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# EMPLOYER IMPLICATIONS OF CONDUCTING BACKGROUND CHECKS IN THE POST-911 ENVIRONMENT

JOHN G. IGWEBUIKE AND KENDALL D. ISAAC\*

Against the backdrop of the September 11, 2001 attacks, conventional wisdom suggests that employers would be willing to disclose information about prospective employees that may be deleterious to a new, hiring employer. Furthermore, one would also expect the converse to be true: employers will be able to ascertain employee reference data so as to hire the most qualified candidates who pose no significant risks to the new employer. The opposite has been the case in both instances. Former employers are increasingly paranoid about giving job reference information to inquiring, prospective employers about former employees for fear of lawsuits by those employees who allege that negative employer references resulted in their failure to be hired with a new company; and, new employers are consequently unable to ascertain valuable information needed to hire qualified and productive employees. This analysis examines the arguments on both sides and suggests steps to deal with the present conundrum.

## I. INTRODUCTION

September 11, 2001 is the singular event that altered employer perspectives regarding prospective candidates for employment. Coupled with increasing workplace violence, prospective employers now more than ever seek credible information and sources by which to ascertain whether potential employees have engaged in, or have the propensity to commit, violence in the workplace or other illegal or dangerous activities.<sup>1</sup> Prior to

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<sup>1</sup> See generally Frank Gaskill and Cooper Johnson, *Human Resources' Role in Combating Workplace Violence*, 2 J.Bus. Ind. & Eco. 13-26 (2002).

9/11, background checks were viewed as a luxury. Now they appear to be a necessity. A survey conducted in 2003 and reported by Flint revealed that 82% of employers conducted a background check on potential new hires, as compared to 66% of employers in 1996.<sup>2</sup> A 2004 survey conducted by the Society of Human Resource Management (“SHRM”) of 345 Human Resource Professionals reflected an even higher percentage of employers conducting background checks (96%).<sup>3</sup> Just over 20% of those surveyed indicated that they had implemented new, or changed existing, background and reference check policies as a direct result of the 9/11 terrorist attacks.<sup>4</sup>

Since 9/11, a proliferation of background check companies, both of the brick and mortar and low-cost internet based type, have surfaced to fill the ever growing desire of companies to screen out potentially problematic employees.<sup>5</sup> Eisenschenk and Davis remarked that one company that conducts background checks for employers indicated that after 9/11, the company went from having 200-500 clients use their services in a month to over 10,000 new clients in one month alone!<sup>6</sup> Other companies boasted not-so-modest gains of 33% in new business post 9/11.<sup>7</sup> Clearly, employers began expressing an increased desire to screen individuals before hire in an attempt to safeguard the work environment.

But using background-screening companies and reviewing consumer reports (such as credit reports) and criminal history data only tells part of the story. A valuable piece of the story that is missing deals with actually talking to past supervisors to get first-hand information about the performance and behavioral conduct of the potential new hire. This begs the question, has this increase desire to engage in background checks translated into a well-embraced process whereby employers freely share information amongst each other about workers? And how exactly are these potential new employees helping or hindering this reference and background checking process? Notably, many job applicants include in the very last line of their résumé the following phrase: “References furnished

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<sup>2</sup> Leslie Flint, *An Increase in Background Check Strains an Already Weak, Privacy Rights Clearinghouse* (May. 24 2007), available at <https://www.privacyrights.org/ar/LeslieFlint-BGChks.htm>.

<sup>3</sup> Mary E. Burke, *2004 Reference and Background Checking Survey*, Soc’y Human Res. Mgmt, pg viii (Jan. 2005), available at <http://www.shrm.org/Research/SurveyFindings/Documents/Reference%20and%20Background%20Checking%20Survey%20Report.pdf/>.

<sup>4</sup> *Id.*

<sup>5</sup> See generally Doug Eisenschenk and Elaine Davis, *Background Checks in Hiring and Compensation: The Next Generation*, *Benefits & Compensation Digest*, (Oct. 2004).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

upon request.” Indeed, having a former employer respond positively about an applicant’s performance while working for the former employer may be the determining factor in receiving a letter of acceptance versus a rejection letter. However, a job applicant’s résumé, which expressly promises to provide the references, is one thing. Getting that named employer to actually respond to the reference and to disclose useful information (beyond the former employee’s position, dates of employment and last salary) is quite another matter. And getting a response is critical, especially in light that studies have shown that not only would 95% of college students be willing to be a little dishonest on a resume in order to get a job, but also because it is estimated that 44% of applicants lie about their employment history, 41% make false statements about their educational achievements, and 23% lie about professional licenses and/or credentials.<sup>8</sup> While it is argued that many of the misstatements are minor and perhaps harmless omissions or exaggerations, an Atlanta company found that approximately 8% of these applicants that engage in misstatements, omissions, and/or exaggerations have substantial problems in their backgrounds such as criminal histories and have essentially committed fraud in order to obtain a job.<sup>9</sup>

As many prospective employers who inquire into past work performance and conduct of potential employees are discovering, former employers simply are not apt to “provide references upon request.” Indeed the very opposite is the case: Past employers are circumspect at the prospect of giving references (positive or negative) regarding a past employee. They ground their concerns and fears on the fact that their responses to reference inquiries may subject them to needless litigation. This assertion seems plausible, for employees have succeeded in suing employers who give negative references about employees.

For example, in *Frank B. Hall & Co., Inc. v. Buck*, a terminated employee who suspected his former employer was bad-mouthing him hired a private investigator who posed as a hiring employer and contacted the plaintiff’s former employer.<sup>10</sup> The investigator tape-recorded the employer stating “scurrilous” and baseless allegations about the former employee’s character and honesty.<sup>11</sup> The jury awarded the former employee \$2,000,000 in total damages because of the false negative references disseminated by the employer.<sup>12</sup> Furthermore, the law has extended the basis upon which employers may be liable for damages to former

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612 (Tex. App. 14th 1984).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

employees by now allowing lawsuits for giving false “positive” references about employees. (See *Randi W. v. Muroc Joint Unified School District*, 1997)<sup>13</sup> which will be discussed in detail later in this article); negligent referral, misrepresentation, interference with prospective contractual relations (commonly referred to as a tortious interference with employment opportunities), violations of privacy, and other state and federal bases. Yet, while many employers may be wary of giving references, few cases demonstrate that former employees have been successful in suing their former employers for a negative reference. Even fewer cases are extant in the literature with regards to false “positive” cases.

Finally, the need by employers of reference information along with the benefits that accrue to their day-to-day business decisions implicate employers’ need for references, particularly since 9/11. Not only are employers concerned about the negative impact on the business by hiring someone with a poor track record of performance or, worse yet, behavioral issues, the employer must also be cognizant of the potential for a negligent hiring, retention and/or supervision suit being filed by other employees that may be physically or mentally harmed by that new hire. This type of suit holds the employer responsible for either making a poor hiring decision without doing a “due-diligence” background check first, or for retaining that employee once they learn that there are problems in the employee’s background.

It was noted in the case of *Kenneth R v. Roman Catholic Diocese of Brooklyn* that “a necessary element of such causes of action is that the employer knew or should have known of the employee’s propensity for conduct which caused the injury.”<sup>14</sup> It is expected that employers would have conducted a reasonable background and reference check before hiring the employee, and thus they will be deemed liable unless they can clearly state that they had no such knowledge - and perhaps that when they conducted the background check they were unfortunately only given dates of employment and no other information that would have alerted them to such a propensity.

Lack of foreseeability is therefore the strongest defense available to employers under this scenario. These lawsuits, while difficult for an employee to win, can have a devastating financial (not to mention workplace morale) effect on the employer if the employee is successful. Jason Morris, who served as chair of the National Association of Professional Background Screeners, stated that the average verdict in a negligent hiring suit is \$2 million dollars! The foregoing paragraphs

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<sup>13</sup> *Randi W. v. Muroc Jt. Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997).

<sup>14</sup> *Kenneth R v. Roman Catholic Diocese of Brooklyn*, 229 A.D. 2d 159 at 161, cert. denied, 522 U.S. 967 (1997).

analyze the benefits vis-à-vis the disadvantages of not providing candid job references.

#### BENEFITS OF EMPLOYMENT REFERENCES

A bounty of benefits accrue to employers on a macro- and micro-economic when candid reference information is allowed to flow freely throughout the economy. First, from a macro-economic standpoint, the very viability of the American labor market and robustness of an efficient economy turns on the provision of valuable, factually truthful information about employee productivity, strength and weaknesses, and fitness for particular positions.<sup>15</sup> Second, prospective employers who receive candid reference information utilize this data to make hiring, job placement, training, supervision, and monitoring decisions. For instance, in *Summers v. Cotton Trucking*, a California jury awarded the plaintiff a \$3.1 million judgment against the trucking company for negligently hiring and retaining a reckless driver.<sup>16</sup> Third, the process of making effective business decisions about employees demands that former employers share relevant employee information. Paetzold and Willborn argue that an employer policy of providing candid job references would actually encourage more productive employees through the process of “self selection.”<sup>17</sup> Productive employees, the authors argue, will prefer to work for an employer who issues positive references, whereas, unproductive employees would prefer to work for an employer who does not disclose performance-related reference information.<sup>18</sup> Thus, firms with candid disclosure policies should attract a more productive workforce and reap the consequential profits and efficiency gains.

Additionally, economists point out another benefit of providing candid job references: reduction of employee turnover or the reduction of inefficient “mis-match” between employer job requirements and employee knowledge, skills, and abilities.<sup>19</sup> These economists argue that discharge can deter misconduct, incapacitate unproductive workers, or signal employee productivity to the labor market.<sup>20</sup>

McKenna argues that much of the turnover in employment results from an inefficient match between employer and employee which results in

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<sup>15</sup> J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. Chi. L. Rev. 115, 240-281 (1998).

<sup>16</sup> *Summers v. Cotton Trucking*, WL 451124, 21 (1996) Trials Dig 2d 75.

<sup>17</sup> Ramona L. Paetzold and Steven L. Willborn, *Employer Irrationality and the Demise of Employment References*, 30 Am. Bus. L.J. 123-126 (1992).

<sup>18</sup> *Id.*

<sup>19</sup> Verkerke, *supra* note 12.

<sup>20</sup> *Id.*

inefficiencies for the employer and the employee.<sup>21</sup> McKenna further notes that some unemployment may actually be efficient because former employees can search for jobs that better fit their economic value, persona, and interests.<sup>22</sup> To support this conclusion, McKenna presents a statistical model showing that both employers and new employees analyze the economic efficiency of their relationship and make decisions as to whether to continue the employment relationship after a certain period of time sufficiently necessary to make that determination.<sup>23</sup> Hence, a body of research in the economics literature seems to point up the positive effects for employers (former and prospective) and employees (past and prospective) with regards to the provision of useful job reference data. Another benefit, similar to the employee turnover benefit referenced above, is the betterment of the work environment by hiring “right” instead of just filling seats with warm bodies.

When bad hires are made due to a mismatch between applicant and job assignment, the resulting problems in the workplace created by other employees having to “pick up the slack” can result in lowered morale and eventually good employees leaving the employer due to frustration. Additionally, when an employee is hired and begins to harass other employees – and thus giving rise to a negligent hiring cause of action – this can be highly detrimental not just to the victim of the harassment but also to other employees in the department who have to witness and indirectly or directly suffer the consequences of such dysfunctional conduct.

Potential employers who seek references as well as former employers requested to give such references would likely not disagree that the free flow of job reference information is vital to the viability of the larger economy and their very viability as firms (i.e., making key staffing decisions, reducing violence, reducing transactions costs associated with recruitment, hiring, and firing, etc.). Thus, given the benefits of accessible job references, the statistical improbability of successful lawsuits, and need for such information for making staffing decisions, why the persistent paranoia in responding to the job reference requests? Before we further analyze the legal framework surrounding this issue, a story shared by Professors Adler and Peirce in their article on “No Comment” reference inquiries really hones in on this paranoia complex and drives home the importance of employers needing background information and the hypocrisy of employers requesting the information from other employers and feeling frustrated about only getting “no comment” feedback while

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<sup>21</sup> C.J. McKenna, *Uncertainty and the Labour Market: Recent Developments in Job Search Theory* (1985).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

simultaneously refusing to give out former employee feedback themselves.<sup>24</sup> The story is as follows:

“On December 13, 1994, American Eagle Flight 3379 crashed near Raleigh-Durham International Airport, killing fifteen people on board. After a ten-month probe, the National Transportation Safety Board concluded that the plane's captain made several mistakes immediately before the plane crashed. Among other things, the pilot misread a warning light on the instrument panel and then improperly handled the aircraft. Prior to seeking employment with American Eagle, the pilot had resigned from another airline to avoid being fired for failing a critical flight test. The pilot's former employer never conveyed this information to American Eagle. When queried about its failure to obtain the critical information, American Eagle responded that it ‘strongly believes’ airlines should share information about pilots when they apply for jobs. American Eagle admitted, however, that it never shares information about its own pilots. The company said that it feared being sued by employees who want their records to be kept private. As a result, American Eagle has asked Congress to enact legislation that would give airlines immunity from such lawsuits.”<sup>25</sup>

#### LACK OF LEGAL INCENTIVES FOR REFERENCE DISCLOSURE POLICIES

The current legal framework governing employment references tends to discourage past employer disclosure of reference information of past employees. When employers opt to disclose reference information based upon a "full reference disclosure" policy revealing all relevant facts of a former employee, such practice avails to former employees a wide array of theories for suing the former employer. Given the potential of being subject to a torrent of potential lawsuits, employers tend to opt (quite logically) for one of two other policy options: “no comment” or “limited comment.”

The primary reason employers are loath to give references is that the law places no affirmative duty on employers to provide references. Although it can be argued that the *Randi W.* decision imputes a duty of disclosure to employers, that case is only limited to instances where the former employer

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<sup>24</sup> See generally Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 Wash. & Lee L. Rev. 1381 (1996).

<sup>25</sup> *Id.* at 1383.



“knows” of the former employee’s dangerous propensities.<sup>26</sup> Failing that, employers have no affirmative duty to disclose employment information about former employees. Hence, (and as the flowchart points out,) many employees opt for “no comment” reference strategies, in which they would refuse to comment on current or former employees’ past job performance and suitability for new employment.<sup>27</sup> As discussed above, such a “no comment” policy is deleterious to the former employee, employees, and the public at large.<sup>28</sup> However, the policy shields employers from liability from former employees (or unknown third parties). The 2004 SHRM survey revealed that in fact over 50% of the 345 employers surveyed had a firm policy not to provide any information.<sup>29</sup> However, 75% did indicate they may change their “no comment” policy if there existed clearer employer immunity laws that would protect them from civil suit for providing “some comment.”<sup>30</sup> Another option open to former employers under the current tort liability schema, is that of merely verifying basic employment dates and details. As compared to the “no comment” practice, the marginal increase of useful information disclosed is exiguous. Indeed, it further reflects the reasoning of many employers: “My company can avoid legal liability by simply providing the minimum quantum of data.” Like the no comment policy, this option avoids the risk of liability from the former employee (or third-parties for omitting negative and known information of the employee’s dangerous propensities or conduct).<sup>31</sup> Certainly, employers are not irrational in choosing not to give job references. Undoubtedly, employers tend to employ a cost-benefit analysis in determining not to providing candid references. Accordingly, the cost-benefit analysis followed by former employers can be summarized as follows:

First, employers have no affirmative duty to disclose information about former employees.

Second, they fear that such disclosure may expose them to possibility of wide swath of law suits and damages. Indeed, job references present to employers legal land mines to included, but not limited to defamation, intentional infliction of emotional distress, breach of contract, invasion of privacy, negligent referral, negligent hiring, and punitive damages.

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<sup>26</sup> *Randi W.*, 929 P.2d at 595.

<sup>27</sup> See generally Bradley Saxton, *Employment References in California After Randi W. v. Muroc Joint Unified School District: A Proposal for Legislation to Promote Responsible Employment Reference Practices*, 18 Berkeley J. Empl. & Lab. L. 240, 240-281 (1997).

<sup>28</sup> *Id.*; see also Deborah A. Ballam, *Employment References-Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 Am. Bus. L.J. 445, 445-466 (2002).

<sup>29</sup> *Burke* at 16, *supra* note 3.

<sup>30</sup> *Id.* at 24.

<sup>31</sup> Saxton at 265, *supra* note 24.

Third, even if the employer's position is vindicated in a suit, the cost of defending the suit (or multiple suits) can be exorbitant.

Fourth, responding to job reference inquiries consumes valuable time, not to mention physical and human resources.

Fifth, employers perceive the benefits of attending to and responding to employer references to be at best exiguous. Thus, taken together, employers choose to exercise their legal right not to respond to requests that consume their limited resources and whose utility yields little to no perceived economic benefit.

#### DELETERIOUS CONSEQUENCES OF EMPLOYER FAILURE TO DISCLOSE

First, prevailing status of "no comment" or "limited comment" reference policies in force is damaging to employers because they find themselves stifled when seeking to obtain reference information for use in decision-making. So while they protect themselves by not commenting to other employers, the circle of life transition emanates into harm to that very employer when they are unable to obtain reference information on their own potential new hire. The policies are also damaging to employees. For example, failure to given detailed reference information about a high-performing employee may preclude that employee's chances of finding employment that her knowledge, skill, and abilities might otherwise be well suited. Additionally, this policy has an effect of elongating a former employee's job search which, in turn, could elongate that former employee's time spent collecting unemployment compensation against the former employer's unemployment compensation policy. Also, the society is harmed when former employers hide behind "no comment" reference policies to avoid disclosing information that would alert a prospective new employer that a job applicant is dangerous (Saxton, 1997).<sup>32</sup>

Indeed, the facts alleged in *Randi W. v. Muroc Joint Unified School District*, suggest a prototypical example of how public policy is badly served when employers try to avoid liability by using "no comment" policies.<sup>33</sup> When society's legal rules encourage employers to use "no comment" reference policies to avoid liability--as the *Randi W.* court acknowledged they could--prospective employers may be unable to obtain information that, if available, would discourage them from hiring employees with demonstrated propensities to hurt or abuse others, including children.<sup>34</sup> While there is no affirmative duty imposed on employers to respond to reference inquiries, many believe that the risks of giving job references have been exaggerated (See appendix flowchart for

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<sup>32</sup> *Id.*

<sup>33</sup> *Randi W.*, 929 P.2d 582.

<sup>34</sup> *Id.* at 589.

description of the potential liabilities). In fact, thirty-one (31) states have attempted –with varying degrees of adequacy - to quell the fear employers have about the legal risks assumed by giving job references by passing laws which grant employer immunity for providing honest and truthful information about former employees to potential new employers (see Workforce Management).<sup>35</sup>

Former employers recognize the important part of job references in the hiring process to prospective employers.<sup>36</sup> Furthermore, they recognize that when former employers refuse to give references, hiring employers are prevented from hiring the employees who will be a good fit for the position.<sup>37</sup>

Not only is employer aversion to giving job references deleterious to prospective employers, it may have an inhibiting effect on the ability of qualified candidates to find work which would otherwise provide a good-fit between the employee's skill set and the prospective employer's job requirements. For example, many employers interpret a former employer's refusal to provide employee referral information as a negative comment on the applicant.

The foregoing paragraphs (Part I) has introduced the present paucity of candid reference information while addressing the benefits of employer references while counter-balancing the negative implications of giving full-disclosure references. On a macro-level, employers are getting too little useful information about prospective applicants because at the micro-level employers are giving little to no useful information to those firms who make legitimate inquiries. The remaining portion of this paper (Part II) analyzes some of the legal risks faced by employers in giving job references. State-based common law tort law suits are discussed along with federal and state legislative remedies. Employer defenses to such suits are also discussed. The paper concludes (in Part III) by providing and discussing strategies employers might take to minimize their liability for potential lawsuits associated with giving job references.

## II. ANALYSIS

### ATTENDANT LEGAL RISKS

Former employees who believe their prospect of gaining employment with a new employer was hampered due to negative job reference usually

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<sup>35</sup> *State Laws Protect Employers Who Give Job References*, Workforce Management, available at <http://www.workforce.com/archive/article/22/03/75.php> (last visited February 23, 2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

allege the tort action of defamation for redress. They sometimes also allege claims of invasion of privacy, interference with prospective contractual relations, discrimination, misrepresentation, and other state and federal grounds. Third parties may also seek redress by alleging negligent referral on the part of the employer. The following is a discussion of some of these potential claims.

#### DEFAMATION

The main basis for employer law suit related to employer references is the tort suit for defamation. The most important legal doctrine affecting employer reference practices is defamation. Defamation addresses injury to ones reputation. In *Zinda v. Louisiana Pacific Corp.*, the court addressed defamation as: “[C]ommunication [. . .] that tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him.”<sup>38</sup>

“To succeed in a defamation action, the employee must plead and prove that that the employer made a false and defamatory statement of fact.<sup>39</sup> An employment reference containing false and derogatory information concerning a former employee would meet this test (e.g., “Joe was fired for stealing from the company”).<sup>40</sup> Defamation law seeks to deter former employers from giving candid references; however, it also creates counterbalancing incentives to against providing false-negative references.”

In a defamation action, an employer cannot be sued for making a statement about the former employee that represents mere opinion of the employee. In short, only assertions of material fact (as opposed to opinion) made by the employer are actionable.<sup>41</sup> “Although an individual can generally not be sued merely because he or she expresses an opinion about an employee, if the opinion can be reasonably understood to imply the existence of a defamatory fact, then the opinion may give rise to a lawsuit.

In a 1992 case, New Hampshire’s federal court held, somewhat surprisingly, that a supervisor’s statements to an employee that “your job isn’t important and doesn’t require brains,” “you have a bad attitude,” and “you have a lot of growing up to do” were not protected opinion under New Hampshire law.”<sup>42</sup>

It should also be noted that some employees have utilized the Fair Credit Reporting Act as an avenue of suing an employer for defamation. The Act

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<sup>38</sup> *Zinda v. Louisiana Pacific Corp.*, 440 NW2d 548 (1989).

<sup>39</sup> When That Call Comes In, *New Hampshire Employment Law Letter*, available at <http://techforhr.hrlaws.com/node/1043114>, (last visited November 17, 2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Supra* note 39. See also *Godfrey v. Perkin-Elmer*, 794 F. Supp. 1179, 1190 (D.N.H. 1992).

stipulates that an employee must be notified about any investigation into the employee's credit or personal background, which this "personal background" element could be implicated in a background check conducted on the employee.<sup>43</sup> Because the law requires that the employee be notified of adverse information obtained, the employee now has an avenue to find out where the adverse information was gathered and therefore which former employers to sue for defamation.<sup>44</sup>

#### EMPLOYER DEFENSES TO DEFAMATION

Under certain circumstances, the "publisher" of a false and defamatory statement may avoid liability if the statement is protected by an absolute or conditional (qualified) privilege. In the job reference context, a qualified privilege is likely available. This means that with respect to information that would legitimately help a prospective employer make an informed decision about hiring an applicant, even if the information provided by the employer is false, the employer will be found liable only if it knows the information is false or acts with reckless disregard as to the information's truth or falsity. To put it simply, employers should not communicate information which would not legitimately help a prospective employer make an informed decision about hiring an applicant or which is known to be false or which cannot be substantiated, preferably from information in the employee's personnel file. Because the issue of the conditional or qualified privilege is more salient to the employer job reference issue, the following paragraphs provide deeper elucidation. Most state legislators have sought to encourage employers to provide responsible employment references in the post-911 environment.

Although these statutory protections vary from state to state, in general the breadth of the protections can be grouped as follows: Employers are granted a conditional privilege which protects employers from liability for job references they have provided inquiring employers. To this end, the protections are two-fold: (a) it protects the referring employer from suits from their former employees; and (b) protects the former employer from suits by third parties a la' the *Randi W.* case (discussed at length below).<sup>45</sup> This conditional privilege is not absolute. For example, the information communicated by the employer must be relevant to the employee's job performance, given in good-faith, and truthful. Where the information is dispensed out of malice or retribution, the employer will be deemed to have abused the conditional privilege however and thereby have forfeited its protection and thus may be liable for damages in defamation and other tort

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<sup>43</sup> 15 U.S.C. 1681k.

<sup>44</sup> *Id.*

<sup>45</sup> *Randi W.*, 929 P.2d 582.

based claims. The conditional protection also covers (i) employers who initiate dissemination of the reference information as well as (ii) employers who provide the information upon receipt of a job reference request.

#### NEGLIGENT REFERRAL—FALSE POSITIVE REFERENCE

A recent addition to tort theories upon which former employees'—and third parties'—may base suits against employers regarding job references is negligent referral (also called, the false positive reference). This is a significant broadening of the law because traditionally employees could base cognizable law suits for negative referrals. Here, employers can sue former employers and third parties may also sue the former employer for negligent referral. While an employer generally has no affirmative duty to respond to a reference inquiry, an employer who does choose to respond risks potential liability to the prospective employer or third parties if the employer negligently or intentionally omits material information about an applicant's unfavorable characteristics. In 2008, the 5th Circuit Court of Appeals held in *Kadlec Medical Center* that while employers have no duty to disclose negative information about an employee, any reference provided about that employee must not misrepresent the employee's work history.<sup>46</sup>

To understand the practical significance of the negligent referral case law and its contribution to the dearth of responsible references, the following case bears discussion: In *Randi W.*, a student alleged that her eighth-grade science teacher had exposed himself to her during an after-school session as he assisted her with a science fair project.<sup>47</sup> The incident was reported to the principal who threatened the science teacher with immediate discharge if the instructor did not fail to resign at the end of the school year. The teacher chose to resign rather than face the negative stigma associated with being fired. The principal agreed not to mention the alleged sexual misconduct to prospective employers who inquire about his performance. Furthermore, the principal provided the teacher with a letter of reference lauding the science teacher and accentuating the principal's exceptional teaching performance ratings.<sup>48</sup>

The teacher succeeded in finding another science position at another school. In addition, some months later, a student at the new school reported that the teacher sexually assaulted her.<sup>49</sup> The Supreme Court of California concluded that a former employer can be found liable for

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<sup>46</sup> *Kadlec Med. Ctr. v. Lakeview Anesthesia Associates*, 527 F.3d 412 (5th Cir. 2008) cert. denied, 555 U.S. 1046 (2008).

<sup>47</sup> *Randi W.*, 929 P.2d at 585.

<sup>48</sup> *Id* at 586.

<sup>49</sup> *Id* at 584.

negligent misrepresentation (and the resultant attendant injuries) for giving an unqualified positive employment references to a prospective employer on behalf of a former employee whom the referring employer knows to be potentially dangerous. The court reasoned that had the prospective employer (newly employing school district) known of the initial complaint of sexual misconduct, it is doubtful that the teacher would have found another similar position, and at least the molested student might have been spared the trauma of sexual abuse.<sup>50</sup> A lack of candid reference information thus impedes employers' efforts to avoid such hiring mistakes.

Commentators have asserted that while the result of the *Randi W.* case was decided correctly, given the state of current law, it will have serious, unintended consequences: For example, Saxton argues that the case will (i) prompt employers to excessively provide negative information that will be deleterious to job seekers; and (ii) discourage many more employers from disclose any employment information at all.<sup>51</sup>

Finally, another consequence of the *Randi W.* case is the practical difficulty of implementation now presented to employers in judging precisely how much and what types of negative employee information to disclose about certain employees.<sup>52</sup> The logical decision would be for employers to enforce a "no comment" reference policy than to make the disclosure and consequently run the risk of suit by the former employee for misrepresentation, defamation, interference with prospective advantage, and other state or federal violations. Employers that do venture into the danger zone of making a comment usually err on the side of providing a "neutral" reference rather than a positive or negative one. A neutral reference merely provides factual information about the employee that may be as minute as providing the dates of employment, salary and last job title or as robust as also providing information regarding the last few employment evaluation ratings and the dates and titles of different jobs held while the employee worked there. This information, while helpful to the potential new employer, falls short of either endorsing or criticizing the employee an instead tightropes a fine line of just proffering basic factual information and nothing more. Normally the employer would require the former employee to sign a release before even this "more robust" basic factual information is provided.

#### INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

If a prospective employer who receives an unfavorable employment reference from the job applicant's former employer decides not to hire the

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<sup>50</sup> *Id.* at 596.

<sup>51</sup> Saxton at 258, *supra* note 27.

<sup>52</sup> Saxton at 258, *supra* note 24; Verkerke, *surpa* note 12.

applicant, the applicant may assert a claim of intentional interference with prospective contractual relations. The Prosser and Keeton Restatement (Second) of Torts defines this cause of action as follows:

One who intentionally and improperly interferes with another's prospective contractual relation...is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

a. Inducing or otherwise causing a third person not to enter into or continue the prospective relation or

b. Preventing the other from acquiring or continuing the prospective relation<sup>53</sup>

However, an employer who provides an unfavorable job reference will not likely be found liable under this theory unless the negative reference was both false regarding a material matter and motivated by some degree of ill will or malice (i.e., a malicious intent to hamper a former employee from securing new employment).<sup>54</sup> Like in the defamation context, the employer may be able to assert a qualified privilege to make statements about the employer's performance and conduct to future potential employers.<sup>55</sup> Also, the employment must have been definitively offered or going to be offered to the employee for this allegation to have any merit.<sup>56</sup> Mere speculation that an individual is not receiving job offers because of a reference being given by a former employer will not suffice.<sup>57</sup> In the case of *Delloma v. Consolidated Coal Company*, Richard Delloma was the Superintendent of Consolidation Coal Company's Burning Star # 4 Mine.<sup>58</sup> While acting as the Superintendent, Delloma attempted to date approximately one-third of the female employees he supervised. One of those women filed a lawsuit against Delloma and Consolidation Coal alleging sexual harassment under Title VII and several other tort claims and Delloma was fired. Delloma then attempted to find other employment in the mining industry.

After speaking to the President for Arch Minerals, Delloma was convinced that he had a job. However, when they contacted Consolidated

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<sup>53</sup> Prosser and Keeton, *supra* note 37.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Delloma v. Consolidation Coal Co.*, 996 F.2d 168 (7th Cir. 1993).



Coal to do a background check, the employer responded that there were some record-keeping irregularities that may have been involved in the reasons why he no longer worked there and that Delloma was a "womanizer."<sup>59</sup> When Arch Minerals decided not to hire Delloma, he sued Consolidation Coal. The court, in analyzing the facts and the law, noted that employers have a qualified/conditional privilege in that giving a reference "affected an important interest of the recipient" and the statements "were within generally accepted standards of decent conduct" and were "made in response to a request."<sup>60</sup> The court further noted that once a privilege is established, the plaintiff must prove that the defendant acted with malice. The Court affirmed the dismissal of Delloma's case because he could not prove the statements that were made were made with a malicious intent.<sup>61</sup> This underscores the notion that without evidence of malice or a knowing false assertion about an ex-employee, employers have little to fear from these lawsuits.

#### INVASION OF PRIVACY

Reference checks of prior employment records are not an infringement on the previous employee's privacy if the information provided relates specifically to job requirements and the reason for the employee's departure. Under the Privacy Act of 1974 (which applies only to the federal government) and other similar state laws, reference checking invades an applicant's privacy if it is "unreasonable." Courts tend to base their reasonableness determination by examining a variety of factors to include: (1) whether the employee consented to the reference check; (2) the type of information the prospective employer seeks to gather; (3) whether the prospective employer had a legitimate need for the information; and (4) the number of contacts the prospective employer makes to check the references. As to invasion of privacy claims, the single most crucial factor that the court considers is whether the employee signed a release.<sup>62</sup>

Similarly, the Fourth Amendment, which protects against unlawful searches and seizures also only applies to federal, state and local government employees. Absent state action, employees of private companies do not receive the Fourth Amendment protection granted to their public counterparts. As noted by Bloom, Schachter and Steelman, in the private realm, the employer's interests in, for example, safety, liability for employees' actions, and prevention of theft and intellectual property are

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<sup>59</sup> *Id.* at 169.

<sup>60</sup> *Id.* at 171.

<sup>61</sup> *Id.* at 170.

<sup>62</sup> 5 U.S.C. § 552a (2000).

weighed against the individual's right to privacy.<sup>63</sup> The lower an employee's expectation of privacy, the greater the likelihood that the employer does not invade the privacy of the employee when conducting background searches.<sup>64</sup> The trend in workplace privacy before September 11 was shifting toward employees' interests; however, since then the employer's rights and practices relative to background checks have been given much greater leeway.<sup>65</sup>

#### MEDICAL AND DISABILITY LAWS

The Americans with Disabilities Act (1) bars employers from making inquiries regarding the applicant's possible disabilities and (2) imposes upon employers a duty of providing reasonable accommodation to disabled employees.<sup>66</sup> Also, the Family Medical Leave Act and Health Insurance Portability and Accountability Act (HIPAA) prevent employers from providing confidential medical information about former employees to others.<sup>67</sup>

#### CIVIL RIGHTS STATUTES

Federal and state laws that prohibit employment discrimination (such as Title VII) can subject an employer to liability if the employer gives a negative reference designed to discriminate on the basis of a former employee's race, sex, or other protected characteristic or in an effort to retaliate against a former employee who has engaged in conduct protected by a civil rights statute (e.g., filing a complaint of discrimination or assisting another individual who has filed a complaint). The key to avoiding an employment discrimination claim lies in the consistency of implementation of the limited reference policy. So long as the policy is uniformly administered, it will likely not violate of civil rights laws.

#### BREACH OF CONTRACT

Sometimes an employer and employee will reach an agreement about what will be said in response to job reference inquiries. Under other circumstances, an employee handbook outlining the employer's job reference practice may create a contractual obligation. The employer's failure to comply with the agreement made to the employee can result in a breach of contract claim which may subject the employer to damages to be paid the former employee.

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<sup>63</sup> Elise M. Bloom et. al., *Competing Interests in the Post 9-11 Workplace: The New Line Between Privacy and Safety*, 29 Wm. Mitchell L. Rev. 897(2003).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 42 U.S.C. § 12101 (2006).

<sup>67</sup> 29 U.S.C. § 2601.

### III. CONCLUSIONS

As intimated throughout this article, many employers are circumspect to provide meaningful, if any, employment data about former employees. Very few cases are extant which show former employees succeeding in suing former employers. Indeed, as the *Randi W.* case illustrated, employer reference information can serve a valuable role.<sup>68</sup> Furthermore, a thorough background check reduces the employer's risk of negligent referral lawsuits. Nevertheless, past employers remain reluctant to answer job reference inquiries. Much of this fear is grounded in the fear of law suits, along with the attendant perceived lack of benefits associated with answering job inquiries. Thus, the following paragraphs therefore provide suggestions to employers who seek to give more than cursory reference information, while minimizing their risk of potential law suits. The former employer should refer all job reference inquiries to a single contact person within a single department. For most organizations this will be the director of human resources (or a designee) and within the human resources department. This consolidation strategy can facilitate certain efficiencies and reduce transaction costs. The contact person review the former employee's personnel file, seek out individuals knowledgeable about the former employee's work performance, and summarize performance-related information to be shared. No speculations should be made.

For instance, if an employee were terminated because of tardiness, no speculation as to the cause (e.g., drug abuse) of the tardiness should be made. The contact person should put the reference in writing. The dispensation of employment related information orally or "off the record" opens the door to hearsay statements and allegations. To defend against such allegations, it would be best for the employer to have the requests placed in writing.

Instruct supervisors or other employees who are not designated to handle inquiries not to make any comments or to respond to any questions about another employee's performance.

Personal information about the employee should not be disclosed. Personal information does not relate to the employee's job performance and therefore should not be shared.

Special care should be taken with regard to reporting employee's use of illegal drugs, alcohol, or criminal infractions. Such information should not be disclosed unless they can be verified as to their truth and are inextricably

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<sup>68</sup> *Randi W.*, 929 P.2d. 582.

linked to the employee's job performance. As discussed earlier, truth is an absolute defense to a common law defamation claim.

Do not take retributive action against former employees. Former employers should not take retributive action in the form of critical remarks against a former employee because the employee has filed charges (e.g., discrimination, worker's compensation, harassment) against the employer. Such retributive measures may violate other employee rights and will likely occasion ill-will and resentment by the employee. Consider the use of release forms. Many former employers seek protection from employee lawsuits through the use of release forms signed by the former employee. Failure to provide the release results in refusal by the employer to provide the reference. Employers employing this strategy often require employees to sign the release as part of the employment process. The employee's signature authorizes the employer to disclose truthful reference information to prospective employers while minimizing liability for what is dispensed. Hiring employers have also sought to alleviate the reluctance of former employers to provide meaningful information, by including release forms as part of their applications which relieves the prior employers from liability. Both of these releases must be signed by the employee to be tenable. In fact, Florentino wisely suggests that the hiring employer should have the potential employee sign a release for every employer listed on their application so that each employer can receive a release singularly addressed to them (further easing their concerns about responding to the request for information).<sup>69</sup>

Lastly, employers should work with their state legislatures in an effort to implement or enhance employer immunity statutes relative to the giving of references. Cooper expressed an ongoing sentiment that the current statutes are woefully inadequate to protect employers and have not had a positive impact on job references.<sup>70</sup> If the legislatures worked to provide greater clarity in the law concerning job reference liability, and instituted educational campaigns to ensure the general public was aware of these immunity statutes, employers and employees alike would recognize their existence and better embrace the need for openness in the dissemination of honest, accurate and complete job references. Who knows, this type of openness coupled with legal protections for employers may just cause employees to think before they act – thereby creating a much more productive and well-behaved workforce.

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<sup>69</sup> Torianne Florentino, *Employee Privacy in the Ever-Evolving Workplace*, 701 *Prac. L. Inst.* 679, 681 (2002).

<sup>70</sup> Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 *Cornell J.L. & Pub. Policy* 1, 19 (2001).