(For more information, see NCADD's Fact Sheet on Alcohol-Related Birth Defects.)*
- **About a quarter of all hospitalized patients have alcohol-related problems.**[9]
- **A survey of 1986 deaths found that men who regularly drank two or more drinks a day were nearly twice as likely to die before age 65 than men who drank 12 or fewer drinks a year;** their female counterparts were three times as likely to die before age 65.[10]
- **Alcohol is closely linked to suicide. Among causes of death in alcoholics, an average of 18% are due to suicide.** About 21% of suicide victims are alcohol-dependent.[11]
- **Of offenders convicted of violent crimes, 54% of the inmates in one survey had used alcohol just before the offense.** Broken down into different crimes, that's 68% of inmates convicted on manslaughter charges, 62% on assault, 49% on murder or attempted murder and 52% on rape or other sexual assault.[12]

## CONSUMPTION RATES AND PATTERNS

- **Per capita consumption was 2.54 gallons of *pure* alcohol in 1987, roughly equivalent to 56 gallons of beer, 20 gallons of wine or six gallons of distilled spirits.**[13]
- **Two thirds of the population drink, but 10% of all drinkers (those who drink most heavily) drink half of all alcohol consumed.**[14]
- **Thirty-five percent of high school seniors have had five or more drinks in a row at least once during the two weeks prior to a national survey.**[15] *(For more information, see NCADD's Fact Sheet on Youth and Alcohol.)*

"GOVERNMENT WARNING: 1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. 2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery and may cause other health problems."

*--Warning label required by federal law on beer, wine, hard-liquor and wine-cooler containers, effective November 1990.*

(For footnote attribution, please turn to page 4)