ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7935 HOUSE LABOR & COMMERCE

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 145

ANALYSIS: (continued)

This legislation would force the State to change its classification system from the "whole job" system currently in use. The costs shown are required to complete the development of the Alaska Quantitative Evaluation System (AQES), which reached a preliminary stage with a $500.0 thousand appropriation in 1983. The lapse date should be June 30, 1996, to coincide with the expected implementation of the first report that is required January 1, 1996.

Daily News

Studies: Bias, economy keep pay gap alive

By DIANE LEWIS
Boston Globe

Women still have a long way to go before their paychecks equal men's, and the reasons include the nation's changing economy, bias in the workplace and the effect of child-rearing on lifetime earnings, according to two new reports.

The first report, by Working Woman magazine, compares the earnings of men and women from 1973 to 1991 and is based on information gathered by the Economic Policy Institute in Washington.

In the second report, Martha N. Ozawa, a professor of social policy at Washington University in St. Louis, used data from the Social Security Administration to examine the life earnings and retirement of 700,000 black and white women who were 35 and older.

Working Woman found that college-educated women still earn less than males with high school diplomas despite reports that women gained ground in the 1980s.

"When you look at the figures for women in the median-pay bracket, the narrowing of the wage gap in the 1980s was about 75 percent because of men's wages falling, not to female wage growth," said Jared Bernstein, an economist at the policy institute.

Bernstein blamed the changing economy for a decline in wages so pervasive that every group, regardless of social standing, education or gender, is feeling the effect.

Working Woman also found that as women grow older, the wage gap widens — a situation the magazine attributed to bias. Even in the best occupations, it said, women earn less.

"If you view salaries in a larger historical context, the truth becomes clear," the magazine reported. "In the 1980s women were merely making up ground lost in the 1960s and 1970s."

In her report, Ozawa found that women who stay home with children and resume work after three or more years rarely return to their prior salaries.

"Men are not penalized by having children, but women never quite catch up in terms of pay if they stay home for a while to rear children," Ozawa said in a telephone interview.

Ozawa reported that the white women in her study earned $237,228 in the years they were employed. Black women's lifetime earnings were $188,061. However, women with no children earned far more: $304,631 for white women and $234,475 for black women.

Ozawa, who examined the effect of race, gender and education on women's earnings, noted that black women with or without children worked for a longer period but earned less than their white peers. The exceptions were black women with college degrees. Such women

Please see Page C-6, PAY

PAY: Little equality between men, women

Continued from Page C-1

earned 10 percent more than white women who completed college, even though, overall, black women earn 21 percent less than white women.

One reason was the number of children the two groups of women had. Black women with college degrees had, on average, 1.7 children, compared with 2.1 children for white women who graduated from college. Another factor, Ozawa said, was that black women continued to work after the birth of children, unless they had four or more. They also worked past retirement age.

"The data showed that black women worked hard, but most are at the bottom of the pay scale even though their participation in the labor force is higher than that of white or Hispanic women," Ozawa said.

According to the report, white women with no children had very high employment rates that tapered as they approached retirement. By 60, about 40 percent had stopped working.

Ozawa found that white women with one child earned 16 percent less than other white women with the same educational levels and no children. She also reported the salary gap between those women widened with the birth of each additional child.

> *"The data showed that black women worked hard, but most are at the bottom of the pay scale . . ."*
>
> — Martha N. Ozawa
> Washington University

Working Woman said women's salaries actually peaked in 1973. Back then women with college degrees plus two years of post graduate study earned an average of $18.01 an hour compared with $21.09 for men with the same level of education. But by 1991, the wages of women in that category had dropped to $16.57 an hour. However, men were earning $21.11. Meanwhile, women with four years of college were earning $12.65 per hour — less than the $13.50 hourly wage that male high school graduates took home 20 years ago.

See Tours, back page Hank Rust, right, and his son Todd keep Rust's Flying Services Inc. running

Alaska salaries still falling into gender gap

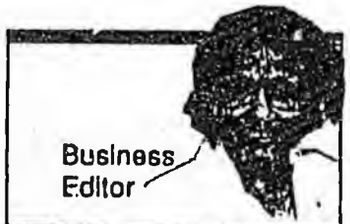
Survey says women's wages equal 62 percent of male income

The gender gap in wages and salaries in America is an important factor in the continued fragile economic condition of women.

Men make more money than women not only because of historical trends, occupational trends and decades of dominating the ranks of higher-paid management positions, but also because they typically earn more money for doing the same jobs women do.

A recent study by the Alaska Department of Labor found that in 1988, the average wage and salary income of women in Alaska was only about 62 percent of male average income. That compared with women's income nationwide, which is roughly 70 percent of male average income.

The study, which surveyed 114,642 women and 129,378 men, all



Rose Ragsdale

of whom had wage and salary income in 1988, and received a Permanent Fund dividend, found a 38 percent wage gap between women and men in the Alaska work force.

While women comprise about 47 percent of the persons in the study group, they account for only about 35 percent of the group's total wage income of $4.85 billion.

In 1988, the average annual female wage income in Alaska was about $14,900, while the average male wage income was $24,200.

Using statistical analysis, the state Labor Department study also found that women earn about 18 percent less than men of the same age, location, industry group and occupational group.

That implies that age, location, industry group and occupation group account for about 20 percent of the total 38 percent wage gap between women and men.

But the remaining 18 percent reflects pay differences between men and women within the same industry and occupational groups.

The trend was evident in every wage category from Alaska's lowest paid workers to the state's highest paid, and women were more prominently represented in the lower salary categories.

For example, nearly 50 percent of the women earned less than $10,000 in wage and salary income from Alaskan sources in 1988, compared with 40 percent of the men.

Also, 46 percent of the men in the study earned $20,000 or more, but only 30 percent of the women fit in that category. And nearly 14 percent of the men earned $50,000 or more, compared with less than 3 percent of the women.

The study also found that while age is the single most important factor in explaining the variation in the level of wage income of all workers, age probably plays a small role in the wage gap between the sexes.

State labor economists say other possible factors in the huge wage gap between men and women in the same industry and occupational groups include a tendency among women to work fewer hours than men; to have less job tenure or labor force experience due to family responsibilities; and to face employment, promotion, or wage discrimination.

These findings suggest that as long as women are the principal care givers in the family and in society, there will always be a wage gap between the sexes. However, the study also suggests the gap can and likely will narrow considerably in the future as women make gains in areas such as job tenure and management ranks and laws regarding discrimination are more vigorously enforced.

Meanwhile, women can muster their resources to overcome the long-term impoverishing effects of the income disparity they have with men.

Anchorage Times - 3-13-91

HB 99

Subject	HB145	Department of Administration Proposal	Comment
Add "elimination of sex based wage disparities" to the means of promoting harmonious and cooperative employee relations and assuring effective and orderly governmental operations.	Section 1 of bill, amending AS 23.40.070(3). See specifically, page 2, lines 11 and 12.	Omit	Department of Administration's proposal omits all references that imply a union right to bargain over classifications.
Collective bargaining may not defeat cost reduction provision upon implementation of new classification system.	-	Proposed AS 23.40.210(b). See also proposed AS 39.27.013 below.	Source: HB676, February 17, 1986. This provision reduced implementation costs by approximately 50 percent.
Collective bargaining agreements may provide a freeze upon reclassification downward for up to two years.	-	Proposed AS 23.40.210(c).	Source: 2 AAC 07.345(e). This provision will allow offsetting savings to be realized two years after implementation.
Provide a one-time exception upon implementation of the new classification system of the pay rules that normally apply to a reclassification upward.	-	Proposed AS 39.27.013.	Source: HB676, February 17, 1986. Employees moved upward as a result of the new classification system will receive minimal immediate increases, but will be eligible for future step increases. This provision reduced implementation costs by approximately 50 percent.
Require public employers to report results of new classification system to unions and to use the report in bargaining.	Proposed AS 39.90.210(c). Page 3, lines 4 through 9.	Omit	Department of Administration's proposal omits all references that imply a union right to bargain over classification.
Method of notice to legislature of implementation costs.	Proposed AS 39.90.210(d), sentences 2b and 3.	Delete proposed AS 39.90.210(d) sentences 2b and 3; replace with requirement that implementation cost be included during budget preparation.	This approach better prepares the public employers to implement their plans.
Legislative review and amendment of plan, potential for partial funding.	Proposed AS 39.90.210(e)	Omit	Amendment of a public employer's classification plan should not be subject to collective or political bargaining. Appropriation will be through normal budget process. Implicates separation of powers.
Require public employer to notify union when reporting to the Legislature.	Proposed AS 39.90.210(f).	Omit	Department of Administration's proposal omits all references that imply a union right to bargain over classification. Any report to the Legislature will be publicly available.

Subject	HB145	Department of Administration Proposal	Comment
Protect public employers from unfair labor practice charges over specified amounts of money to be used for specific pay purposes.	Proposed AS 39.90.210(g)	Omit	Department of Administration's proposal omits all references that imply a union right to bargain over classification.
Recognize as public policy the negotiation of pay rate adjustments.	Proposed AS 39.90.210(h)	Omit	Department of Administration's proposal omits all references that imply a union right to bargain over classification.
Pay Equity article does not diminish duty to bargain in good faith.	Proposed AS 39.90.210(i)	Omit	Good faith bargaining requirements are established in PERA and need not be repeated here.
Specify compensation relationships required in preparation for bargaining.	Proposed AS 39.90.220	Change Section Title. Delete portion of first sentence in paragraph (a).	Department of Administration's proposal omits all references that imply a union right to bargain over classification.
Establish pay equity policy.	Proposed AS 39.90.200	No change.	-
Require classification system to determine comparable work value.	Proposed AS 39.90.210(a)	No change.	-
Specify factors in classification system.	Proposed AS 39.90.210(b)	Delete "shift work"	Covered by AS 39.27.025. No need to pay twice.
Require public employers to report plan to create pay equity to the Legislature.	Proposed AS 39.90.210(d)	No change except to method of notice of cost. (See above).	-
Establish reasonable compensation relationship.	Proposed AS 39.90.220	No change except deletion of reference to collective bargaining. (See above.)	-
Definitions.	Proposed AS 39.90.300	No change.	-
Initial Report by January 1, 1996	Proposed Section 3	No change. Proposed Section 4	-
Department of Administration provide technical assistance to Court, Legislature, school districts and REAAs.	Proposed Section 3	No change. Proposed section 4	-

ALASKA STATE EMPLOYEES ASSOCIATION
AFSCME Local 52, AFL-CIO

ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME #52

WOMEN'S ISSUES COMMITTEE

Sherry Saunders and Alma Seward, Co-Chairs

COMPARABLE WORTH PAY EQUITY
Initial Report
Release Date: February 14, 1992
Prepared by Richard Seward

INTRODUCTION:

The ASEA AFSCME Local 52 Women's Issues Committee directed Business Agent Richard Seward to prepare an initial analysis of wage trends for employees of the State of Alaska. The Committee hypothesized that employees in female dominated job classes were paid substantially less than employees in male dominated job classes.

This initial report will be followed in March 1992 by a preliminary comparable worth analysis prepared by the American Federation of State County and Municipal Employees.

METHOD:

The State of Alaska, Department of Administration, Division of Personnel and Equal Employment Opportunity supplied the Union with the following raw data:

a. Payroll 10/15/91 sorted by job classification and number of men, women, and unknown gender employees in each classification.
b. List of job classifications and classification codes for the State of Alaska.

The Union obtained the following pay scales showing both salary and equivalent hourly wage:

a. General Government Unit wage scale for pay ranges 5 through 27.
b. Public Safety Officers wage scale for pay ranges 71 through 79.
c. Labor Trades and Crafts wage scale for pay ranges 50 through 60.

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TOLL free: 800-478-2305

d. Partially Exempt wage scale for pay ranges 28 and 29.

Minimal differences exist between the General Government Unit wage scale and other State wage scales using ranges 5 through 27 such as the Supervisory Unit and Confidential Employees Unit scales. The General Government Unit scale is applied to a majority of state employees and all members of ASEA AFSCME #52.

A data base was created on Microsoft Works capturing:

1. Job Classification
2. Job Classification Code
3. Total Employees in Job Classification
4. Total Men in Job Classification
5. Total Women in Job Classification
6. Percentage Men in Job Classification
7. Percentage Women in Job Classification
8. Pay Range for Job Classification
9. Minimum Wage Per Hour for Pay Range
10. Maximum Wage Per Hour for Pay Range

The data base was transferred to Microsoft Works spreadsheets for sorting, reporting, and charting.

INITIAL ANALYSIS:

1041 records were captured in the data base. Of these total job classifications, 123 had no employees paid 10/15/91. An additional 46 job classes held 204 employees for which the Union was unable to determine a pay range. These 204 employees represent 1.65% of the total employees paid.

The remaining 872 job classifications contained 12,182 employees paid on the 10/15/91 payroll.

A. Sex Dominated Job Classifications

The Union decided that 70% of either men or women in a job class would define a job class as either "male dominated" or "female dominated." 70% was chosen as the definition because 70% was the defining percentage in Washington State courts.

The Union found 254 female dominated job classifications containing 4,365 employees. 415 job classification were male dominated and contained 4,861 employees. There are 203 job classes containing a 31% to 69% gender balance. Gender balanced classes contain 2,956 employees.

For the October 15, 1991 payroll, 76% of State employees were in gender dominated job classifications.

B. Wages

The male dominated, gender balanced, and female dominated job classifications sub-groupings were each sorted by wage. The Union found the following relationships among the wages (assuming the male dominated job maximum wage equals $1.00):

Job Class Category	Number Job Classes	Number Workers	Median Minimum Hourly Wage	Median Maximum Hourly Wage	Percent Total Workers
Female Dominated	254	4365	$ .50	$ .66	36%
Gender Balanced	203	2956	$ .73	$ 1.00	24%
Male Dominated	415	4861	$ .73	$ 1.00	40%

(Female Median = Range 12 GGU, Other Median = Range 16 GGU)

By striking a mean between the minimum and the maximum hourly rates in the median pay ranges, the Union finds:

For every dollar earned in a male dominated job, an employee earns 67 Cents in a female dominated job.

CONCLUSION:

The ASEA AFSCME #52 Women's Issues was correct in suggesting sex discrimination in the State of Alaska pay system. Further study, such as that proposed in HB 99 will determine the extant to which comparable worth pay will end this apparent sex discrimination.

WOMEN IN THE WORKFORCE

THE WORKING WOMAN'S IMPACT ON FAMILY INCOME

If the U.S. middle class is alive and well, it is largely due to the unsung labors of American women, who have been entering the job market at a record clip. That is the main implication of a new Conference Board report on working women, which notes that the number of employed females has risen by about 80% over the past 20 years, compared with 27% for males. Already, it says, more than 50% of all married women work, including women with children. And in homes where the husband has a job, nearly two-thirds are employed.

The influx of women into the labor force, claims the study, is a major reason why some 46% of all families now earn more than $25,000 a year—in today's dollars—compared with only 28% two decades ago. Although only one-third of all wives in families earning $10,000 to $15,000 a year are employed, the report estimates that more than two-thirds of wives in families in the $30,000 to $35,000 range bring home paychecks. And in families with income between $40,000 and $50,000, some 70% of wives have jobs. "An impressive 60% of all family income is now earned by households where wives are working," says Conference Board consumer economist Fabian Linden.

The picture isn't all positive. To sure, more than half of all college s dents are now women, and females e 23% of all medical degrees and 30% of law degrees. Moreover, more than of all accountants, college teachers, bank officials—and more than 47% bus drivers—are women. On the ot hand, college-educated women work full-time still earn only 55% of the comes of their male counterparts. . although differences in age, experie and occupation help explain this gap, study also blames the practice of " than equal pay for equal qualificatio

The "T pical" Alaskan Woman Today

She is 25, a working woman who earns half as much as most men. She's younger and better educated than her counterparts in the Lower 48, but she runs a higher risk of getting divorced.

She will have her children earlier and will bear more of them than women Outside. But like women throughout the country, the chance that she will spend her adult and later years alone is increasing.

Alaska Women, A Databook

"Economic inequality persists in Alaska" Barbara Baker, Alaska Women's Commission

FACTS:

60% work outside the home

43% of all jobs in Alaska are held by women

30% of all family income in Alaska is earned by women

average income is 11K (compared to 22K for men)

1 out of every 4 women heading households lives in poverty

U.S. Department of Labor

Office of the Secretary
Women's Bureau
Washington, D.C. 20210

20 FACTS ON WOMEN WORKERS

1. A majority of women work because of economic need. Nearly two-thirds of all women in the labor force in 1978 were single, widowed, divorced, or separated, or had husbands whose earnings were less than $10,000 (in 1977).

2. About 42 million women were in the labor force in 1978; they constituted more than two-fifths of all workers.

3. Fifty-nine percent of all women 18 to 64—the usual working ages—were workers in 1978, compared with 88 percent of men. Fifty percent of all women 16 and over were workers. Labor force participation was highest among women 20 to 24.

4. The median age of women workers is 34 years.

5. Fifty-three percent of all black women were in the labor force in 1978 (4.9 million); they accounted for nearly half of all black workers.

6. Forty-five percent of Spanish-origin women were in the labor force in March 1978 (1.8 million); they accounted for 39 percent of all Spanish-origin workers.

7. Women accounted for nearly three-fifths of the increase in the civilian labor force in the last decade—13 million women compared with 9 million men.

8. More than one-fourth of all women workers held part-time jobs in 1978.

9. The average worklife expectancy of women has increased by more than one-half over the two decades since 1950. In 1970 the average woman could expect to spend 22.9 years of her life in the work force.

10. The more education a woman has the greater the likelihood she will seek paid employment. Among women with 4 or more years of college, about 3 out of 5 were in the labor force in 1978.

11. The average woman worker is as well educated as the average man worker; both have completed a median of 12.6 years of schooling.

12. The number of working mothers has increased more than tenfold since the period immediately preceding World War II, while the number of working women more than tripled. Fifty-three percent of all mothers with children under 18 years (16.1 million) were in the labor force in 1978.

13. The 5.8 million working mothers 1/ with preschool children in 1978 had 6.9 million children under 6 compared with 4.8 million working mothers with 6.0 million children under 6 years of age in 1973.

14. The unemployment rate was lowest for adult white men (20 and over) and highest for black young women (16 to 19) in 1978:

Adults	Percent	Teenagers	Percent
White men	3.7	White men	13.5
White women	5.2	White women	14.4
Hispanic men	6.3	Hispanic men	19.5
Hispanic women	9.8	Hispanic women	22.0
Black men	9.1	Black men	36.5
Black women	11.1	Black women	41.0

15. Women workers are concentrated in low paying dead end jobs. As a result, the average woman worker earns only about three-fifths of what a man does, even when both work full time year round. The median wage or salary income of year-round full-time workers in 1977 was lowest for minority-race 2/ women--$8,383. For white women it was $8,737; minority men, $11,053; and white men, $15,230.

The median earnings of full-time year-round women farm workers were $1,635, private household workers, $2,714; sales workers, $6,825; and clerical workers, $8,601.

16. Fully employed women high school graduates (with no college) had less income on the average than fully employed men who had not completed elementary school--$8,462 and $9,332, respectively in 1977. Women with 4 years of college also had less income than men with only an 8th grade education--$11,134 and $11,931, respectively.

17. Among all families, about 1 out of 7 was headed by a woman in 1978 compared with about 1 out of 10 in 1968; 39 percent of black families were headed by women. Of all women workers, about 1 out of 8 was a family head; about 1 out of 4 black women workers was a family head.

18. Among all poor families, nearly half (49 percent) were headed by women in 1978; more than 2 out of 3 poor black families were headed by women. In 1968 about one-third (35 percent) of all poor families were headed by women and 51 percent of poor minority 3/ families had female heads.

1/ Includes never married mothers.

2/ "Minority races" refers to all races other than white. Blacks constitute about 90 percent of persons other than white in the United States. Spanish-origin persons are generally included in the white population; about 93 percent of the Spanish-origin population is white.

3/ Data on black families are not available for 1968.

19. It is frequently the wife's earnings which raise a family out of poverty. In husband-wife families in 1978, 6.1 percent were poor when the wife did not work; 2.7 percent when she was in the labor force. Among all wives who worked in 1978, the median contribution was more than one-fourth of the total family income. Among those who worked year round full time, it was nearly two-fifths.

20. Women were 80 percent of all clerical workers in 1978 but only 6 percent of all craft workers (women were about 3 percent of all apprentices as of June 1978); 63 percent of service workers but only 43 percent of professional and technical workers; and 64 percent of retail sales workers but only 23 percent of nonfarm managers and administrators.

Source: U.S. Department of Commerce, Bureau of the Census; U.S. Department of Health, Education, and Welfare, National Center for Social Statistics; U.S. Department of Labor, Bureau of Labor Statistics and Employment and Training Administration.

Pay Equity

Comparable worth pay equity is NOT equal pay for equal work. It is equal pay for jobs of comparable value.

This means female dominated jobs should be paid equally to male dominated jobs requiring equivalent education and training, skill, effort, and responsibility, and involving equivalent work hazards.

On average, a woman with 4 years of college can expect to earn the same salary as a man with an 8th grade education. Female high school graduates can expect to earn less than men who have not completed elementary school. (Statistics from US Dept. of Labor)

In California, a registered nurse earns less than tree trimmers and parking lot attendants.

In Alaska, a registered nurse earns less than a supply officer or an electrical technician.

In Alaska, women earn 62 cents for every dollar men earn.

The average annual wage for men in 1990 was $27,655.
The average annual wage for women in 1990 was $16,934.

The proportion of poor families headed by women is steadily increasing.
- 1 of every 4 women heading households lives in poverty.

About 80% of working women are employed in the low-paying, deadend jobs where women have traditionally worked.

- Women are approx 80% of all clerical workers, but only 6% of all craft workers.

Many states are approaching the issue of pay equity.

Some states have begun to implement pay equity by increasing the wages for workers in underpaid job classes: Washington, Hawaii, Oregon, Minnesota, Wisconsin, Massachusetts, Iowa, Michigan and others.

The courts have ruled that the cost of ending pay discrimination may NOT be a consideration in whether the discriminatory practices are corrected.

> So far, pay equity costs in the public sector have amounted to 2% to 4% of payroll.

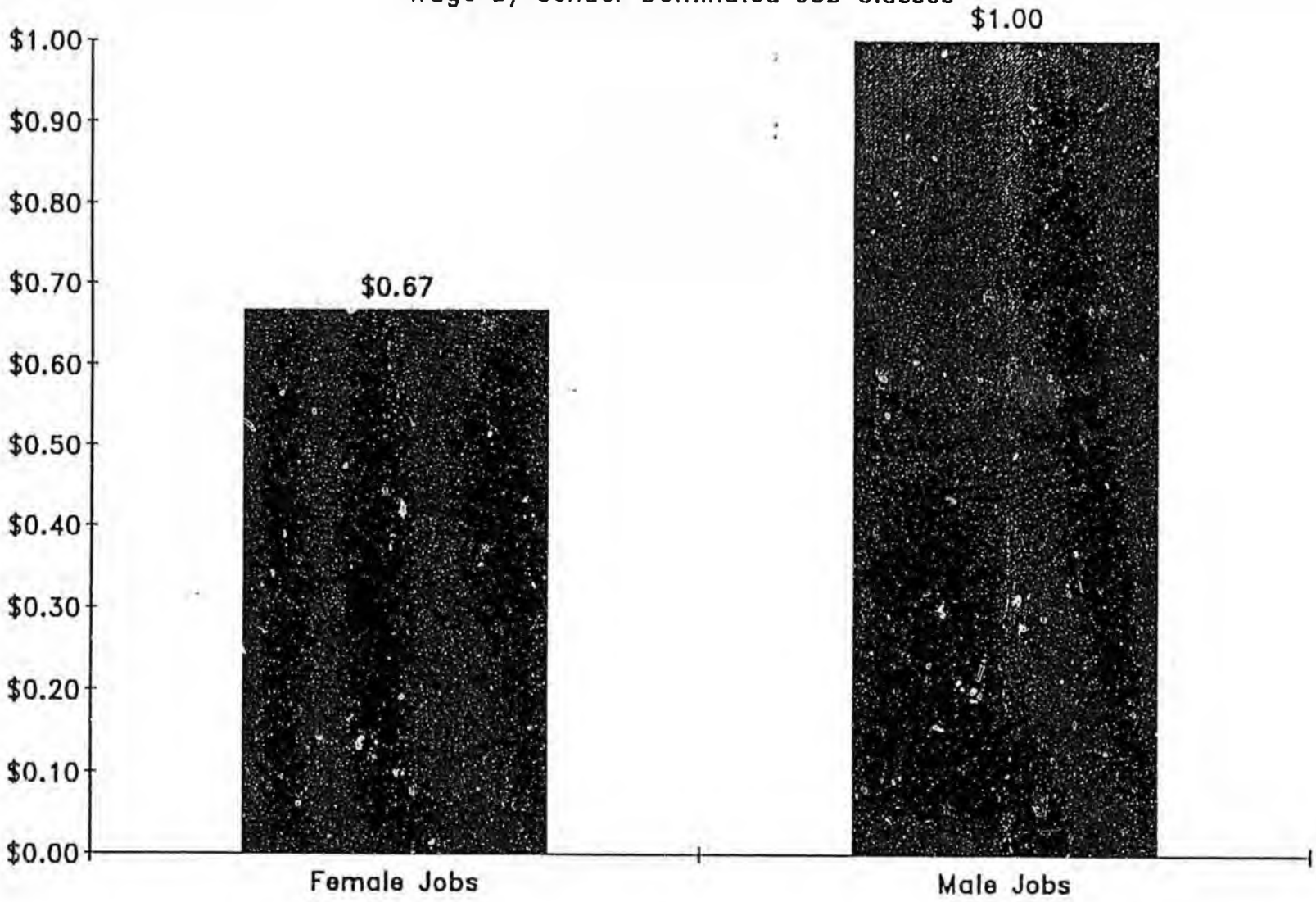
Under the 1963 Equal Pay Act, it is illegal to pay men less in order to create pay equity.

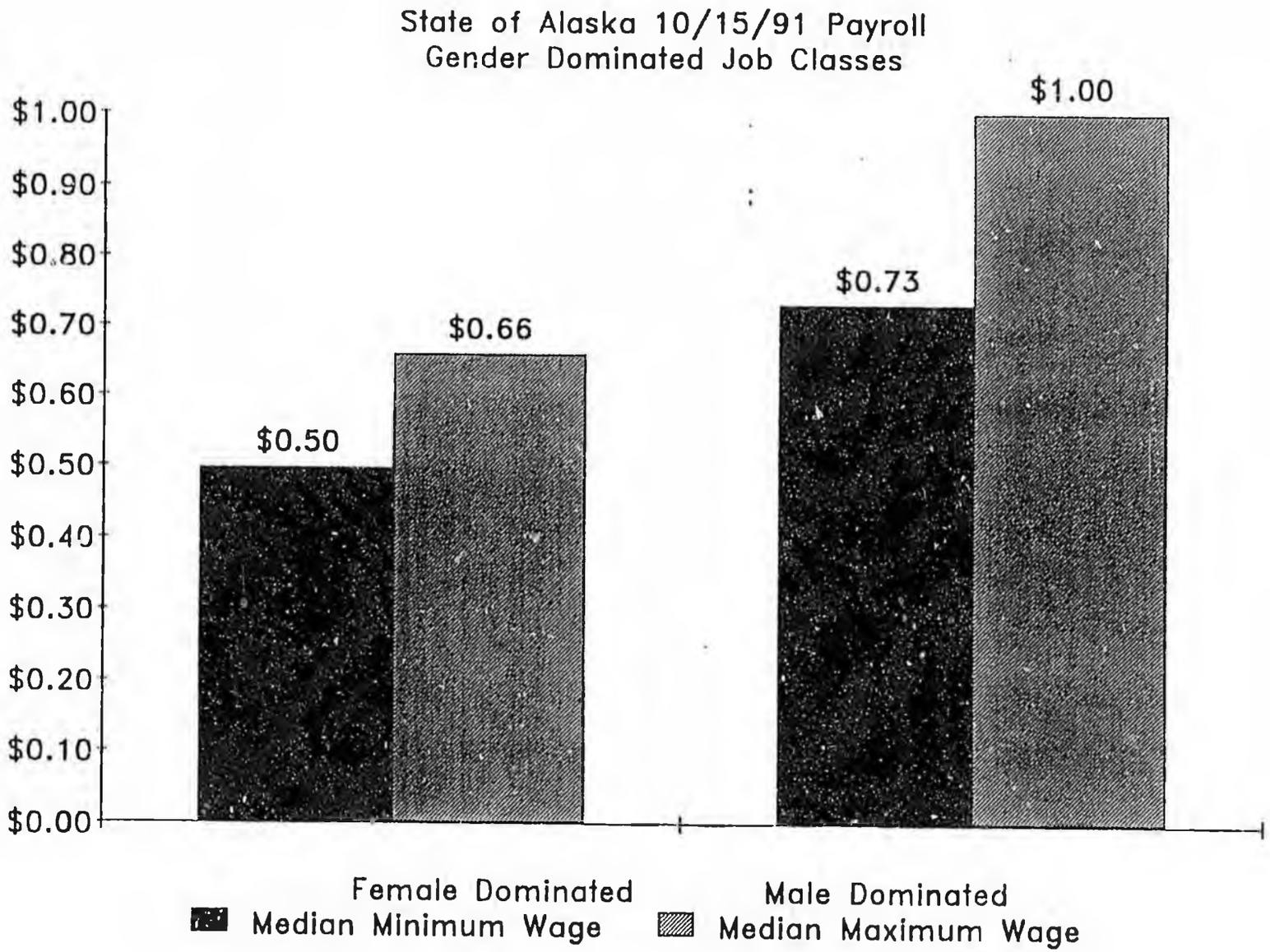
There are widely accepted methods of evaluating and comparing jobs in order to establish equity. In job evaluation, factors common to all jobs are identified, such as skill, effort and responsibility, and point are assigned to each factor. The total points measure job value.

Pay equity will not eliminate pay differences based on performance and years of service.

Pay equity will not hurt the economy. In other states, pay equity in public employment has been implemented without disrupting the economy and without an excessive cost. For example, the cost of implementing pay equity in Minnesota state government was less than 4% of payroll.

State of Alaska, October 1991 Payroll
Wage By Gender Dominated Job Classes




State of Alaska 10/15/91 Payroll
Gender Dominated Job Classes
$1.00
$0.90
$0.80
$0.70
$0.60
$0.50
$0.40
$0.30
$0.20
$0.10
$0.00
$0.50
$0.66
$0.73
$1.00
Female Dominated
Male Dominated
Median Minimum Wage
Median Maximum Wage

March 18, 1993

Representative Fran Ulmer
State Capitol
Juneau, AK 99811

Dear Representative Ulmer:

I am very alarmed at what is happening to the job class in which I work for the State of Alaska. It appears that the backbone of state employees, the support staff in the accounting and clerical series are being reclassified into a new job series which will ultimately lead to these people being paid less. The reason why I am alarmed is that many of these are the divorced or unwed mothers supporting broken families with very little financial assistance from absent fathers. I am very concerned when I look at the high cost of living in Alaska and the take home pay of these people. It simply is not enough upon which to survive. Before I remarried, my take home pay left me 340 extra dollars a month to buy meat. Yes, hamburger and chuck steak wouldn't have been on my menu if I hadn't had some money left to me by my father.

It seems terribly unreasonable to place yet more of a burden on this low paid job series. If women, who comprise the major percentage of this job class, cannot afford to work, we Alaskans will have more people on the unemployment and welfare rolls, more poverty, more alcoholics and druggies, more social problems to deal with, and that's far more expensive in the long run.

It has always been spouted to me from the private sector that the majority of the cost is in the higher paid classes. Instead of starting at the bottom of the heap, why doesn't Administration start at the top where it would be affordable and make a bigger savings to the State. Nickel and diming those who are paid so little while those at the higher scales are upgraded and get more is very galling.

There are so many places state government could save money if the working people aren't demoralized. Encouraging cost saving practices from the top on down would be a start.

I have no idea how many letters are mailed each day by state employees, but just one letter of a few pages sent in a manila envelope rather than a standard white envelope costs an extra 40 cents. Expand that 40 cents to the 248 working days per year and only 500 people making that choice, the choice to be wasteful without realizing it, and the state has spent an extra $47,000. There are thousands of letters sent every day. The waste in this small area alone must be astronomical. This is the sort of thing your support staff notices. Why can't we get a drive, get people motivated to be more conscientious about careful spending. Recognize people for good ideas and implement them.

I thank you for your time and the concern you have for your constituents.

Sincerely,

Jackie Tyson-Heimdahl

March 17, 1993

Dear Representative Ulmer,

Just wanted to drop you a line to say thank you for attending the ASEA Women's Committee meeting last evening. Your input and knowledge was very valuable!

I fully agree with you and your "hard headedness" attitude in keeping at putting out information to the public, education, etc., to better understand what Comparable Worth / Pay Equity is really about. I don't want to fall back into a traditional role for women of when met with resistance, I'd roll up into a ball and keep quiet. We need to be noisy, and consistenly noisy.

I'm gratified to know that aware people as yourself are in office now, even though your numbers may be small.

Thanks again for your attendance to our meeting, and for support!

Sincerely,

Barbara J. Rinker

Barbara J. Rinker
PO Box 74868
Fairbanks, AK 99707

- Women's Committee Member
- Admin. Support Rep for ASEA Bargaining Team.

Gender Gap: No Progress for Alaskan Women

by F. Terry Elder

Terry Elder is an economist with the Research & Analysis Section, Administrative Services Division, Alaska Department of Labor. He is based in Juneau.

Between 1988 and 1990, the income "gender gap" widened by 0.5% for Alaskan women. The ratio of female-to-male average wage income fell from 61.7% in 1988 to 61.2% in 1990[1]. (See Table 1.) Although the sex distribution of employment and total wage income in 1990 was about the same as in 1988, the average wage income of men outpaced that of women.

Comparisons by age group

The sex distribution of employment by age group in 1990 showed the same pattern as in 1988[2]. (See Figure 2.) Women account for a larger share of employment at younger age groups than at older age groups. This is due to the relatively rapid increase of female participation in the labor force in recent decades. Older age groups partially reflect labor force composition prior to the time women began to enter the labor market in ever-increasing numbers.

Between 1988 and 1990, the average annual wage income of both men and women rose for every age group except the oldest age groups. (See Figure 2 for 1990 income.) For men aged 65-74 and for men and women aged 75+, average wage income fell. This probably reflected the larger number of workers aged 65-74 in the 1990 data set and possibly some reduction in seasonal and part-time employment. Part-time employment is especially important for the youngest and oldest age groups of both sexes.

The pattern of wage income for age groups did not change from 1988. Peak average wage income for men occurred in the 45-49 year-old age group at $41,600. The same age group for women earned a peak average of $23,800. As in 1988, women earned less than men in every age group (See Figure 3.) The female-to-male

Note

[2]Compared to the 1988 data set, the 19-24 year-old age group was the only age group in which women's share of employment declined. Their employment share of every other age group rose. The largest share increases, ranging from 1.2 percentage points to 1.5 percentage points, were in the 35-39, 45-49, and 55-59 year-old age groups.

Note

[1]A detailed comparison of male and female wage and salary employment and earnings using 1988 data is found in our August 1990 publication, *The Gender Gap*. The 1988 data base contained information on 244,020 people, and the 1990 data base covered 235,667 people. No conclusion should be drawn from this decline, since the data bases are constructed with data for individuals for whom the relevant information is known. As such, they are subsets of total employment, and increases or decreases do not imply commensurate increases or decreases in total employment. Given the size of the subsets, however, there is no reason to believe that the share of employment and the average annual wage income by sex are not true reflections of actual comparative performance of the sexes. Those are the key aspects dealt with in this article. For the readers' information, the U.S. Department of Commerce, Bureau of Economic Analysis reported 1990 total personal income for Alaska of $11.96 billion, up 18.3% from 1988

Table 1

Wage and Salary Employment and Earnings Alaska, 1988-1990

	1988	1990
Employment Distribution By Sex (%)		
Male	53.0	52.7
Female	47.0	47.3
Annual Wage Income Distribution By Sex (%)		
Male	64.6	64.5
Female	35.4	35.5
Average Annual Wage Income ($)		
Male	24,232	27,655
Female	14,962	16,934
Total	19,877	22,580
Female/Male Wage Ratio (%)	61.7	61.2

Source: Alaska Department of Labor, Research and Analysis Section.

patterns between men and women.

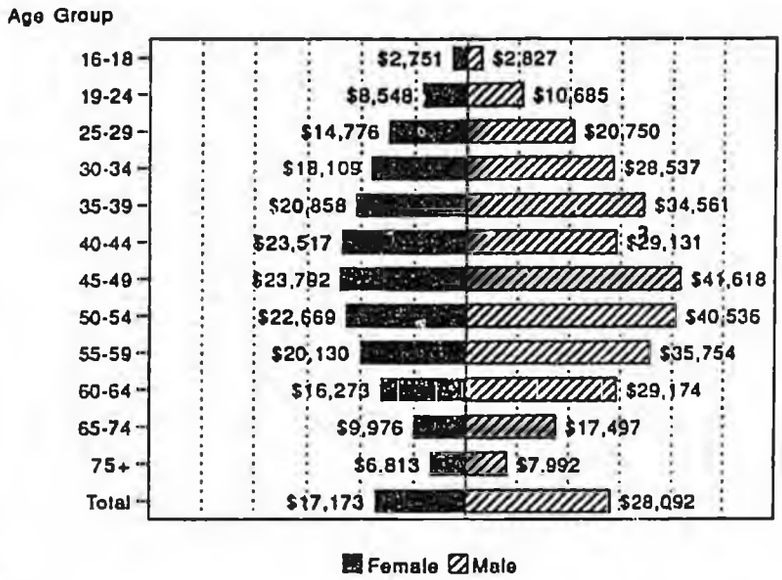
Comparisons by industry group

In 1990 as in 1988, women predominated in the finance/insurance/real estate, services, and local government sectors. Mining, oil and gas and construction were male-dominated industries. (See Figure 7.)

Oil and gas industry workers had the highest average wage income. (See Figure 8.) Other industry sectors with above-average income included mining, state government and transportation/communication/public utilities. Compared to 1988, the average wage income of both men and women rose in every industry sector except one[4].

Figure • 2

Male & Female Average Annual Wage Income by Age Group — Alaska, 1990

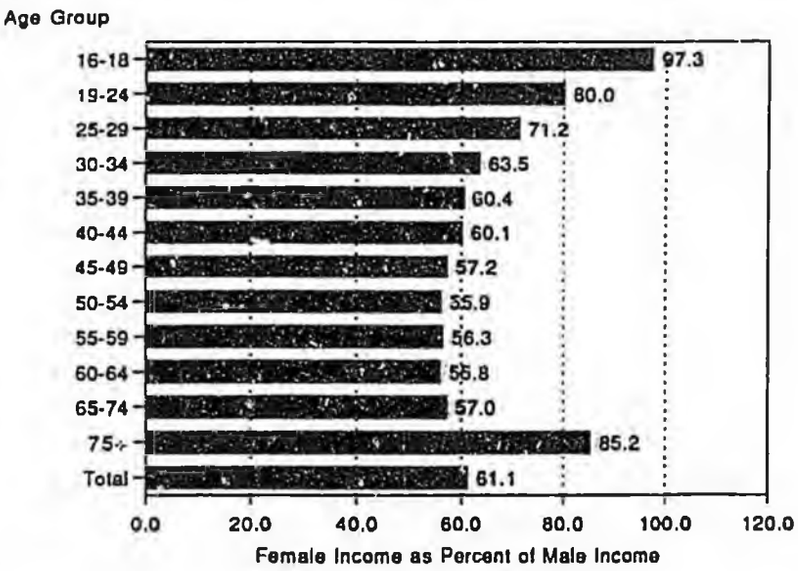


Note: Data for 122,030 males and 109,763 females for whom age data are available.

Source: Alaska Department of Labor, Research & Analysis Section.

Figure • 3

Female/Male Ratios of Private & Public Sector Average Annual Wage Income by Age, Alaska, 1990



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[4]The exception was for male workers in the Nonclassified sector, which represented less than 1 percent of male employment.

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Gender Gap: No Progress for Alaskan Women

by F. Terry Elder

Terry Elder is an economist with the Research & Analysis Section, Administrative Services Division, Alaska Department of Labor. He is based in Juneau.

Between 1988 and 1990, the income "gender gap" widened by 0.5% for Alaskan women. The ratio of female-to-male average wage income fell from 61.7% in 1988 to 61.2% in 1990[1]. (See Table 1.) Although the sex distribution of employment and total wage income in 1990 was about the same as in 1988, the average wage income of men outpaced that of women.

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The sex distribution of employment by age group in 1990 showed the same pattern as in 1988[2]. (See Figure 2.) Women account for a larger share of employment at younger age groups than at older age groups. This is due to the relatively rapid increase of female participation in the labor force in recent decades. Older age groups partially reflect labor force composition prior to the time women began to enter the labor market in ever-increasing numbers.

Between 1988 and 1990, the average annual wage income of both men and women rose for every age group except the oldest age groups. (See Figure 2 for 1990 income.) For men aged 65-74 and for men and women aged 75+, average wage income fell. This probably reflected the larger number of workers aged 65-74 in the 1990 data set and possibly some reduction in seasonal and part-time employment. Part-time employment is especially important for the youngest and oldest age groups of both sexes.

The pattern of wage income for age groups did not change from 1988. Peak average wage income for men occurred in the 45-49 year-old age group at $41,600. The same age group for women earned a peak average of $23,800. As in 1988, women earned less than men in every age group (See Figure 3.) The female-to-male

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[2]Compared to the 1988 data set, the 19-24 year-old age group was the only age group in which women's share of employment declined. Their employment share of every other age group rose. The largest share increases, ranging from 1.2 percentage points to 1.5 percentage points, were in the 35-39, 45-49, and 55-59 year-old age groups.

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Source: Alaska Department of Labor, Research and Analysis Section.

average wage income ratio declined in 8 out of 12 age groups between 1988 and 1990. Within the age groups 40-44, 45-49, 55-59 and 65-74 the gender gap narrowed.

Comparisons by occupation group

As in 1988, most occupation groups in 1990 were dominated by female or male workers (see figure 4)[3]. The average annual wage income of men rose in eight of nine occupation groups between 1988 and 1990 (see figure 5). In contrast, average wage income for women fell in six of nine occupation groups.

Unavailable data for some men and women, however, may have influenced this result. The average income of men for whom occupation data were available was higher ($28,400) than income for all men. The average wage income of women for whom occupation data were available was lower ($16,700) than income for all women. Therefore, occupation data were probably not available for more high-income women than for low-income women and for more low-income men than for high-income men.

With that caveat in mind, women earned less than men in every occupation group (see figure 6). The gender gap increased for every occupation group except Service Workers.

Comparisons by occupation

Not only were occupation groups male or female dominated, but individual occupations were, too. In the 100 largest occupations ranked by female employment, women made up 60.9% of employment compared to 47.3% of overall employment. (See Table 2, page 7.) The female-to-male wage income ratio was 73.5% compared to 61.2%. In contrast, in the 100 largest occupations ranked by male employment, women accounted for only 42.5% of employment. The female-to-male wage income ratio was only 54.8%. (See Table 3, page 10.)

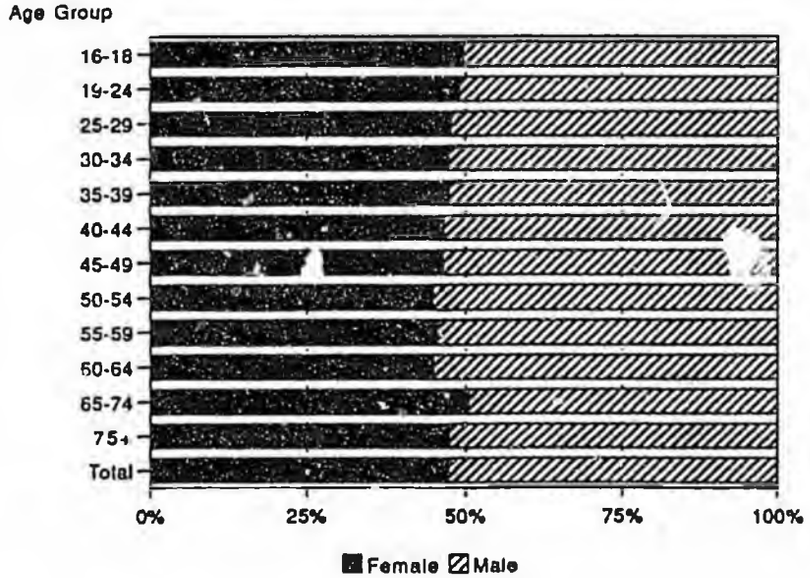
Women's average wage income exceeded men's average wage income in 12 of 100 occupations ranked by female employment, but only in 5 of 100 occupations ranked by male employment. These figures were similar to those in 1988. Little has changed during the two-year period to close the gap in employment and earnings

Figure • 1

Sex Distribution of Total Employment by Age Group — Alaska, 1990

Note: Data for 122,030 males and 109,763 females for whom age data are available.

Source: Alaska Department of Labor, Research & Analysis Section.



Note

[3]Since occupation data are not available for a large portion of female and male workers, conclusions should be tempered since they may be affected in unknown ways by the excluded data.

patterns between men and women.

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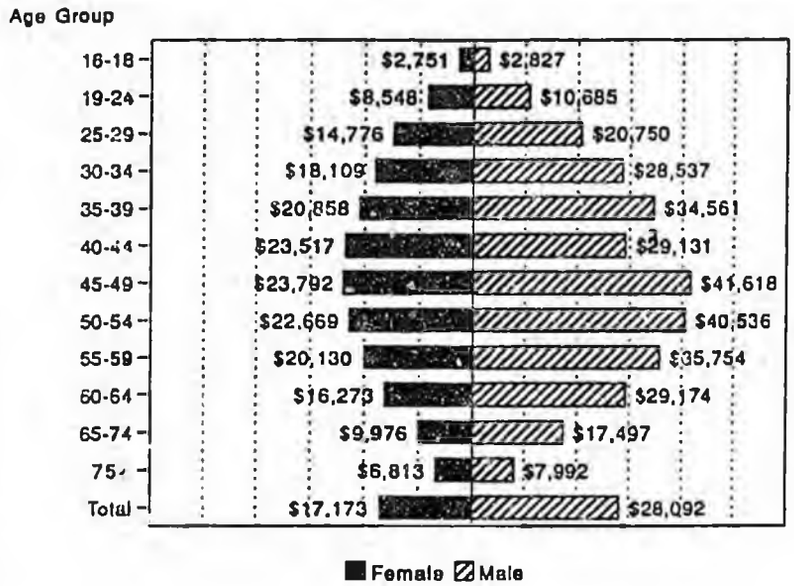
In 1990 as in 1988, women predominated in the finance/insurance/real estate, services, and local government sectors. Mining, oil and gas and construction were male-dominated industries. (See Figure 7.)

Oil and gas industry workers had the highest average wage income. (See Figure 8.) Other industry sectors with above-average income included mining, state government and transportation/communication/public utilities. Compared to 1988, the average wage income of both men and women rose in every industry sector except one[1].

Figure • 2

Male & Female Average Annual Wage Income by Age Group — Alaska, 1990



Note: Data for 122,030 males and 109,763 females for whom age data are available.

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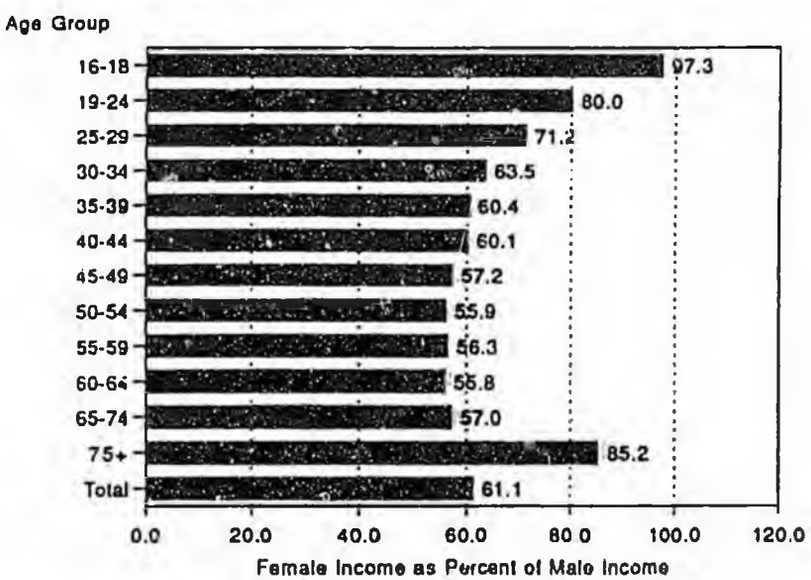
Figure • 3

Female/Male Ratios of Private & Public Sector Average Annual Wage Income by Age, Alaska, 1990



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Source: Alaska Department of Labor, Research & Analysis Section.

Note

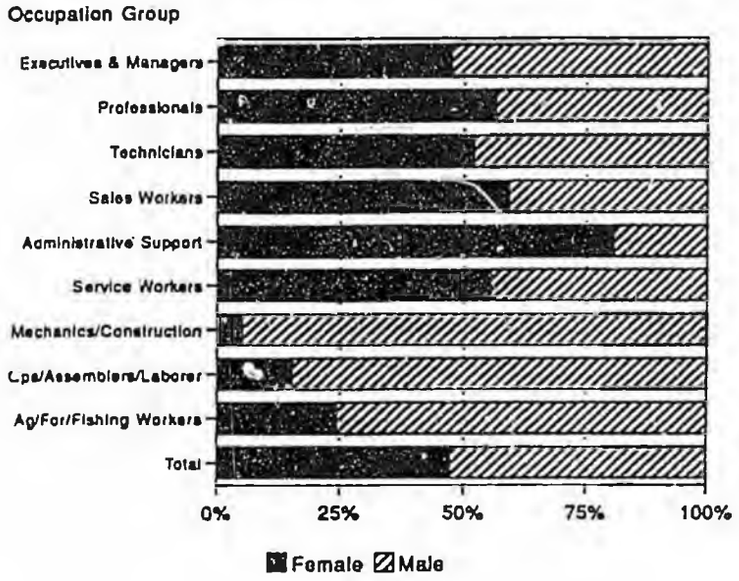
[1]The exception was for male workers in the Nonclassified sector, which represented less than 1 percent of male employment.

Figure • 4

Sex Distribution of Total Employment by Occupation Group — Alaska, 1990

Note: Data for 82,134 males and 73,224 females for whom occupation data are available.

Source: Alaska Department of Labor, Research & Analysis Section.



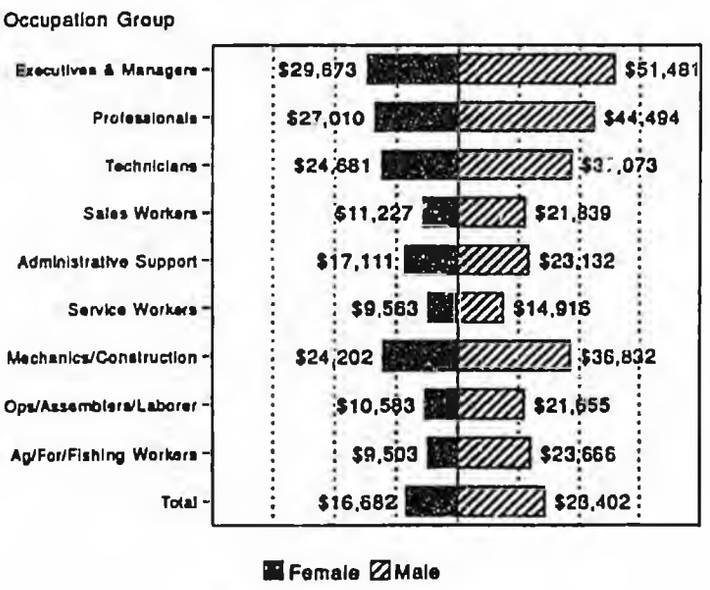
In 1990, as in 1988, women earned less than men in every industry. (See Figure 9.) Overall, they earned 61.2% of male income in 1990 compared to 61.7% in 1988. Working women lost ground over the two-year period in both the private and the public sectors. In the private sector, the gap widened by 0.4% as women earned 55.7% of male income in 1990 compared to 56.1% in 1988. In the public sector, they earned 70.7% compared to 71.4%, an increased gap of 0.7%. The female-to-male wage income ratio fell in 8 of 14 industry groups. Mining, food manufacturing, wholesale trade, finance/insurance/real estate, nonclassified and local government showed an increase.

Figure • 5

Male & Female Average Annual Wage Income by Occupation Group — Alaska, 1990

Note: Data for 82,134 males and 73,224 females for whom occupation data are available.

Source: Alaska Department of Labor, Research & Analysis Section.



Women really haven't come a long way

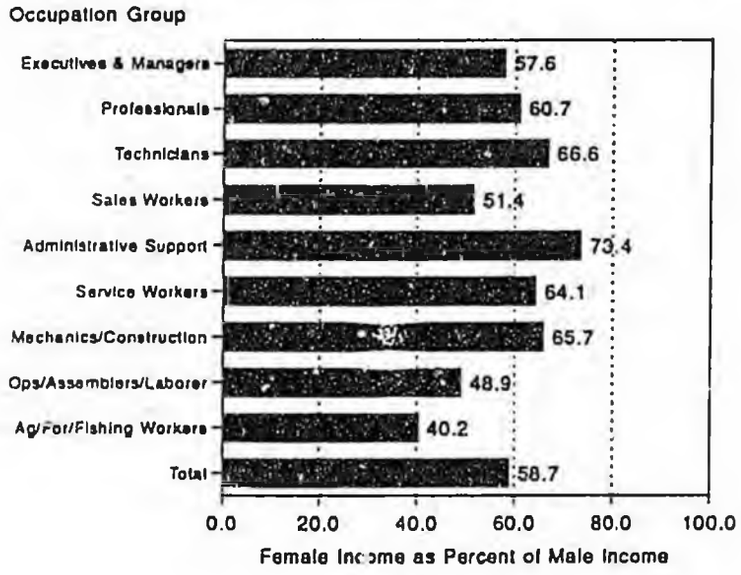
There is no doubt that women increased their share of employment dra-

matically in recent decades. State economic and demographic forecasters predict women will continue to increase their share of the labor market in the foreseeable future. On the other hand, the occupational and industry employment patterns of men and women differ markedly. The most dramatic difference is that women generally earn less than men.

In Alaska between 1988 and 1990, little or no progress is evident in balancing the employment and income patterns of men and women. As a result, occupations and industries continue to be male or female dominated. And the ratio of female-to-male wage income actually has declined.

Figure • 6

Female/Male Ratios of Private & Public Sector Average Annual Wage Income by Occupation Group, Alaska, 1990



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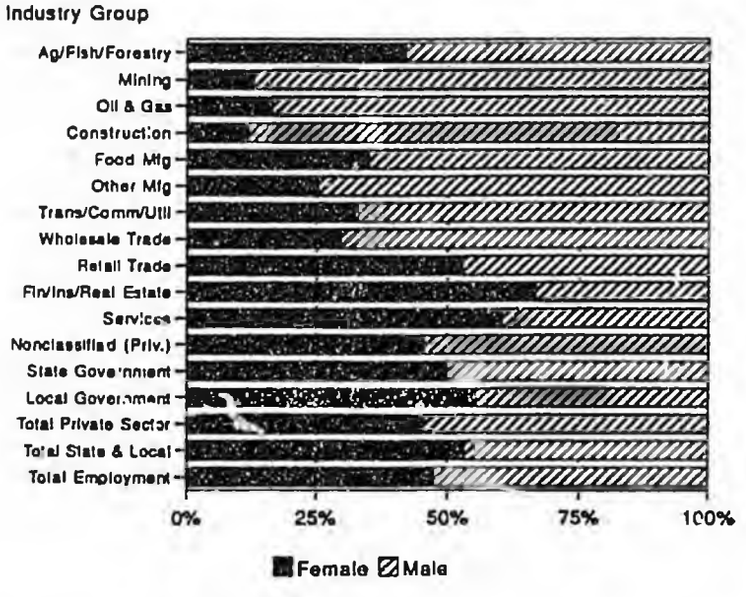
Source: Alaska Department of Labor, Research & Analysis Section.

Figure • 7

Sex Distribution of Total Employment by Industry Group — Alaska, 1990



Note: Data for 124,121 males and 111,545 females.

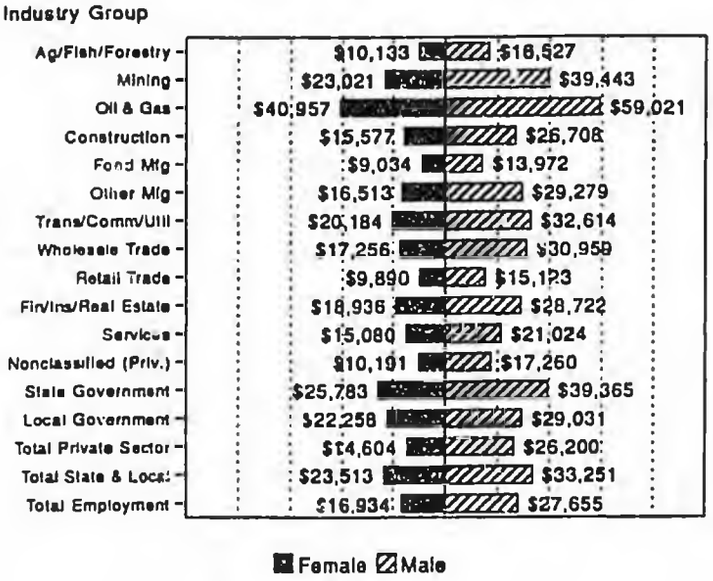
Source: Alaska Department of Labor, Research & Analysis Section.

Figure • 8

Male & Female Average Annual Wage Income by Industry Group — Alaska, 1990

Note: Data for 124,121 males and 111,546 females.

Source: Alaska Department of Labor, Research & Analysis Section.



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Female/Male Ratios of Private & Public Sector Average Annual Wage Income by Industry Group, Alaska, 1990

Note: Data for 124,121 males and 111,546 females.

Source: Alaska Department of Labor, Research & Analysis Section.

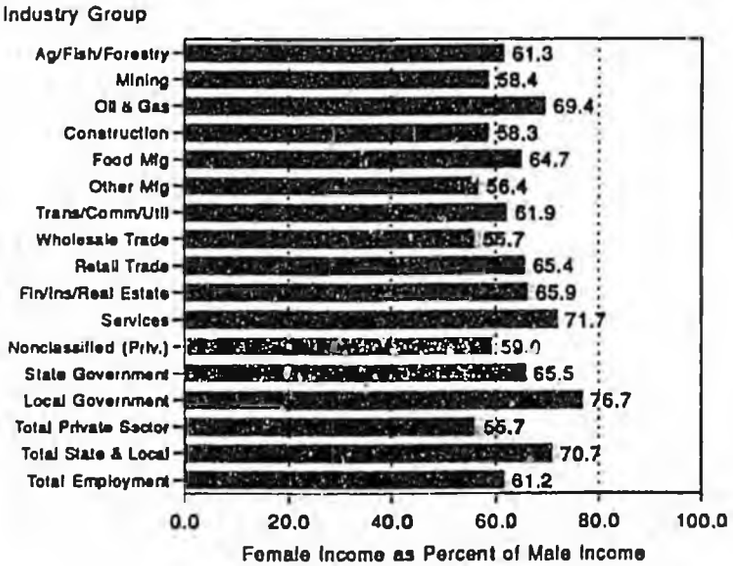

Table 2

100 Occupations With the Largest Employment Ranked by Female Employment — Alaska, 1990

Occupational Title	Employment			Average Annual Wage Income		
	Male	Female	% Female	Male	Female	Female/ Male Ratio
General Office Occupations	1,168	5,319	82.0	17,924	13,429	74.9
Sales Clerks	1,562	3,931	71.6	11,864	8,735	73.6
Secretaries	130	3,858	96.7	20,630	21,202	102.8
Bookkeeping and Accounting and Auditing Clerks	281	2,731	90.7	22,573	19,895	88.1
Waiters and Waitresses	518	2,697	83.9	8,926	7,356	82.4
Teacher Aides	469	2,041	81.3	14,050	11,262	80.2
Receptionists	93	1,725	94.9	10,873	13,096	120.4
Cashiers	504	1,586	75.9	11,329	10,578	93.4
Janitors and Cleaners	2,803	1,521	35.2	13,039	11,550	88.6
Child Care Workers, Except Private Household	196	1,475	88.3	11,739	7,448	63.4
Kitchen Workers, Food Preparation	1,088	1,347	55.3	11,304	9,992	88.4
Miscellaneous Food and Beverage Preparation Occupations	1,565	1,280	45.0	6,817	7,385	108.3
Elementary School Teachers	395	1,260	76.1	36,672	33,352	90.9
Counter Clerks	981	1,252	[illegible]	12,183	7,854	64.5
Registered Nurses	65	1,251	95.1	34,630	27,165	78.4
Management Related Occupations, NEC	806	1,179	59.4	45,902	26,024	56.7
Maids and Housemen	256	1,150	81.8	11,824	8,300	70.2
Food Counter, Fountain and Related Occupations	524	1,050	66.7	5,142	5,065	98.5
Bartenders	457	888	66.0	12,774	11,135	87.2
Adult Education and Other Teachers, NEC	512	865	62.8	22,120	16,200	73.2
Cooks, Except Short Order	1,223	861	41.3	15,132	10,426	68.9
Administrative Support Occupations, Including	150	814	84.4	35,688	17,944	50.3
Managers: Administrative Services	482	790	62.1	47,103	28,915	61.4
Miscellaneous Hand Working Occupations	1,043	789	43.1	9,292	6,794	73.1
Manual Occupations, NEC	3,080	753	19.6	12,250	8,458	69.0
Teachers: College, University and Other Postsecondary	992	726	42.3	36,937	24,472	66.3
General Managers and Other Top Executives	1,448	720	33.2	59,176	30,989	52.4
Reservation Agents and Transportation Ticket Clerks	158	673	81.0	22,300	16,810	75.4
Accountants and Auditors	351	617	63.7	48,451	35,407	73.1
Salespersons: Garments and Textile Products	89	602	87.1	12,481	10,292	82.5
Secondary School Teachers	549	593	51.9	41,078	31,744	77.3
Bank Tellers	35	589	94.4	11,939	12,374	103.6
Personal Service Occupations, NEC	315	576	64.6	14,884	11,626	78.1
Short-order Cooks	660	562	46.0	6,525	5,132	78.6
Social Workers	201	535	72.7	23,521	18,801	79.9
Health Aides, Except Nursing	56	526	90.4	18,585	15,987	86.0
Supervisors: General Office Occupations	147	490	76.9	45,310	28,753	63.5
Attendants, Amusement and Recreation Facilities	534	453	45.9	6,708	6,461	96.3
File Clerks	75	424	85.0	11,269	11,521	102.2

Table • 2 (cont.)

100 Occupations With the Largest Employment Ranked by Female Employment — Alaska, 1990

Occupational Title	Employment			Average Annual Wage Income		
	Male	Female	% Female	Male	Female	Female/ Male Ratio
Salespersons: NEC	663	409	38.2	33,631	15,455	46.0
Stock and Inventory Clerks	933	408	30.4	22,023	12,636	57.4
Hairdressers and Cosmetologists	29	399	93.2	11,480	10,821	94.3
Inspectors and Compliance Officers, Except Construction	256	382	59.9	31,734	15,708	49.5
Nursing Aides, Orderlies, and Attendants	62	381	86.0	17,544	15,378	87.7
Data Entry Keyers	82	377	82.1	20,426	16,206	79.3
Dental Assistants	11	358	97.0	22,140	16,512	74.6
Health Technologists and Technicians, NEC	155	346	69.1	31,808	19,525	61.4
Telephone Operators	43	340	88.8	21,607	22,051	102.1
Supervisors: Food and Beverage Preparation and Service	232	323	58.2	23,911	15,557	65.1
Typists	20	309	93.9	13,978	15,388	110.1
Bus Drivers	480	298	38.3	17,104	10,176	59.5
Library Clerks	48	292	85.9	9,557	13,789	144.3
Billing Clerks	20	286	93.5	22,628	19,491	86.1
Prekindergarten and Kindergarten Teachers	11	284	96.3	22,901	20,148	88.0
Teachers, Ex Postsecondary	123	283	69.7	42,860	30,745	71.7
Welfare Service Aides	56	281	83.4	3,246	5,486	169.0
Dispatchers	188	280	59.8	31,709	17,927	56.5
Supervisors: Sales Occupations, Retail	377	277	42.4	36,986	21,092	57.0
Teachers: Special Education	83	271	76.6	44,906	40,856	91.0
Stock Handlers and Baggers	956	264	21.6	13,673	7,520	55.0
Recreation Workers	198	264	57.1	12,330	10,044	81.5
Payroll and Timekeeping Clerks	27	262	90.7	29,146	22,949	78.7
Construction Laborers	2,722	261	8.7	19,552	11,245	57.5
Officials and Administrators: Other, NEC	355	252	41.5	47,594	32,849	69.0
Record Clerks, NEC	37	247	87.0	24,199	21,838	90.2
Sales Occupations: Services, NEC	136	236	63.4	17,497	15,085	86.2
Librarians	27	227	89.4	33,528	29,660	88.5
Vocational and Educational Counselors	134	224	62.6	35,815	28,318	79.1
Licensed Practical Nurses	14	222	94.1	23,037	22,103	95.9
Computer Operators	153	221	59.1	29,925	24,444	81.7
Financial Managers	226	218	49.1	66,524	44,535	66.9
Bill and Account Collectors	44	212	82.8	23,113	21,454	92.8
Legal Technicians	58	206	78.0	26,545	29,247	110.2
Order Clerks	64	204	76.1	26,227	20,635	78.7
Waiters'/waitresses' Assistants	257	201	43.9	7,305	5,251	71.9
Billing, Posting, and Calculating Machine Operators	19	198	91.2	26,148	20,673	79.1
Managers: Food Serving and Lodging Establishments	200	194	49.2	25,897	17,470	67.5
Public Transportation Attendants	32	178	84.8	22,509	18,173	80.7

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Occupational Title	Employment			Average Annual Wage Income		
	Male	Female	% Female	Male	Female	Female/ Male Ratio
Dental Hygienists	8	177	95.7	NA	26,173	NA
Hand Cutting and Trimming Occupations	435	175	28.7	9,292	7,629	82.1
Business Service, Except Advertising, Sales Occupations	170	167	49.6	40,749	23,855	58.5
Personnel, Training, and Labor Relations Specialist	112	159	58.7	47,222	29,955	63.4
Truck Drivers, Light (Including Delivery and Route)	1,343	155	10.3	20,264	11,110	54.8
Supervisors: Financial Record Processing Occupations	26	153	85.5	45,796	31,229	68.2
Managers: Medicine and Health	76	151	66.5	47,807	37,958	79.4
Guards and Police, Except Public Service	934	143	13.3	24,192	16,979	70.2
Advertising and Related Sales Occupations	89	141	61.3	27,180	27,229	100.2
Insurance Adjusters, Examiners, and Investigators	76	138	64.5	49,514	32,061	64.8
Designers	65	136	67.7	37,184	16,283	43.8
Managers: Marketing, Advertising, and Public Relations	244	135	35.6	51,075	33,569	65.7
Technicians, NEC	187	134	41.7	29,447	19,089	64.8
Clinical Laboratory Technologists and Technicians	28	127	81.9	34,891	26,799	76.8
Freight, Stock, and Material Movers, NEC	1,219	125	9.3	20,171	15,367	76.2
Managers: Property and Leasing	94	125	57.1	38,737	20,499	52.9
Science Technologists and Technicians, NEC	114	122	51.7	23,690	20,896	88.2
Education Teachers	100	122	55.0	43,752	41,283	94.4
Lawyers	266	120	31.1	64,613	46,504	72.0
Traffic, Shipping, and Receiving Clerks	297	112	27.4	23,571	20,507	87.0
Officials and Administrators, Public Adminstration	46	112	70.9	28,318	8,694	30.7
Demonstrators, Promoters, and Models	34	111	76.6	13,059	8,897	68.1
Personnel Clerks, Except Payroll and Timekeeping	7	106	93.8	NA	24,594	NA
Total Top 100	**41,462**	**64,520**	**60.9**	**21,609**	**15,872**	**73.5**
Total	**124,121**	**111,546**	**47.3**	**27,655**	**16,934**	**61.2**

Note: Shaded areas highlight occupations in which female average wage income equals or exceeds male average wage income. These data cover 4-digit Standard Occupational Code (SOC) occupations for people who reported both income and 4-digit occupational codes. Employment is defined as the number of workers who worked in an occupation at any time during the year. Workers, who worked in more than one occupation, are assigned to the occupation in which they earned the majority of their annual wage income. Average wage income is not disclosed for occupations with male or female employment of less than eleven workers. NEC means "not elsewhere classified".

Source: Alaska Department of Labor, Research and Analysis Section.

Table • 3

100 Occupations With the Largest Employment Ranked by Male Employment — Alaska, 1990

Occupational Title	Employment			Average Annual Wage Income		
	Male	Female	% Female	Male	Female	Female/ Male Ratio
Manual Occupations, NEC	2,080	753	19.6	12,250	8,458	69.0
Janitors and Cleaners	2,803	1,521	35.2	13,039	11,550	88.6
Construction Laborers	2,722	261	8.7	19,552	11,245	57.5
Carpenters	1,939	53	2.7	21,221	13,887	65.4
Miscellaneous Food and Beverage Preparation Occupations	1,565	1,280	45.0	6,817	7,385	108.3
Sales Clerks	1,562	3,931	71.6	11,864	8,735	73.6
General Managers and Other Top Executives	1,448	720	33.2	59,176	30,989	52.4
Truck Drivers, Light (Including Delivery and Route)	1,343	155	10.3	20,264	11,110	54.8
Mechanics and Repairers, NEC	1,255	66	5.0	36,373	22,958	63.1
Cooks, Except Short Order	1,223	861	41.3	15,132	10,426	68.9
Freight, Stock, and Material Movers, NEC	1,219	125	9.3	20,171	15,367	76.2
General Office Occupations	1,168	5,319	82.0	17,924	13,429	74.9
Kitchen Workers, Food Preparation	1,088	1,347	55.3	11,304	9,992	88.4
Automobile Mechanics	1,084	17	1.5	27,745	22,736	81.9
Electricians	1,069	31	2.8	39,331	24,019	61.1
Miscellaneous Hand Working Occupations	1,043	789	43.1	9,292	6,794	73.1
Truck Drivers, Heavy	1,029	35	3.3	30,043	21,021	70.0
Teachers: College, University and Other Postsecondary	992	726	42.3	36,937	24,472	66.3
Counter Clerks	981	1,252	56.1	12,183	7,854	64.5
Stock Handlers and Baggers	956	264	21.6	13,673	7,520	55.0
Guards and Police, Except Public Service	934	143	13.3	24,192	16,979	70.2
Stock and Inventory Clerks	933	408	30.4	22,023	12,636	57.4
Operating Engineers	839	83	9.0	36,507	30,512	83.6
Airplane Pilots and Navigators	812	18	2.2	40,053	29,728	74.2
Management Related Occupations, NEC	806	1,179	59.4	45,902	26,024	56.7
Heavy Equipment Mechanics	774	7	0.9	42,427	NA	NA
Plumbers, Pipefitters and Steamfitters	751	17	2.2	36,327	28,185	77.6
Stevedores	707	48	6.4	13,751	6,631	48.2
Garage and Service Station Related Occupations	667	62	8.5	12,354	7,211	58.4
Salespersons: NEC	663	409	38.2	33,631	15,455	46.0
Short-order Cooks	660	562	46.0	6,525	5,132	78.6
Machinery Maintenance Occupations	652	18	2.7	38,283	38,350	100.2
Supervisors: Mechanics and Repairers	612	29	4.5	52,609	49,230	93.6
Police and Detectives, Public Service	599	55	8.4	41,744	40,895	98.0
Extractive Occupations, NEC	588	23	3.8	39,144	29,068	74.3
Communications Equipment Repairers	583	67	10.3	53,070	36,711	69.2
Secondary School Teachers	549	593	51.9	41,078	31,744	77.3
Attendants, Amusement and Recreation Facilities	534	453	45.9	6,708	6,461	96.3
Food Counter, Fountain and Related Occupations	524	1,050	66.7	5,142	5,065	98.5
Waiters and Waitresses	518	2,697	83.9	8,926	7,356	82.4
Adult Education and Other Teachers, NEC	512	865	62.8	22,120	16,200	73.2

Table • 3 (cont.)

100 Occupations With the Largest Employment Ranked by Male Employment — Alaska, 1990

Occupational Title	Employment			Average Annual Wage Income		
	Male	Female	% Female	Male	Female	Female/ Male Ratio
Cashiers	504	1,586	75.9	11,329	10,578	93.4
Painters (Construction and Maintenance)	492	17	3.3	22,656	8,320	36.7
Welders and Cutters	492	4	0.8	34,996	NA	NA
Managers: Administrative Services	482	790	62.1	47,103	28,915	61.4
Bus Drivers	480	298	38.3	17,104	10,176	59.5
Petroleum Plant Operators	478	25	5.0	76,440	68,032	89.0
Vehicle Washers and Equipment Cleaners	471	67	12.5	12,347	10,385	84.1
Teacher Aides	469	2,041	81.3	14,050	11,262	80.2
Excavating and Loading Machine Operators	460	13	2.7	37,511	27,917	74.4
Bartenders	457	888	66.0	12,774	11,135	87.2
Hand Cutting and Trimming Occupations	435	175	28.7	9,292	7,629	82.1
Salespersons: Parts	411	70	14.6	25,189	15,409	61.2
Elementary School Teachers	395	1,260	76.1	36,672	33,352	90.9
Supervisors: Sales Occupations, Retail	377	277	42.4	36,986	21,092	57.0
Misc Material Moving Equipment Operators	375	8	2.1	31,275	NA	NA
Aircraft Engine Mechanics	368	14	3.7	31,663	27,942	88.2
Truck Drivers, Tractor-trailer	362	5	1.4	29,812	NA	NA
Officials and Administrators: Other, NEC	355	252	41.5	47,594	32,849	69.0
Accountants and Auditors	351	617	63.7	48,451	35,407	73.1
Industrial Machinery Repairers	345	44	11.3	42,873	26,294	61.3
Logging Occupations, NEC	340	29	7.9	29,331	10,460	35.7
Civil Engineers	321	28	8.0	51,224	42,102	82.2
Personal Service Occupations, NEC	315	576	64.6	14,884	11,626	78.1
Baggage Porters and Bellhops	307	53	14.7	17,347	19,405	111.9
Traffic, Shipping, and Receiving Clerks	297	112	27.4	23,571	20,507	87.0
Sailors and Deckhands	288	38	11.7	20,122	12,986	64.5
Bus and Truck Engine, and Diesel Engine Mechanics	284	5	1.7	35,626	NA	NA
Bookkeeping and Accounting and Auditing Clerks	281	2,731	90.7	22,573	19,895	88.1
Supervisors: Overall Construction	273	3	1.1	56,632	NA	NA
Supervisors: Production Occupations	271	45	14.2	57,543	25,090	43.6
Aircraft Mechanics (Except Engine Specialists)	268	6	2.2	31,702	NA	NA
Lawyers	266	120	31.1	64,618	46,504	72.0
Petroleum Engineers	261	30	10.3	94,118	73,644	78.2
Garbage Collectors	258	53	17.0	14,583	9,956	68.3
Waiters'/waitresses' Assistants	257	201	43.9	7,305	5,251	71.9
Maids and Housemen	256	1,150	81.8	11,824	8,300	70.2
Inspectors and Compliance Officers, Except Construction	256	382	59.9	31,734	15,708	49.5
Supervisors: Handlers, Equipment Cleaners, Helpers	246	61	19.9	32,221	14,631	45.4
Managers: Marketing, Advertising, and Public Relations	244	135	35.6	51,075	33,569	65.7
Helpers: Miscellaneous Mechanics and Repairers	240	8	3.2	27,874	NA	NA

Table • 3 (cont.)

100 Occupations With the Largest Employment Ranked by Male Employment — Alaska, 1990

Occupational Title	Employment			Average Annual Wage Income		
	Male	Female	% Female	Male	Female	Female/ Male Ratio
Electrical Power Installers and Repairers	240	5	2.0	51,880	NA	NA
Hand Packers and Packagers	236	50	17.5	11,965	7,891	66.0
Groundskeepers and Gardeners, Except Farm	233	67	22.3	10,702	9,412	87.9
Supervisors: Food and Beverage Preparation and Service	232	323	58.2	23,911	15,557	65.1
Machine Feeders and Offbearers	231	77	25.0	14,130	6,159	43.6
Industrial Truck and Tractor Equipment Operators	231	10	4.1	33,776	NA	NA
Automotive Body and Related Repairers	230	2	0.9	29,929	NA	NA
Financial Managers	226	218	49.1	56,524	44,535	66.9
Heating, Air-conditioning, and Refrigeration Mechanics	224	5	2.2	34,752	NA	NA
Salespersons: Hardware	222	88	28.4	19,858	12,980	65.4
Construction Managers	222	17	7.1	58,761	27,283	46.4
Driver-sales Workers	220	26	10.6	17,018	15,001	88.1
Power Plant and Systems Operators, Exc. Stationary	213	7	3.2	32,841	NA	NA
Expediters	207	60	22.5	25,233	19,769	78.3
Social Workers	201	535	72.7	23,521	18,801	79.9
Managers: Food Serving and Lodging Establishments	200	194	49.2	25,897	17,470	67.5
Grader, Dozer, and Scraper Operators	199	5	2.5	30,630	NA	NA
Recreation Workers	198	264	57.1	12,330	10,044	81.5
Child Care Workers, Except Private Household	196	1,475	88.3	11,739	7,448	63.4
Engineers, NEC	196	16	7.5	85,990	58,824	68.4
Total Top 100	62,231	45,953	42.5	26,107	14,301	54.8
Total	124,121	111,546	47.3	27,655	16,934	61.2

Note: Shaded areas highlight occupations in which female average wage income equals or exceeds male average wage income. These data cover 4-digit Standard Occupational Code (SOC) occupations for people who reported both income and 4-digit occupational codes. Employment is defined as the number of workers who worked in an occupation at any time during the year. Workers, who worked in more than one occupation, are assigned to the occupation in which they earned the majority of their annual wage income. Average wage income is not disclosed for occupations with male or female employment of less than eleven workers. NEC means "not elsewhere classified".

Source: Alaska Department of Labor, Research and Analysis Section.

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By the year 2000 all of the nation's poor will be women and their children....You may be among...

THE·NOUVEAU POOR

Avis Strong Parke lives in a summer house on Cape Cod, but when we visited her it was not summer and the wind cutting across the bay shook the plastic covering on the windows and turned her breath white as she spoke. "We don't have any heat," she apologized, almost compensating for the cold with her smile. "You get used to that. The real problem is that the pipes tend to freeze and crack." Her outfit gave us a new perspective on the price of plumbing repairs: trousers outgrown by one teenage son, shoes worn out by another, and thermal underwear shared with another of her six children, three of whom still live at home with her. In her own phrase, Avis is one of the "nouveau poor": middle class by birth and marriage, she is now raising her three youngest children on a tenuous combination of welfare, child support, and her native Yankee ingenuity.

Most people know that the poor, with what the Administration calls their "runaway entitlements," are slated to take the brunt of the federal budget cuts. What most people do not know is that today, more than at any time in recent history, the poor are likely to be women. Two out of three adults who fall into the federal definition of poverty are women, and more than half the families defined as poor are maintained by single women. In the mid-sixties and until the mid-seventies, the number of poor adult males declined, while the number of poor women heading households swelled by 100,000 a year, prompting the National Advisory Council on Economic Opportunity to predict:

All other things being equal, if the proportion of the poor in female-householder families were to continue to increase at the same rate as it did from 1967 to 1978, the poverty population would be composed solely of women and their children before the year 2000.

The grim economic news belies the image of the seventies as women's "decade of liberation." For some women, in some ways, it was. Women who were young, educated, and enterprising beat a path into once-closed careers like medicine, law, college teaching, and middle management. In the media, the old feminine ideal of the suburban housewife with 2.3 children and a station wagon was replaced by the upwardly mobile career woman with attaché case

BY BARBARA EHRENREICH AND KARIN STALLARD

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and skirted suit. Television "anchorwomen" became as familiar as yesterday's news, chairmen became chairpersons, so that at times it seemed as if the only thing holding back *any* woman was a subnormal supply of "assertiveness." But, underneath the upbeat images, women as a class—young, old, black, white—were steadily losing ground, with those who were doubly disadvantaged, black and Hispanic women, taking the heaviest losses.

Sociologist Dr. Diana Pearce, who first flagged the trend in a 1978 article, calls it "the feminization of poverty," and if the phrase is not yet a household expression, it may be because public officials are loath to advertise the fact that the prime victims of service cutbacks are women—women and their dependent children. According to Pearce, the trend is accelerating. Between 1978 and 1980, the number of women who head households recruited into poverty rose to 150,000 per year, and there is every reason to think it will continue to increase. The feminization of poverty—or, to put it the other way, the impoverishment of women—may be the most crucial challenge facing feminism today.

Avis Parke is one of the recent "recruits," and she does not fit any of the stereotypical images of female poverty. She is not an elderly widow. Nor is she a habitué of what conservatives call "the welfare culture," with the implication that poverty is a congenital and, possibly, racial defect. She is 51 years old, divorced, a welfare recipient for just a little over a year, and—like nearly two thirds of the adult single women who are poor—she is white. If Avis Parke, with her handsome New England features and hearty outgoing manner, is not the kind of person you would expect to catch paying for her groceries with food stamps, she is in some ways typical of the new female poor. The fastest-growing segment of the female poor are single women—divorced or never married—raising their children on their own.

There was little in the first 48 years of Avis Parke's life to prepare her for an existence in which the cost of the laundromat has to be weighed against the price of a haircut for one of her sons, and the pleasure of having guests is offset by the cost of serving coffee. Her ancestors arrived from England in 1630, in what must have been one of the first boats after the *Mayflower*, and on one side she can trace her family back to John and Abigail Adams. When she was a 19-year-old college student, she married a young man who was studying for the Unitarian ministry, and she began to gear her own ambitions to "being a fully functioning partner in my husband's work as a minister." In deference to the Administration's recent attempts to distinguish the "deserving" from the "undeserving" poor, we should mention that Avis was a virgin when she married, with 300 people in attendance, at Boston's famous Arlington Street Church, and that she believed for many years that decisions about sex and family planning were best left to her husband. In fact, the most striking thing about Avis's life before poverty is how thoroughly and patiently she lived out the mid-century feminine mystique.

When her husband moved, she moved. When they were temporarily settled, she worked hard at being the minister's wife, attending church functions and visiting parishioners. When he decided he needed to further his theological education, she helped put him through school. Through it all, she was immersed in motherhood. "I just had babies every two years. I wanted at that point to be domestic and be a mother and that was what I knew best how to do." She studied natural childbirth, well before it was stylish, and breast-fed all six babies. She believed in her husband's mission and tried to live through it. "My name was always attached to his . . . people saw us as one unit."

> Divorce ended Avis's membership in the middle class.

As the babies grew and the moves multiplied, crisscrossing the Northeast, strains developed in their marriage. In her forties Avis discovered that she wanted to be "a personage on my own . . . with self-pride and esteem . . . not just my husband's wife or my children's mother." She also discovered that her husband was, as she puts it, "being intimate" with other women. There were angry confrontations, but she kept on believing that "when he recognized what a good thing he had going in our marriage and our home and our children and myself, then he would come around . . . and after all this, in twenty years, we would die together." Then, one evening when she was in the kitchen finishing the dishes, he came in and announced that he had filed for a divorce. This was three years ago, and it was the end of Avis Parke's membership in the middle class.

Today, Avis takes a certain pride in another kind of membership—in a spreading network of other local women who are also poor and also single. On the day in late February when we visited, Avis invited five of her friends over to sit around the electric heater in the Hyannis Community Action Center and talk about what it means to be single and poor. There is Mary Ann who, in better times, has made $5 an hour working in a travel agency but now cannot afford a place to live for herself and her son, who was seriously injured in a car accident several months ago. There is Betsy, a 52-year-old woman who cannot see well enough to hold a job, but is not technically blind, and hence does not qualify for Supplemental Security Income (SSI). There is Janet, who grew up in a Polish-American working-class family believing that the poor were "people who had a lot of kids and didn't know how to talk right"; Sally, in her mid-thirties, who maintains her stylish good looks in defiance of a poverty-level budget; Felicia, the youngest of the group, who is sustained by her personal combination of environmentalism and spiritualism.

The talk was irreverent, wide-ranging, and oddly cheerful—something like one of those early consciousness-raising sessions where shared anger became the basis for a more deeply shared affection. But the subject kept returning to money—wages, rents, prices—and it was *our* consciousness that was being raised. Betsy talked about the petty indignities of poverty: "The government does give me food stamps, so I eat. But when I need certain little basic things, like having my teeth cleaned, well, I can't have them. And I have to curb my habits. Don't walk in a liquor store and buy a bottle. Don't look at the books they sell in supermarkets. Keep away from the stores.

"By the way," she said, standing up and modeling for us, "I want you to know I really dressed for the interview today. The dress comes from a church bazaar; the hat cost a quarter. I bought the glasses because rehab does not buy me the glasses. I also bought the stockings, okay? I

bought those for seventy-nine cents at the grocery store. A friend gave me the boots, and the purse comes from the Salvation Army."

Everyone got into the act, showing off the $1.99 blouse from the thrift shop, the *haute couture* from Goodwill, the chic-er offerings from the local churches. But, when we returned to the larger issues of subsistence, the laughter faded.

"I've been slammed down, beat down, so much," said Mary Ann, "that my anger is really getting up. I work in an office with fifteen fantastic women who are suffering exactly as I am. You want to talk about mad? Every one of these women is divorced. We come home with a hundred and twenty-three dollars a week. We don't even know how we're going to eat. . . . How the kids are going to be fed." There was an agreement that what had happened to them could happen to almost any woman. But, said Sally, "There is a lot of denial among women. It's like how people are about seat belts. They don't want to wear them because they don't want to face the fact that they're really in danger . . ."

The Descent into Poverty

For many women like those we talked to in Hyannis, poverty begins with single parenthood—becoming single or becoming a parent, whichever comes first. Avis Parke's was a classic case of the husband leaving for a younger woman. Carla was only 23 when she packed up her two-year-old daughter and left her husband. A moderately prosperous restaurant owner in Long Island, he had a habit of pushing Carla down the stairs and kicking her when she fell. Now she is on welfare and works off the books as a cleaning woman. Louella Johnson's husband took off one day and left no forwarding address. Before moving in with relatives in the black community of Oakland, California, she had to steal to feed her two children. Janice Cagle, who lives in Du Page County, Illinois, entered poverty with the birth of her baby and the almost simultaneous departure of her boyfriend. All in all, the number of female-headed families with children increased by 81 percent during the seventies and approximately one third of these families are poor.

A woman's first line of defense, once she finds herself sinking into poverty, is to try to collect from the missing male. But the chances of sitting pretty on child support and alimony are about equal to the odds of drawing steady income from the state lottery. Despite the "Kramer vs. Kramer"-inspired myth of paternal reliability, 40 percent of departed fathers contribute nothing to their children's support, and the average payment provided by the other 60 percent is less than $2,000 a year. (Also contrary to the myth, the latest census figures show that the number of men raising children on their own *declined* between 1970 and 1980.) Some men, like Louella Johnson's husband, make a clean getaway (though she eventually traced him to the Navy). Others, like Carla's, make themselves intolerable. Carla was awarded child support on the condition that her husband have visitation rights with his daughter, but after two of his visits turned into assaults on herself and a third led to a weekend-long kidnapping of the child, Carla decided she would rather be dependent on welfare than on him.

Even when the father is law-abiding and reasonably affluent, the amount of his court-awarded support is usually painfully meager. Diana Pearce believes the courts take a punitive attitude toward divorced women: "It's as if the judge says, 'You want to be independent? You want to raise children on your own? Then do it.' " Judicial compassion runs especially low in the case of black women, who stand only a 29 percent chance of being awarded any child support by the courts, compared to a 71 percent chance for white women.

The next line of defense for the woman facing poverty is not—contrary to popular opinion—public assistance. A 1978 study by Nancy Mudrick, associate professor of social work at Syracuse University, showed that women's dependence on Aid to Families with Dependent Children (AFDC) peaked after a full two years of divorce or separation. This means that most women make a valiant effort to support themselves before turning to welfare; but here, too, the odds are discouraging. First there is the problem of child care. There were only 467,000 government-subsidized day-care slots allotted in fiscal 1982, and the current federal budget cuts call for a 25 percent reduction. Without low-cost day care, friends or relatives have to be mobilized to watch the children. Carla, for example, worked out an intricate trading system with another single mother next door. Then there's transportation. Janice Cagle gave up her job as a maintenance foreman when her car broke down; Avis Parke had no car until recently and no access to public transportation. And women, if they can get to jobs and arrange for child care, earn, on the average, just over $10,000 a year, compared to an average of $21,000 for men. According to the Bureau of Labor Statistics, it takes $25,407 a year to maintain a family of four at an "intermediate" standard of living—$15,000 more than the average women's earnings.

Welfare, for many women, is a last resort. There are about 3 million women receiving AFDC for themselves and their 8 million children and the major reason there are not more is that the system is designed to discourage all but the most determined, or desperate, from using it. Avis Parke's friend Sally laughed as she recalled how naive she was on her first visit to the welfare office: "I walked in and I said, 'Hi, I'm Sally Michaels. I really don't know much about this. Do you have any brochures?" For her first visit to the welfare office, Carla wore a trim suit and dressed her daughter in a starched pinafore. They sat in the waiting room from 8:30 A.M. to closing time at 4:30 P.M., and they skipped lunch because Carla had only enough money for the trip home. The next day, the same thing happened until, near closing time, Carla "threw a fit, an absolute hysterical fit" and finally won an intake interview. Once on the rolls, the humiliation continues. Carmen Gonzales, who has made her way from being a welfare recipient to being a paid welfare advocate in Brooklyn, New York, told us: "I would cry whenever I came home from welfare. And my kids would ask, 'Mama, what's wrong?' and I just had to be alone for a while afterward because it was so degrading. . . . I felt like a hungry dog going to get a very small bone."

At current benefit levels, that "bone" is very small indeed. In 1980, the average AFDC monthy payment for a family of four was $398. The Children's Defense Fund, an independent agency in Washington, D.C., reports: "In most states AFDC payments are intolerably low, failing to provide even a minimum

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level of decency. In Mississippi, the average payment for a child is 97 cents a day; in Texas, it is $1.18 a day; in South Carolina, $1.22." Food stamps help some, but there is no state where the combined benefits of AFDC and food stamps are enough to bring a family *up to* the official poverty level. And this, we should emphasize, was the situation *before* the Reagan cutbacks. As the cuts go into effect, says Carmen Gonzales, "it will be hell. People are already pressed to the limit."

What Makes Women Poor?

The feminization of poverty was under way well before the Administration began its current assault on the poor—before Reagan and even before Carter. The causes are economic and they are also what we loosely call "social," and they are not likely to go away. First, there is the matter of jobs: it is true that more American women are employed now than at any time in this century, but for women, employment is not necessarily an antidote to poverty. The jobs that are available to us are part of the problem.

The list is familiar—clerical work, sales, light manufacturing, and the catchall category, "service work," which includes nurse's aides and grade-school teachers, waitresses, and welfare caseworkers. Only 20 out of 420 listed occupations account for 80 percent of employed women, and it is this occupational segregation—more than any "overt" discrimination—that accounts for women's low average earnings. In general "women's work" not only pays less than men's but is less inflation-proof. The Bureau of Labor Statistics reports dramatic declines in real earnings for the sectors of the work force in which women are concentrated, such as services and clerical work.

Even when men and women share the same occupational category, distinctions of rank and function often maintain the income inequality. On the same floor of a department store, you may find women selling luggage and will probably find men selling washing machines. Men don't *know* more about washing machines, just as women have no special affinity for valises, but it is the washing-machine sale that brings a commission. Distinctions like this account, in large part, for the fact that, in 1981, women sales workers earned on the average only 52 percent as much as male sales workers, while women college teachers earned 80 percent as much as their male colleagues, and women bank officers earned 60 percent as much as their male counterparts.

Not that women haven't made heroic efforts to crack the traditionally male skilled trades. "The women who come to us are incredibly determined," says Rosemary Goldford, the director of New York's Nontraditional Employment for Women (NEW), a CETA-funded agency that helps low-income women get training and placement for skilled blue-collar jobs. Thanks to affirmative action, special training programs and sheer chutzpah, the number of female skilled blue-collar workers increased by 80 percent in the seventies, but the magnitude of the change chiefly reflects women's abysmally low starting point. Only 3 percent of machinists are women; 2 percent of electricians; 1 percent of auto mechanics—and women's prospects in these usually well paid, unionized occupations are not encouraging. When a New York local of the International Brotherhood of Electrical Workers announced in the fall of 1980 that applications were available for a position as an apprentice electrician, 1,300 people lined up to get them. "We sent twenty-five women to that line and they camped out for four nights," Goldford recalls, "just to get an application form."

> For women, jobs are no sure antidote to poverty.

The extreme occupational segregation of women in our society makes for a crucial difference between women's poverty and men's. For men, poverty is often a consequence of unemployment, and is curable by getting a job. But for women, concentrated in the low-wage stratum of the work force, a job may not be a solution to poverty. According to the National Advisory Council on Economic Opportunity, "poverty among hundreds of thousands of women already working underlines the failure of the 'job' solution. Of the mothers working outside the house who headed households with children less than 18 years old in 1978, more than one quarter had incomes below the poverty level."

But occupational "desegregation" may no longer be an effective, long-term solution to women's poverty, either. Affirmative action can help women out of the low-paid ghetto of "women's work," but the underlying trend in the U.S. labor market has been for intermediate level, skilled and semiskilled jobs to disappear. The skilled trades, for example, which offered generations of European immigrant men a way out of poverty, have been going the way of the blacksmith and the itinerant scissor-sharpener. In her 1981 study of the labor market, MIT professor Emma Rothschild found that 70 percent of all new private-sector jobs created between 1973 and 1980 were low-paid, mostly women's jobs, in the retail and service sectors. One reason for the shift is the "deindustrialization" of America as capital has shifted from heavy manufacturing (*e.g.*, cars and the rubber and steel to make them) to more lucrative short-term or overseas investments. The other reason has to do with automation and what management considers an "efficient" division of labor.

In his classic 1974 study, *Labor and Monopoly Capital*, Harry Braverman argued that low-paid, low-skilled jobs tend to proliferate at the expense of higher paid, skilled jobs, and that this trend stems from the employer's basic drive to maximize profits. Low-paid assembly-line workers, each performing one repetitive process, replace the skilled mechanic, and so forth. As Braverman pointed out, the "dumb" jobs that are left after automation and a redivision of labor are often considered women's work.

Bennett Harrison, a professor of economics and urban studies at MIT, says that his studies of the New England economy bear out the trends that Braverman described. "The reorganization of work that occurs with the introduction of new automation equipment tends to eliminate jobs at the center of the skill spectrum. We call it the case of the disappearing middle. You have more low-skill jobs at the bottom, jobs that are likely to be slotted for women, and then you have managerial jobs at the top—and a growing polarization between them." Sometimes the "disappearing middle" includes those jobs that have traditionally been skilled job opportunities for women. In their 1981 study of the "retail revolution," Barry Bluestone and his coauthors found that as department-

store chains centralize their buying and computerize their inventory control, well-paying, usually female jobs like those of the buyers (who might have risen from the sales force) are being eliminated. (In discount stores like K-Mart and Woolco, even the saleswomen have vanished, and the only women workers in sight are the check-out "girls" earning between $3 and $4 an hour.) "We may be approaching a situation like that in some industrializing Third World countries," says Anna Lee Saxenian, an editorial board member of the monthly economic magazine, *Dollars and Sense*, "where there has been a big increase in jobs for women—often more than for men—but the jobs don't lead anywhere, they don't lift women out of poverty."

In the old days, circa 1955, when Americans believed that they had achieved "the affluent society," women's earning power was an esoteric subject that barely rated academic notice. According to prevailing mythology, men got jobs and women—unless they were grossly inept—got men. The fact that about 30 percent of all women (and almost 50 percent of black women) worked outside their homes did not alter the "pin money" theory of women's employment. In the middle-class mainstream, women expected to be supported by their husbands, and men expected their wives to stay at home as visible evidence of their success as breadwinners: this was the unwritten pact between the sexes. But, as we know, the pact has been rather abruptly broken. The divorce rate doubled between 1960 and 197[illegible] leveled briefly between 1977 and 1978 and is now heading upward off the charts again. Whether through divorce, desertion, or death, an estimated 85 percent of American women can expect to have to support themselves (if not themselves and their children) at some time in their lives. And that is the second major reason for the feminization of poverty in the 1970s.

"The family" as a social issue has one thing in common with the real families most of us grew up in—it is an area where emotions tend to crowd out clear thinking and reasoned analyses. Even the phrase commonly used to describe what happened in the 1970s—"the breakdown of the family"—implies the value judgment that what's left is somehow damaged, "broken." Despite the efforts of feminists to promote more pluralistic notions of what constitutes a legitimate family, there is still a stigma attached to the female-headed household. The question of why the numbers of these households are increasing easily becomes a question of who's to *blame*.

In the 1960s, when female-headed households were still seen as a largely black phenomenon, Daniel Patrick Moynihan (now Democratic Senator from New York) advanced the theory that

PROGRAM	FISCAL YEAR 1983 REAGAN BUDGET PROPOSALS AND IMPACT ON WOMEN
Nutrition	
WIC (Women, Infants, Children) *Food Program:* all of the 2 million recipients are women and children identified as "nutritional risks"	Terminate as separate program and include in block grant, giving states broad program discretion; cut money earmarked for WIC by $300 million, eliminating 700,000 participants unless states choose to fund from own resources
Food Stamps: 85% of the 22 million recipients are women and children	Cut by $2.3 billion (on top of FY '82 cut of $2.4 billion); 16% of food-stamp households will lose all benefits; 70% will lose some benefits
School Lunch Program: 48% of families served are headed by women	Freeze funds at FY '82 level (a 35% cut from FY '81) and withdraw "entitlement" status (allowing further administrative cuts); some 9.5 million children will be dropped from the program
Medical Care	
Family Planning: 99% of 4.5 million users are women	Freeze funds at FY '82 level (a 25% cut from FY '81); reduce federal matching funds by half; include program in block grant to states with new regulations for parental notification for birth control prescribed for minors
Medicaid: 61% of recipients are women	Cut by $2.1 billion and reduce federal funds for optional services (glasses, prenatal care, physical therapy, dental care)
Medicare: 60% of enrollees are women	Cut by $2.5 billion and increase share of expenses (currently more than 50%) borne by enrollees
Education	
Title I—Compensatory Education for the disadvantaged: 60% of families served are headed by women	Cut service levels by 50%, eliminating 2.5 million children from program
Energy	
Low-Income Energy Assistance: 85% of 8.5 million households served are elderly or headed by women	Cut by 31% and require reductions based on food-stamp allowance, forcing many to choose between food and heat; 2.3 million households will be dropped from program
Income Supports	
AFDC (Aid to Families with Dependent Children): 93% of 4 million served are women and children	Cut by $2 billion (federal, state, and local funds); tighten eligibility; require "workfare"; at least 600,000 families will lose AFDC (and Medicaid eligibility) or receive reduced benefits; more than 160,000 families will no longer qualify for federally aided child care
SSI (Supplemental Security Income): women make up most of 4.2 million aged, blind, or disabled recipients	Cut by $286 million; tighten eligibility; 2.6 million, or 65% of recipients, will have benefits eliminated or reduced
Legal Services	
Legal Services Corporation: 67% of clients are poor women	Eliminate program (or restrict kinds of litigation allowed); if eliminated, well over a million poor people will lose access to judicial system
Employment	
CETA (Comprehensive Employment and Training Act): women are more than 60% of those eligible	Eliminate program at end of FY '82 and institute a much reduced, state-controlled substitute

Chart prepared by Vikki Gregory, codirector of Women's Workforce, Wider Opportunities for Women

SPE... REPO...

poverty causes female-headed households and vice versa, in an endless cycle of self-propagating social breakdown. Poor blacks, according to Moynihan, live in a "matriarchy" where the very predominance of strong women inhibits men's talents as responsible breadwinners, and leads to a new generation of female-headed households.

By the end of the seventies, however, this kind of racial—and class—stereotype clearly did not fit the demographic facts. The female-headed family—or to put it less hierarchically, a family consisting of a woman plus her dependent children—is the fastest growing type of family in America. It is true that the change is most spectacular in the black community, where more than 45 percent of families are now headed by women (compared to 31 percent in 1970). But the change cuts across race and class lines, and defies stereotypes. Though only 14 percent of white families are female-headed, the number of white female-headed families has been increasing, throughout the 1970s, almost as fast as the number of black female-headed families. Perhaps surprisingly, college-educated women of both races are more likely than others to become single mothers. In his study, "Economic Policies and Black Progress," issued by the National Urban League, Robert B. Hill found that female-headed households are increasing 10 times faster among college-educated black women than among black women who have not completed high school. Among white women, households headed by college-educated women are increasing five times faster than those headed by women who did not complete high school. By 1980, college-educated women were heading more than one fifth of all female-headed families. Thus the female-headed household can no longer be regarded as a telltale feature of the "culture of poverty."

Yet the tendency to blame someone still runs strong especially when the female-headed household originates in divorce, and the most recent scapegoat—replacing the black "matriarch"—is the working woman. To the ideologues of the New Right, the baneful effects of female employment are self-evident: it makes women selfish and it makes men irresponsible. George Gilder, President Reagan's favorite social theorist, believes that female wages undermine men's ability to control their destructive impulses: "If they cannot be providers, they have to resort to muscle and phallus." In his one known departure from a pure free-market economic philosophy, Gilder advocates *enforcing* wage differentials between women and men—because unemployed men are potentially dangerous, while "unemployed women can perform valuable work in creating and maintaining families."

Kathleen Teague, founder of Virginia STOP-ERA and a frequent spokeswoman for the New Right's "profamily" politics, offered several reasons why women's entry into the work force disrupts marriages. For one thing, she told us, "once a woman is earning some money, she tends to want to have some say in how it's spent. Finances become a cause of problems." For another, when a man ceases to be the sole breadwinner, he "doesn't feel needed any more." As she explained:

"If a man doesn't think he's needed by his wife, he'll go out and find another woman who does need him. Take the case of a woman who's been a housewife, then she gets women-libberized [sic] and goes into the work force. No matter what, her husband isn't going to feel he's number one in her life any more. So she will lose him to a more conservative woman."

There is, in the grain-of-truth department, an established correlation between a wife's earnings and the likelihood of divorce, but this sociological observation tells us little about the intimate dynamics of divorce and separation. Though it is easy to find out to whom divorces are granted (mostly women), there is no statistical information on who initiates divorce or on how this might be changing over time. The best guess is that women's employment—inadequate as it is in terms of earnings—has simply made it easier for both partners to leave: a woman who feels she is capable of earning a wage is more likely to dump an abusive husband—as Carla did—even if the wage is not sufficient to support the family. And a man is less likely to feel guilty about leaving a woman who, he thinks, can fend for herself. As men's liberation spokesman Herb Goldberg advised in his 1976 book, *The Hazards of Being Male: Surviving the Myth of Masculine Privilege:* "Support your wife's assertiveness during marriage, her educational and occupational development, and anything else that will make her an autonomous, independent person. Then, during divorce, it will make you less vulnerable to guilt..."

Another sociologically accepted correlate of marital disruption is very low earnings on the part of the husband. (In fact, in the case of zero male earnings, things may never get past the premarital stage. There is a clear connection, according to Howard University social welfare professor Harriette McAdoo, between the high rate of out-of-wedlock births among teenage black women and the astounding—some estimates are as high as 60 percent—rate of unemployment among black teenage men.) If the labor market trends discussed above continue, and well-paying (traditionally male), blue-collar jobs continue to vanish, then there would be reason to expect increasing rates of marital disruption among low and lower-middle income people. Men who had once been stably employed industrial workers may find themselves migrant job-seekers, and, if the economy continues to sag, a resident husband may become a status symbol reserved for the executive class.

If so, it may be time to overcome what Diana Pearce calls "our deep social ambivalence toward the woman who is single and economically independent." Robert Hill agrees, pointing out that half of all young black people who go to college come from female-headed households. Summing up the evidence, Andrew Cherlin, professor of sociology at Johns Hopkins University and author of *Marriage, Divorce, Remarriage* (Harvard University Press), says: "A large number of studies have made it unclear that the absence of the father was directly responsible for any of the supposed deficiencies of broken homes." The problem, he thinks, is "not the lack of a male presence, but the lack of a male income."

Of the two major causes of the feminization of poverty—the economic fact that women earn very little on their own and the social reality that they are more likely than ever to *be* on their own—most experts agree that only the first is likely to be helped by reform efforts. Eleanor Holmes Norton, former head of the Equal Employment Opportunity Commission, says that she is "alarmed" by the rise in female-headed households in the black community: "You can't underestimate the stress of raising a child in the ghetto by yourself, without a grandma, without an aunt, with no one you can turn to." But she sees no easy way to reverse the trend. "What we *can* do is remedy the conditions under which poor women are living and raising their children—and that means day care, that

means job training.

Mary Rubin, a research associate at the Business and Professional Women's Foundation in Washington, agrees that female-headed households are "unquestionably" here to stay. "For women who are unable to work or unable to find work," she says, "the government needs to increase income support up to a level that guarantees a reasonable standard of living. And for women who are working, which is most poor women, we need vigorous government action against pay inequities and occupational segregation."

Does the Right Have a Plan for Poor Women?

If the Reagan Administration worries at all about the feminization of poverty, it won't turn to feminist or liberal policy analysts. On most issues, the Administration is more disposed to listen to the thinkers and spokespeople of the New Right, and, to hear them talk, they do have a solution to all that ails women, financially and emotionally.

First there is supply-side economics to restore prosperity. As David Stockman explained it in the December, 1981, interview in the *Atlantic* that so embarrassed his employer the President, this means tax breaks and other incentives for the rich, which will supposedly lead, through some undisclosed trickle-down process, to more jobs for everyone else. Then there are the "profamily" measures—from quashing gay rights to reinstating school prayers—all of which will restore a dissolute America to "family values." Add the "profamily" measures to the economic ones, and you get, with just a little more sleight of hand, every man in a job and every woman in her home. If that sounds like an unappealing return to the culture that begot "Father Knows Best," don't worry—it won't happen. Though what will happen, if the New Right and near-New Right have their way, should probably worry us even more.

The New Right's solution to the feminization of poverty is, as you may have deduced, marriage. (Actually, none of the New Right spokespeople we interviewed was aware of the statistics on women and poverty, so the "solutions" were only elicited after a short briefing.) Onalee McGraw, who handles education and family issues at the influential Heritage Foundation (the New Right think tank initially bankrolled by beer magnate Joseph Coors in 1973), rejects economic solutions such as efforts to increase women's earnings. "The priorities would be out of whack," she explained, since her first priority is to make men productive workers and reliable husbands. "I don't oppose equal pay for women," she told us, "but it could possibly exacerbate the whole situation in the long run.... Anything that's more likely to make a woman more independent, more of a powerhouse, more of a threat to men, is not going to help." Her solution? "We need to make it tougher for men to get divorced," and, second, we need to make it tougher for them to remain single or stray, by "withholding sexual favors until they're married."

These are long-term solutions, and possibly difficult to implement, so we pressed Kathleen Teague (who, in addition to her STOP-ERA affiliation is the executive director of the American Legislative Exchange Council, "another New Right institution) for a more immediate solution for women who are poor and single. They should make more of an effort to attract husbands, she told us: "The reason women aren't remarrying is that they don't have the right strategy.... Some single women are trying to be martyrs, to prove they can be independent, that they can do anything. It would be better to say, 'How much I'd like to find a nice man!' Many men tell me how turned off they are by women who are trying so hard to be independent."

> The Right's solution—you may have guessed it—is marriage.

No one in the New Right, however, is demanding an expansion of welfare payments to cover tuition for "total woman" courses, Freudian psychoanalysis, or other aids to the development of a more demure personality. In fact, as we turn from the New Right's profamily philosophy to their economic programs, the scene changes quickly from images of white-fenced cottages to the gray desolation of crumbling tenements and makeshift rural housing. They believe that welfare should be abolished, for the ostensibly charitable reason that, like other forms of female income, it weakens male responsibility. (George Gilder believes that the expansion of welfare in the 1960s produced "a wreckage of broken lives and families worse than the aftermath of slavery.") Government antidiscrimination efforts should be abandoned. Unions should be weakened. If the right is even partly successful, the future—for women—will look more like Engels's portrait of Manchester in the 1840s than Levittown in the 1950s. For, without the protection of government assistance, the poor assume their historical role as *cheap labor*, and the female poor are cheapest of all—excepting, of course, children.

Consider the trend. In the seventies—beginning at the time that the New Right was still just a gleam in Richard Viguerie's eye—more than a million new women slid into the state of extreme deprivation that the government defines as poverty. They faced, along with the already-poor, a steadily dwindling package of public assistance. Actual dollar value of welfare benefits shrank by 29 percent, nationwide, in the decade of the seventies. Now add the current wave of budget cutbacks. An estimated 15 million women will be directly affected by the cuts in AFDC, Medicaid, food stamps, subsidized school lunches, and dozens of other programs. Many of them will be forced to search for jobs, on or off the books, at any wage. (Ironically, some of Reagan's welfare revisions will decrease the incentive to work—at least on the books—by lowering the welfare payments for every dollar earned. Other welfare cuts, though, are simply throwing women off the rolls.) But the wider effect of the cutbacks, as Frances Fox Piven and Richard Cloward argue in their book, *The New Class War*, will be to drive down the wages of people who are now *above* poverty, because the social programs that have allowed the poor to subsist have also allowed the non-poor to risk pushing for better wages and working conditions.

There is already a sense of desperation among America's female poor—a desperation that translates into a willingness to do almost anything, on any terms. After losing her maintenance job in a Chicago suburb, Janice Cagle said, "I applied for a job in every rinky-dink place I could walk to on foot... give me transportation, and I'll wash toilets." A mother of three, in Brooklyn's Bedford-Stuyvesant area, who asked not to be identified, told us, "If it's a matter of having food on the table, I would do anything short of prostitution." One major effect of

Reaganomics, comments Queens College economics professor William Tabb, is "the creation of a veritable army of women who would potentially be available to work under extremely exploitative conditions."

There are still laws to enforce the minimum wage, to protect employees' health and safety and ensure their right to organize—but the right has plans to circumvent them. One idea being promoted by the Heritage Foundation and incorporated in Reagan's economic proposals is for urban "enterprise zones"—designated areas in which companies would be offered tax breaks and other incentives to set up shop. The idea comes, via Margaret Thatcher's administration in England, from Third World countries like Malaysia and the Philippines, where special industrial zones were set up in the 1960s and 1970s to attract multinational corporations. In the Third World models, employers were lured not only by tax holidays and suspension of export duties, but by cheap labor and the absence of health and safety regulations. An estimated 90 percent of the workers in Third World enterprise zones are women, employed chiefly in light assembly work, such as in the manufacture of electronics and garments.

Supporters of the "enterprise zone" plan include liberals like Congressman Robert Garcia (D.-N.Y.), who believes the zones could attract business to the inner city through tax breaks alone, without offering cut-rate wages. Cornell University professor William Goldsmith, who has just completed a study of enterprise zones, is less sanguine. "So far they're saying they don't want to go below the minimum wage," he told us in a March interview, "but I think that's rhetoric. The idea in England was to create 'little Hong Kongs,' and Hong Kong translates into sweatshops." In case all this sounds remote, the Illinois legislature recently passed a bill that would have allowed industrial zones in which the minimum wage as well as health and safety regulations could have been suspended. (The bill was vetoed by Governor James Thompson in September, 1981.) The kinds of jobs that U.S. enterprise zones are likely to attract, Goldsmith predicts, are low-paid, light-assembly work that, whether here or in the Third World, is seen as "women's work." At worst, Goldsmith told us, the zones would "serve as vehicles through which an increasingly disenfranchised and desperate group of women could be massively exploited in the labor market."

While liberals debate the value of enterprise zones, the New Right has an even more innovative plan for women: they would like to legalize "homework" so that women could do industrial or clerical work right in their own homes. This was proposed to us as a solution for female poverty by New Right leader Connaught (Connie) Marshner, editor of the *Family Protection Reporter*, staff member of Paul Weyrich's Committee for the Survival of a Free Congress, and chairman of the Pro Family Coalition and of the powerful Library Court, which brings together representatives from various New Right and antifeminist causes for biweekly strategy sessions. "Business and industries should be able to provide jobs that women can do without leaving their homes, like in micro-electronics," she told us.

Unions are justifiably horrified by the idea of a return to homework, which was widespread in the 19th century. Because it would be hidden in private homes and apartments, no wage regulations could be enforced nor would wages have the same meaning as in a normal workplace, since the homeworker would have to cover all the overhead, and probably supply her own sewing machine, typewriter, or other equipment. Worse still, homework could reopen the door to child labor. Near the turn of the century, poor women and their children worked upward of 14 hours a day to fill their piecework quotas in New York City's garment and hat industries. When we raised this possibility to Marshner, she was not dismayed. "I'm not for child labor," she said. "But if the mother had a computer terminal at home and she had a twelve-year-old to help, I'd say, 'why not?' The humanistic reforms of the 19th century made children into economic liabilities." Moral Majority board member Tim La Haye, who shares Marshner's low regard for humanism, is also campaigning for a return to homework. As a result of these proddings from the New Right, the Department of Labor is currently considering loosening its regulations on both homework (which is now banned in seven industries with histories of particularly exploitative practices) and child labor.

"Hard times," as one of Avis Parke's nouveau poor friends put it, "have a remarkable way of opening your eyes." The Far Right is on the offensive and—despite polls that show a rapid turn against Reaganomics—liberals have been less than aggressive about presenting their alternatives. And feminists? We wrapped up our research with a new kind of question on our minds: do we, as feminists, have a plan for women?

The question is no longer so redundant, nor the answer as self-evident, as it might once have seemed. Our Movement was born in a time of relative prosperity and economic expansion. Insofar as we had an economic agenda, it was to get into the mainstream and take our chances—or, we hoped, our opportunities—as equals. Equality has been the issue that defined the feminist movement and united women across lines of conventional political affiliation. But now we seem to be faced with the lesson that the black movement learned before us: that legal equality does not guarantee economic survival—and without ERA we will not have even achieved legal equality.

Since our Movement began in the late sixties and early seventies, each recession has bottomed out in a deeper trough; each administration has cut further into that frayed "safety net" of social welfare programs. Men as well as women have seen their aspirations foreclosed and their options narrowed, but after a decade of worsening times, it is women who are left at the bottom. Gender inequality has begun to blur into class inequality, until today even our familiar list of feminist economic reforms—day care, affirmative action, and the more radical demand for equal pay for comparable work—begins to look inadequate to the circumstances.

We need a feminist economic program, and that is no small order. An economic program that speaks to the needs of women will have to address some of the most deep-seated injustices of a business-dominated economy and a male-dominated society. Framing it will take us beyond the familiar consensus defined by the demand for equal rights—to new issues, new problems, and maybe new perspectives. Whether there are debates ahead or collective breakthroughs, they are long overdue: the feminization of poverty demands a *feminist* vision of a just and democratic economy.

Barbara Ehrenreich is the co-author with Deirdre English of "For Her Own Good" (Anchor) and a contributing editor to "Ms." Karin Stallard is a writer living in Brooklyn, New York. *The writers thank Rachel Fershko of the Institute for Policy Studies for research assistance in Washington, D.C. This article was made possible by a research grant from the Windom Fund.*

HB

147

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 10, 1993 FURTHER REFERRALS: Judiciary

Date of Committee Action: 2/25/93

The LABOR AND COMMERCE Committee considered: HB 147

HOUSE BILL NO. 147 EMPLOYER'S LIABILITY FOR REFERENCE INFO

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

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

[ ] have attached amendments(s)

[X] do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

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

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

3 [X] zero fiscal note DOA Court System Dept Law [ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Brian D. Porter	✓				
[illegible]	✓				
[illegible]	✓				
[illegible]	✓				
Bill Hudson	✓				

Bill Hudson
CHAIRMAN'S SIGNATURE

Alaska State Legislature

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February 20, 1992

MEMORANDUM

TO: Representative Max Gruenberg

FROM: Christine M. Cheff
Legislative Analyst

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

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

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

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

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[1]Chapter 91-165.

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

- Backup from Sponsor -

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

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

Attachments

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

CHAPTER 91-165

House Bill No. 497

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

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

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

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

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

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

Filed in Office Secretary of State May 28, 1991.

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

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

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

DATE: March 23, 1991 as Reported to Clerk

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

BILL #: HB 497

RELATING TO: Civil Liability/Former Employer

SPONSOR(S): Glickman

STATUTE(S) AFFECTED: Section 768.095, Florida Statutes

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

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

****

I. SUMMARY:

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

HB 497 creates no local or state fiscal impact.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

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

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

B. EFFECT OF PROPOSED CHANGES:

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

C. SECTION-BY-SECTION ANALYSIS:

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

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

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

None

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None

2. Direct Private Sector Benefits:

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

employer should have more complete information relating to employment candidates.

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

None

D. FISCAL COMMENTS:

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

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable

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

Not applicable

V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:
Prepared by: Staff Director:

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Liability for Employment References

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

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. 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is no evidence that Caprock charged Rabin with the duty of voluntarily assisting other meat packing plant employers in hiring of employees generally, or in the hiring of any former employees of Caprock; nor is there any evidence of any custom or practice of such unsolicited assistance on the part of one meat packing plant to another such plant, or of any benefit to Caprock in thus prejudicing the opportunity of Wagner for employment elsewhere. . . .

[T]here is no factual basis for the inference that Rabin's unsolicited calls were referable to or in discharge of any duty he owed Caprock, or that Caprock had conferred on Rabin such comprehensive and general power as to make Rabin its alter ego whose acts were the acts of the corporation.

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

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

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

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

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

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

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

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

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

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

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

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

trial court dismissed Birl's complaint.

Interference with Contractual Relations

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

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

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

Slander

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. *Id.*

20. *See, e.g., St. Clair, supra* n.17, 25 Mass. App. Ct. at 665 n.2 (where plaintiff lost a job opportunity after defendant defamed him in a reference, separate damages could not be awarded *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., Gussett, 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., Bullings* v. *Fairbanks*, 136 Mass. 177, 179 (1883).

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

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

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

III. Summary Judgment

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

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

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

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

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

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

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

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

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

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

131. *Id.*

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

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

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

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

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

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

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

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

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

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

mary judgment."[142] With the preservation of free speech and the uninhibited sharing of information at stake, there is ample reason for such liberality.

IV. Staying Out of Trouble

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

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

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

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

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

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

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

Conclusion

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

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