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## POTENTIAL EMPLOYER LIABILITY FOR EMPLOYEE REFERENCES

### I. INTRODUCTION

Employers are having second thoughts about giving employee references.<sup>1</sup> Until recently, prior employers willingly passed on significant amounts of employee information to prospective employers.<sup>2</sup> However, the increasing propensity of individuals and companies to sue over undesirable<sup>3</sup> or inadequate<sup>4</sup> references has made many employers reluctant to give out frank and detailed references. As courts continue to explore privacy<sup>5</sup> and employee rights,<sup>6</sup> employers will be forced to weigh the benefits

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1. See, e.g., Johnson, *Why References Aren't 'Available Upon Request': A New Fear of Lawsuits Is Tightening Everyone's Lips*, N.Y. Times, June 9, 1985 § 3 (Magazine), at 8, col. 2.

2. "Over the last two centuries the number of employer references . . . has increased dramatically. References for former employees are now written in the millions." Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 146 (1977) [hereinafter Comment, *Qualified Privilege*]. While no studies have been made on the annual number of employer references given, studies have shown that 50 to 90 percent of employers do solicit references. *Id.* at 146 n.18. The number of reports which concern an investigation into an employee's background is unclear. Feldman, *The Fair Credit Reporting Act—From the Regulator's Vantage Point*, 14 SANTA CLARA LAW. 459 (1974). One estimate is that 35 million Americans have had their careers monitored by private personnel investigators. Comment, *Qualified Privilege, supra*, at 147 n.21 (citing AFL-CIO Maritime Trades Dept., *Credit Bureaus: A Private Intelligence Network*, AM. FEDERATIONIST Apr. 1971, at 9, reprinted in *Fair Credit Reporting Act—1973: Hearings on S.2360 Before the Subcomm. on Banking, Housing and Urban Affairs*, 93d Cong., 1st Sess. 956 (1973)). At least one author has recognized that employers need to check references to avoid the possibility of employees misrepresenting their background. Davidson, *Checking References*, 27 LAW OFF. ECON. & MGMT. 45, 45 (1986).

3. Employees may bring suit following a false reference. See, e.g., *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980) (employee filed defamation action against employer after false statements were given in a reference).

4. See, e.g., *Lewis v. Equitable Life Assurance Soc'y*, 361 N.W.2d 875 (Minn. Ct. App. 1985) (plaintiff employees filed suit for defamation against their employer for inadequately describing their reason for termination).

5. Although a legal interest in an individual's right to privacy has been recognized in the United States for many years, during the last fifteen years privacy concerns have become acute, provoking a social response that has been termed a "privacy revolution." See Miller, *The Privacy Revolution: A Report from the Barricades*, 19 WASHBURN L.J. 1, 1-22 (1979); see also Duff & Johnson, *A Renewed Employee Right to Privacy*, 34 LAB. L.J. 747 (1983).

6. "Development of employee rights has forced employers to take a closer look at their policies regarding information gathering and dissemination." Duffy, *Defamation and Employer Privilege*, 9 EMPLOYMENT RELATIONS L.J. No. 3, 444, 444 (1984). Workers have experienced a continual judicial expansion of employee rights. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1489 (1985) (a public employee has a right to respond to charges prior to termination of employment); *California Sav. & Loan Assoc. v. Guerra*, 760 F.2d 274

of providing references<sup>7</sup> against the possibility of defending a costly lawsuit.<sup>8</sup>

This comment gives a broad overview of the grounds on which employees, their prospective employers and third parties file reference lawsuits. It will begin by discussing the causes of action asserted by former employees. Employees bring suits based on defamation,<sup>9</sup> discrimination charges,<sup>10</sup> or alleged interference with prospective employment.<sup>11</sup> An employee may also assert a claim for intentional infliction of emotional harm arising out of the employer's dissemination of a negative reference.<sup>12</sup> This comment will then discuss employees' suits based on violations of state statutes<sup>13</sup> enacted to protect individuals with respect to the information given out by their employers.

The comment will conclude by examining an employer's liability to subsequent employers, former employees and third parties based on a

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(9th Cir. 1985) (employees returning from pregnancy and childbirth leave have a right to be reinstated), noted in 2 LAB. & EMPLOYMENT LAW NEWSLETTER No. 5, at 12 (May 1985); Klayman, *Regulation 1977.12: The Right to Say No to Exposure to Work Conditions that Pose an Immediate Threat to Employee Safety*, 59 U. DET. J. URB. L. 185 (1982); Comment, *Employees Right to Representation at Investigatory Interviews*, 25 B.C.L. REV. 127 (1983); Walker, *Employee Access to Personnel Files: An Emerging Trend*, 1 LAB. & EMPLOYMENT LAW NEWSLETTER No. 6, at 18 (Oct. 1984).

7. Disseminating references may be viewed as a public service of an employer. Furthermore, references benefit employers by imposing "social controls" on employees. "[E]mployers could still use the reward of a good recommendation to motivate employees" and the threat of a bad reference to deter misconduct. Comment, *Qualified Privilege, supra* note 2, at 171 n.169.

8. "The cost of litigation has increased at an alarming rate." Janofsky, *Reducing Court Costs and Delay*, 71 ILL. B.J. 94, 96 (Oct. 1982); see Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (outlining a detailed mathematical cost analysis of current litigation expenses for individuals and businesses).

9. See *infra* text accompanying notes 15-41.

10. See *infra* text accompanying notes 42-54.

11. See *infra* text accompanying notes 93-112.

12. An employee's claims arising from an unfavorable employer reference may often include a claim based on the tort of intentional infliction of emotional distress. See, e.g., *Lekich v. International Business Machs. Corp.*, 469 F. Supp. 485 (E.D. Pa. 1979); *Campos v. Oldsmobile Div., General Motors Corp.*, 71 Mich. App. 23, 246 N.W.2d 352 (1976) (discussing the difference between a cause of action for slander and for intentional infliction of mental distress); *Burba v. Rochester Gas & Elec. Corp.*, 90 A.D.2d 984, 456 N.Y.S.2d 578 (1982); *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977) (although no employee reference is mentioned in the case, plaintiff's alleged cause of action was based on employer's post-employment comments regarding plaintiff). This article will not discuss this cause of action. For more information, see generally Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort*; "Outrage," 38 A.L.R. 4th 999 (1985); W. PAGE KEETON, PROSSER & KEETON ON TORTS § 12, at 54-66 (5th ed. 1984) [hereinafter PROSSER].

13. See *infra* text accompanying notes 55-88.

claim of misrepresentation.<sup>14</sup> This cause of action is brought to recover for the pecuniary or physical harm incurred as a result of reliance on information provided in or missing from a reference.

The cause of action most frequently asserted as the result of an employer's reference is defamation. The potential liability to be incurred for alleged defamation has caused many employers to reconsider the employee references they are willing to offer.

## II. EMPLOYER'S LIABILITY FOR DEFAMATION

A former employer's unfavorable reference may significantly impair an employee's chance at later employment. Accordingly, employee references create a fertile source for defamation<sup>15</sup> lawsuits. An employer's potential liability for defamation is thus causing employers to take a cautious look at the employee references they are willing to disseminate.<sup>16</sup>

### A. *The Employer's Qualified Privilege to Give an Accurate Reference*

An employer has a qualified privilege<sup>17</sup> to make good faith statements<sup>18</sup>

14. See *infra* text accompanying notes 113-45.

15. Defamation is the false communication about another that "tends so to harm [the] reputation of another as to lower him in the estimation of the community or to deter third persons from associating . . . with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977); see, e.g., *Adams v. Lawson*, 191 Va. (17 Gratt.) 250, 255 (1867) (any language which "tends to injure the reputation . . . or to reflect shame and disgrace on the plaintiff"). See generally PROSSER, *supra* note 12, § 111; 50 AM. JUR. 2D *Libel & Slander* § 1 (1970).

In order for a statement to be considered defamatory it must be communicated to someone other than the plaintiff and must be false. PROSSER, *supra* note 12, § 111. Truth is a complete defense and "true statements however disparaging, are not actionable." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). If the defamation is written or fixed in a tangible form, such as film, it is called libel; if it is oral or made by a transitory gesture, it is called slander. PROSSER, *supra* note 14, § 112. Each state may require different proof and may allow different damage awards according to whether the statement was libel or slander. "Unlike most states, Virginia makes no distinction between actions for libel and those for slander." *Fleming v. Moore*, 221 Va. 884, 889, 275 S.E.2d 632, 635 (1981), *cert. denied*, 105 S. Ct. 3513 (1985) (citing *Shupe v. Rose's Stores*, 213 Va. 374, 375-76, 192 S.E.2d 766, 767 (1972)); see also, Note, *Defamation in Virginia—A Merger of Libel and Slander*, 47 VA. L. REV. 1116 (1961). Slanders affecting the plaintiff in business, trade, office or calling are slanders *per se* and thus actionable without any proof of actual damages. *Anderson v. Kammeer*, 262 N.W.2d 366, 372 (Minn. 1977); PROSSER, *supra* note 12, § 112.

16. Numerous sources have discussed a cause of action based on libel and slander arising from an employee reference. See, e.g., *Duffy*, *supra* note 6, at 444; Comment, *Qualified Privilege*, *supra* note 2, at 146; Note, *Master's Defamation of His Servants*, 18 CLEV.-MAR. L. REV. 332 (1969) (presentation of topic is still current). See generally Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification*, 24 A.L.R. 4TH 144 (1983); 50 AM. JUR. 2D *Libel & Slander* §§ 114-16 (1970). Therefore, this comment will briefly overview employee's defamation claims as discussed in recent cases.

17. "Statements made by an employer . . . to one with a legitimate interest in the subject

to a prospective employer<sup>19</sup> concerning the services and character of a current or former employee.<sup>20</sup> Courts grant this qualified privilege to induce fair comment and criticism.<sup>21</sup> The privilege is a "qualified" one because only the truthful statements of the speaker are protected from actions for redress. The qualified privilege benefits the recipient by requiring the disclosure of truthful, relevant information.

For example, in *Stuempges v. Parke Davis & Co.*,<sup>22</sup> the court held that an employer's statements about the work record of a former employee were privileged when the statements were made in good faith to a party with a legitimate interest in the subject matter. After the defendant employer had demonstrated the existence of a qualified privilege, the plain-

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[matter] are conditionally privileged so long as they are made in good faith." *Stuempges*, 297 N.W.2d at 254. Qualified privilege results when the speaker communicates in the "discharge of a public or private duty, legal or moral." *Williams Printing Co. v. Saunders*, 113 Va. 156, 161, 73 S.E. 472, 476 (1912). This privilege is conditional or qualified because it can be lost if abused. *Robinson v. Lescrenier*, 721 F.2d 1101 (7th Cir. 1983); *Scholtes v. Signal Delivery Serv.*, 548 F. Supp. 487 (W.D. Ark. 1982). For a general discussion of the qualified privilege see Note, *Qualified Privilege as a Defense to Defamation*, 45 VA. L. REV. 772 (1959); PROSSER, *supra* note 12, § 115.

18. Even if a reference does not speak favorably of a former employee, an employer will not be liable if the statement was made with good faith in its truth and accuracy. A "publication which is . . . privileged is one made in good faith." *Cook v. East Shore Newspapers*, 327 Ill. App. 559, —, 64 N.E.2d 751, 760 (1946).

19. A privileged communication must be made to a party with a reasonable interest in the information, or with "reciprocal duties or responsibilities pertaining to or in the subject matter" of the communication. *M. Rosenberg & Sons, Inc. v. Craft*, 182 Va. 512, 519, 29 S.E.2d 375, 380 (1944); *see also McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Toomer v. Breaux*, 146 So. 2d 723 (La. Ct. App. 1962). *See generally* 50 AM. JUR. 2D *Libel & Slander* § 275 (1970).

20. A statement must be confined to relevant subject matter. For example, inclusion of non-work related information, e.g. racial class, scandalous family background, etc., in response to a reference inquiry exceeds the scope of the privilege. Otherwise, anything said or written by a master concerning the character of a former servant is a privileged communication. *Williams Printing Co.*, 113 Va. at 157, 73 S.E. at 476; *accord Kroger Co. v. Young*, 210 Va. 564, 567, 172 S.E.2d 720, 722 (1970). *But see Stewart v. Nation-wide Check Corp.*, 279 N.C. 278, 182 S.E.2d 410 (1971) (employer's statement to a party who had a family connection with discharged employee was not qualifiedly privileged); *Harrison v. Arrow Metal Prod. Corp.*, 20 Mich. App. 570, 174 N.W.2d 875 (1969) (held that an employer's communications to prospective employers are not protected with any privilege).

21. Note, *Torts—Libel and Slander—Defenses of Qualified [Sic] Privilege and Fair Comment*, 41 N.C.L. REV. 153 (1962). The qualified privilege attempts to balance society's interest in protecting individuals against inaccurate statements that harm their reputation, and thereby injure their career, against society's interest in facilitating the flow of information so that employers can make wise hiring decisions. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (the defamation action protects plaintiff's right to be free from defamatory falsehood); *Stuempges*, 297 N.W.2d at 257. The law recognizes that the benefits of the free flow of employee reference information outweighs the potential harm to the employee. *Geslewitz, Reviewing Personnel Practices and Documents to Avoid the Risk of Litigation*, 32 PRAC. LAW. 75, 86-87 (Jan. 1986); *see also* Note, *supra* note 17, at 779.

22. 297 N.W.2d 252 (Minn. 1980).

tiff employee only needed to demonstrate that the employer's statement<sup>23</sup> was false or uttered with malice to recover compensatory and punitive damages.<sup>24</sup> The plaintiff recovered by showing that his former employer had wrongfully exceeded the qualified privilege.

Proof of malice<sup>25</sup> destroys the qualified privilege of the employer who gives the reference. For example, in *Wynn v. Cole*,<sup>26</sup> the allegedly defamatory statements<sup>27</sup> were protected by a qualified privilege in the "absence

23. The employer had stated that the employee was a poor salesperson and was not industrious and that he was fired because he sold on friendship, would not get products out, was hard to motivate and could not sell. *Id.* at 255.

24. A plaintiff employee does not need to prove an express defamatory statement on the part of the defendant employer in order to recover.

In an action for slander, nature of damages to be awarded is determined by the type of slander involved, if 'slander per se,' in which slander is accomplished by very words spoken, general compensatory damages will be presumed, but when slander is 'slander per quod,' in which slander results from listener's interpretation of words through innuendo, general compensatory damages must be alleged and proved in order for plaintiff to recover at all, and punitive damages may be awarded in either case, but only upon the finding of actual damages, and nominal damages may be awarded even if no actual loss is proven.

*Rainey v. Shaffer*, 8 Ohio App. 3d 262, 456 N.E.2d 1328 (1983) (plaintiff was unable to recover because she could not prove that the prospective employer inferred that she was a thief from the statements of her former employer).

25. As early as 1786, an employee could not maintain a defamation action against an employer unless the statement was "malicious." See generally Annotation, *Statement with Reference to Discharge from Private Employment as Actionable Per Se*, 66 A.L.R. 1499, 1506 (1952) (citing *Weatherstron v. Hawkins*, 99 Eng. Rep. 1001 (1786)). Since then, courts consistently have held that an employer's qualified privilege is destroyed if a statement is made maliciously or with an intent to injure. See, e.g., *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Cole v. Cooper*, 437 So. 2d 1257 (Ala. 1983); *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del. Super. Ct. 1982); *Kroger Co.*, 210 Va. at 569, 172 S.E.2d at 723; see also Annotation, *supra* note 15, at 156. The burden is on the plaintiff to prove malice. *Southwestern Bell Tel. Co. v. Dixon*, 575 S.W.2d 596, 599 (Tex. Civ. App. 1978). But see *Galvin v. New York, N.H. & H. R.R.*, 341 Mass. 293, 168 N.E.2d 262 (1960) (although there was insufficient evidence to prove malice on behalf of defendant employer, the court still found an abuse of the qualified privilege). For a discussion of this case see *Rapacz, Torts—Massachusetts Finds Abuse of Qualified Privilege Without Proof of Malice in Slander Case*, 10 DE PAUL L. REV. 222 (1960).

Communicating with malice means communicating with ill-will or spite. Malice may be express or inferred from defendant's unreasonable conduct. Malice traditionally has been left to state courts to define. *Duffy, supra* note 6, at 447; see Comment, *Tort Law—Conditional Privilege for Defamatory Statements in Legitimate Business Communication—Bratt v. International Business Machines Corp.*, 392 Mass. 508, 467 N.E.2d 126 (1984), 19 SUFFOLK U.L. REV. 176, 178-83 (1985) (discussing the standard for malice to be applied to conditionally privileged communications). For an excellent discussion of the malice standard in Virginia, see *The Gazette v. Harris*, 229 Va. 1, 325 S.E.2d 713, cert. denied, 105 S.C. 3513, 3528 (1985). See also *Spahn, Libel and Slander in Virginia*, 17 U. RICH. L. REV. 769, 779-83 (1983).

26. 91 Mich. App. 517, 284 N.W.2d 144 (1979).

27. The employer had commented that plaintiff, "did not really apply herself to the best of her abilities. Eager to get on the handwagon if trouble existed." *Id.* at \_\_\_, 284 N.W.2d at

of any evidence of malice."<sup>28</sup> Testimony indicating that the employer did not like the employee was insufficient to raise the inference of actual malice, i.e., that the statements were made "with knowledge that statements were false or with reckless disregard for their truth."<sup>29</sup> As stated in *Stuempges*, the state of mind of the employer making allegedly defamatory statements is "more significant than whether he knew that what he was saying was false."<sup>30</sup> The underlying basis for this rule is the importance of protecting the job seeker from malicious undercutting by a former employer.

In addition to the inability to show malice, truth is a complete defense in a defamation action. True statements, however disparaging, are not actionable.<sup>31</sup>

#### B. *The Recent Trend Toward Reducing the Qualified Privilege Extended to Employers*

Recently, courts have been narrowing the scope of employers' qualified privilege to comment on employees.<sup>32</sup> Several cases demonstrate the employer's increased risk of liability.

Today, an employer who refuses to give a reference can be sued for defamation by the former employee. For example, in *Lewis v. Equitable Life Assurance Society of the United States*,<sup>33</sup> an employer who refused

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28. *Id.* at \_\_\_, 284 N.W.2d at 147.

29. *Id.* (recognizing the commonly accepted standard for actual malice in similar situations). This standard also applies for public employees suing public employers. *McKinley v. Baden*, 777 F.2d 1017, 1020-21 (5th Cir. 1985).

30. *Stuempges*, 297 N.W.2d at 258.

31. *Id.* at 252.

32. "In its term that ended on July 2 [1985] . . . the [U.S. Supreme Court] Justices came down on the side of the plaintiff and narrowed First Amendment protection for a person expressing false and harmful views." Maskowitz, *The Court Sends Mixed Signals on Free Speech*, Bus. Wk. 40 (July 15, 1985); see *Dun & Bradstreet, Inc. v. Green Moss Builders, Inc.*, 105 S. Ct. 2939 (1985) (the Court confirmed an award of \$300,000 in punitive damages against defendant credit reporting agency for incorrectly reporting to five subscribers that plaintiff construction contractor had filed for bankruptcy); *McDonald v. Smith*, 105 S. Ct. 2787 (1985) (holding that a businessman could not claim absolute immunity from a libel suit based on letters he wrote to President Reagan urging that a former state judge not be appointed as U.S. Attorney); Arbetman & Hayman, *The Court Takes Another Look at Protection for Defendants in Defamation Cases*, PREVIEW No. 1, at 18 (1985); see also *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 150, 334 S.E.2d 846, 850 (1985) (recognizing the holding in *Dun & Bradstreet* that "in light of the reduced constitutional value of speech involving no matters of public concern, . . . the state interest [in compensating private individuals for injury to reputation] adequately supports awards of presumed and punitive damages—even absent a showing of [*New York Times*] malice." 105 S. Ct. at 2946).

33. 361 N.W.2d 875 (Minn. Ct. App. 1985), *rev'd in part*, 389 N.W.2d 876 (Minn. 1986). For a discussion of the case, see Feerick, *Employee Defamation*, 194 N.Y.L.J. 1 (Oct. 4, 1985).

to comment on four former employees was found liable for defamation. The plaintiffs contended that the employer's refusal to provide an explanation for the employees' discharge to future employers forced the employees to explain the circumstances themselves. The employees had been fired for what the employer termed "gross insubordination" resulting from their refusal to alter expense accounts to reflect a lower amount than was actually expended. The court concluded that the employees could sue for defamation even though they actually had disseminated the fact that they had been fired for "gross insubordination."<sup>34</sup> The court reasoned that the defamation suit could be brought since the employees were strongly compelled to repeat the defamatory statements.<sup>35</sup> While the Minnesota Court of Appeals acknowledged that the ruling could have a significant impact on employers, the court nevertheless awarded almost one million dollars in compensatory and punitive damages.<sup>36</sup> The Supreme Court of Minnesota upheld the decision but reduced the award of damages by eliminating the award for punitive damages.<sup>37</sup>

Additionally, an employer may be sued for giving inadequate or vague references. For example, in *Carney v. Memorial Hospital & Nursing Home*,<sup>38</sup> a doctor sued his employer hospital for telling a prospective employer that he had been discharged "for cause." The doctor alleged that the hospital's statement was untrue and was intended to injure him in his profession by indicating that he was incompetent to perform professional duties. Despite the statement's vagueness, the court allowed the plaintiff to prove the damages arising from this allegedly defamatory statement.

An employer can also be found liable for defamation because the reference given, although detailed and accurate, lacks a complete description of all the reasons supporting termination of employment. In *O'Brien v.*

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34. *Lewis*, 389 N.W.2d at 888.

35. Several courts have recognized an exception to the general rule that a defendant cannot be liable for defamation when the statement in question was published to a third person only by the plaintiff. This exception applies to compelled self-publication in the context of employment discharges. See, e.g., *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); *Colonial Stores, Inc. v. Barrett*, 73 Ga. App. 839, 38 S.E.2d 306 (1946); *Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982); *Grist v. Upjohn Co.*, 16 Mich App. 452, 168 N.W.2d 389 (1969).

36. *Lewis*, 361 N.W.2d at 881. While the court recognized the implications of the decision, the court felt the impact of the decision would only fall upon "employers whose communications demonstrate dishonesty and malice." *Id.* at 881.

37. *Lewis*, 389 N.W.2d at 891-92. The court overturned the award of punitive damages reasoning that such awards may tend to encourage self-compelled publications and result in employer's refusing to state the reasons for an employee's discharge. *Id.* at 892.

38. 64 N.Y.2d 770, 475 N.E.2d 451, 485 N.Y.S.2d 984 (1985). The court rejected defendant hospital's argument that "for cause" meant only that the hospital had "reason," which may or may not have been valid, for dismissing plaintiff and held that the statement "for cause" may be susceptible to defamatory connotations. *Id.* at \_\_\_, 475 N.E.2d at 453, 485 N.Y.S.2d at 986.



*Papa Gino's of America, Inc.*,<sup>39</sup> the employer truthfully stated in response to a request for a reference that the employee "was terminated for drug use." According to the findings of the jury, the employee's discharge was substantially caused by polygraph test results which indicated that the employee used illegal drugs.<sup>40</sup> The jury also found that the discharge was caused by the employer's desire to retaliate for the employee's failure to hire the son of his supervisor. The court found that the employer's omission of its own retaliatory motives against the employee was "purposeful misrepresentation."<sup>41</sup> This intentional misrepresentation substantiated the plaintiff's claim of malice required to defeat the employer's qualified privilege. The employee was awarded \$50,000 for the defamation claim.

These cases illustrate a trend toward an increasing likelihood of an employee being able to hold an employer liable for almost any statement made in the employee reference context. The cases indicate the recent narrowing of an employer's qualified privilege. As demonstrated in both *O'Brien* and *Lewis*, an employer's policy of disseminating references on its employees can lead to a costly defamation lawsuit. *Carney* demonstrates that the employer can be liable even when no statement was made by the employer.

### III. REFERENCE SUITS BASED ON DISCRIMINATION

#### A. *Intentional Dissemination of Adverse References in an Effort to Promote Discrimination by an Employer*

Suits which allege that the employer discriminated by providing unfavorable references can be brought under civil rights laws,<sup>42</sup> particularly

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39. 780 F.2d 1067 (1st Cir. 1986).

40. *Id.* at 1073.

41. *Id.*

42. Forty-six states, Puerto Rico, the Virgin Islands and the District of Columbia have adopted statutes that prohibit job discrimination on the basis of race, religion, sex or national origin. 1 EPL. COORDINATOR (Research Inst. Am.) 70,022-24 (June 17, 1985) (the four states that lack such coverage include: Alabama, Arkansas, Mississippi, and Virginia). Forty-six states prohibit job discrimination on the basis of age. *Id.* at 70,027-28 (those states lacking coverage include: Alabama, Missouri, Oklahoma, and Wyoming). Only Delaware expressly prohibits job discrimination on the basis of marital status. *Id.* at 70,028-29.

Virginia has various limited statutes requiring equal pay, VA. CODE ANN. § 40.1-28.6 (Repl. Vol. 1981), prohibiting job discrimination based on physical handicap, *id.* § 50.01-41 (Cum. Supp. 1986), prohibiting discrimination with regard to race, color, sex, religion and national origin in working on government contracts, *id.* §§ 2.1-376, -376.1 (Repl. Vol. 1979 and Cum. Supp. 1986) and creating the Equal Employment Opportunity Committee to assure equal opportunities to state employees without regard to race, color, religion, national origin, political affiliation, handicap, sex or age, *id.* § 2.1-116.10 (Repl. Vol. 1979). However, Virginia has no broad-based fair employment statute of general applicability.

Title VII of the Civil Rights Act of 1964.<sup>43</sup> It is an unlawful employment practice to disseminate adverse references in order to promote discrimination.<sup>44</sup> However, an employee has the difficult burden of showing that the motivation for the employer's wrongful conduct was actually discriminatory in nature.<sup>45</sup> An example of an employer deliberately distributing discriminatory references is found in *Shehadeh v. Chesapeake & Potomac Telephone Co.*<sup>46</sup> Plaintiff alleged that the references were untrue and contained damaging accounts of her employment qualifications because of her gender and her husband's Arabic descent. The court found sufficient discriminatory intent to allow her to proceed with her claim.<sup>47</sup> The court stated that "[d]enial of employment on grounds of sex or national origin is as repugnant to the legislative goal [of Title VII] when induced by a former employer as when perpetrated directly by an employer with whom

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43. 42 U.S.C. § 2000-2000h-6 (1983). Title VII bars discrimination in employment on the basis of race, color, religion, sex or national origin. The act provides that: It shall be an unlawful employment practice for any employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or *privileges of employment*, because of such individual's race, color, religion, sex or national origin. *Id.* § 2000e-2(a)(1) (1982) (emphasis added). Title VII protects former employees even though the literal language of the statute says it applies only to "employees or applicants for employment." *Id.* § 2000(e)-2(a)(1) -(2)(a)(2) (1982). The statute prohibits discrimination related to or arising from the employment relationship, whether or not the person discriminated against is an employee at the time of discriminatory conduct. *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977); see Annotation, *Dissemination of Adverse Employment References by Former Employer as Unlawful Employment Practice Under Title VII of Civil Rights Act of 1964 (42 USC § 2000e-2(a)(1))*, 50 A.L.R. Fed. 722 (1980).

44. 42 U.S.C. § 2000e-2(a)(1) (1982); see e.g., *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981); *Silver v. Mohasco Corp.*, 602 F.2d 1083, 1090-91 (2d Cir. 1979), *rev'd. on other grounds*, 447 U.S. 807 (1980). If an employee is terminated for good cause, then it will not be a violation of Title VII for an employer to provide prospective employers with unfavorable references. *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 723 (D.C. Cir. 1978). Many employers have a policy of giving out only dates of work and past salary information for reference checks. An employer who deviates from this policy and issues an unfavorable opinion reference for a former employee discharged for good cause may face charges of disparate treatment that permit an inference of discriminatory intent. See EEOC COMPL. MAN. (BNA) § 602.5(a) (June 1986).

45. The employer's actions must be motivated by a prohibited animus. *Silver*, 602 F.2d 1083 (2d Cir. 1979), *rev'd.*, 447 U.S. 807 (1980); *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334 (S.D.N.Y. 1978), *aff'd mem.*, 607 F.2d 995 (2d Cir. 1979); *Tarvesian v. Carr Div. of T.R.W., Inc.*, 407 F. Supp. 336 (D. Mass. 1976). The employee need not prove that the trait upon which discrimination is based was a substantial or determining factor in the alleged wrongful employer communication, but only that the discriminatory trait was taken into account. The employee only must show that the discriminatory trait had "more likely [than not]" influenced the communication. *Bibbs v. Block*, 778 F.2d 1318, 1327 (1985) (Lay, J. concurring) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

46. 595 F.2d 711 (D.C. Cir. 1978).

47. *Id.* at 723.

a job is sought."<sup>48</sup>

B. *The Unlawful Dissemination of Adverse References in Retaliation for a Discrimination Complaint Lodged by the Employee*

Title VII expressly prohibits an employer from disseminating unfavorable references in retaliation for an employee's prior complaint of discrimination in the workplace.<sup>49</sup> This "anti-retaliation" provision allows employees to participate in Title VII claims against employers without fear of derogatory or unfair future references.<sup>50</sup> For example, in *Bilka v. Pepe's Inc.*,<sup>51</sup> an employee alleged that the employer fired him on the basis of national origin. The court held that the employer had violated Title VII by disseminating negative references in retaliation for bringing discrimination charges.<sup>52</sup> The court found that the anti-retaliation clause of Title VII "was plainly written to protect employees who assert Title VII rights."<sup>53</sup> Accordingly, employers face liability not only for giving a discriminatory reference but also for any negative reference given in retaliation for an employee's complaint of discriminatory practices in the workplace.<sup>54</sup>

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48. *Id.* at 721.

49. 42 U.S.C. § 2000e-3(a) provides that:

[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice . . . or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

See *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978) (employer's refusal to provide an employee with a reference in retaliation for filing charges violates Title VII's anti-retaliation provision); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (act of defendant former employer in advising prospective employer that plaintiff employee had filed a sex discrimination charge against defendant was a retaliatory act and, as such, a violation of 42 U.S.C. § 2000e-3(a)); *Czaenowski v. Desoto, Inc.*, 518 F. Supp. 1252, 1259 (N.D. Ill. 1981) (unlawful retaliation where an employer discharges an employee for good cause, and then provides a reference that knowingly contains false and grossly exaggerated unfavorable information after the employee complains of discrimination); Fed. Reg. Empl. Serv. (Law. Co-op) §§ 2:1-2:3 (Aug. 1984).

50. The anti-retaliation provision of Title VII "was obviously written to prevent employers from chilling employee's assertions of Title VII rights, and the section should be read broadly." *Bilka v. Pepe's Inc.*, 601 F. Supp. 1254, 1259 (N.D. Ill. 1985).

51. *Id.* at 1254.

52. *Id.* at 1258-59.

53. *Id.* at 1259.

54. Additional information needed to bring a reference suit based on Title VII violations is beyond the scope of this comment. For a more extensive treatment, see 9A Empl. Coordinator (Research Inst. Am.) 98,601 (Dec. 17, 1984); [Job Discrimination] Fed. Reg. Empl. Serv. (Law. Co-op) 31:1-4:71 (Aug. 1984); 1-4A A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION* § 1.0-121.24 (1985); Feiger & Lawson, *Evaluation of an Employment Discrimination Case: The Plaintiff's Perspective*, 15 J. MAR. L. REV. 621 (1982); Saperstein & Siniscalco, *Employment Discrimination Claims*, 2 CAL. LAW. 30 (Nov. 1982); Annotation, *supra*

## IV. STATUTORY REGULATION OF EMPLOYEE REFERENCES

## A. Regulation by State Legislatures

## 1. Blacklisting

An employee's rights concerning references often are governed by state law.<sup>55</sup> Many state statutes prohibit employers from impeding a former employee's search for subsequent employment.<sup>56</sup> In Virginia, an employer's conduct must be "willful and malicious"<sup>57</sup> to be actionable. Other states, such as California, require only that the conduct amount to "misrepresentation."<sup>58</sup> An employer's wrongful intervention with prospective employment, or "blacklisting,"<sup>59</sup> is expressly prohibited by many states.<sup>60</sup>

note 43, at 722.

55. Thirty states plus Puerto Rico have enacted some legislation dealing specifically with termination of employment and the employee reference. McCULLOCH, *TERMINATION OF EMPLOYMENT; EMPLOYER AND EMPLOYEE RIGHTS* (P-H) ¶ 20,066 (1984) (Alaska, Delaware, District of Columbia, Florida, Georgia, Illinois, Idaho, Louisiana, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, South Dakota, Tennessee, Wisconsin, Vermont, and West Virginia have enacted no statutes of this kind) [hereinafter *TERMINATION*]. Thirty-three states plus the District of Columbia have enacted privacy statutes dealing with some aspect of employee privacy that could relate to the employee reference situation. 8 *Empl. Coordinator* (Research Inst. Am.) 81,857 (May 15, 1985). The states have exclusive power to regulate both the process by which an employer gathers information about prospective employees as well as the use to which the employer puts the gathered information. See, e.g., CAL. LAB. CODE § 432.2 (West 1971) (prohibiting private employers from requiring polygraph tests as a condition of employment); VA. CODE ANN. § 40.1-28 (Repl. Vol. 1986) (prohibiting employers from forcing employees to pay the cost of medical examinations required as a condition of employment).

56. For example, in Virginia:

No person doing business in this State, or any agent or attorney of such person after having discharged any employee from the service of such person or after any employee shall have voluntarily left the service of such person shall *willfully and maliciously* prevent or attempt to prevent by word or writing, directly or indirectly, such discharged employee or such employee who has voluntarily left from obtaining employment with any other person . . . .

VA. CODE ANN. § 40.1-27 (Repl. Vol. 1986) (emphasis added); see, e.g., *Malquist v. Foley*, 714 P.2d 995 (Mont. 1986) (finding employer's conduct to be "blacklisting per se"); *Wright v. Fiber Indust. Inc.*, 60 N.C. App. 486, 299 S.E.2d 284 (1983) (employee successfully bringing suit under blacklisting statute). In addition to Virginia, twenty-five other states have adopted such statutes. See 12 *Empl. Coordinator* (Research Inst. Am.) 125,007 (Apr. 21, 1986) (Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Washington, and Wisconsin all have statutory provisions dealing with blacklisting). In addition, Kentucky has ruled that an employer that makes a bad-faith threat to fire an employee and give a bad reference may be subject to suit by the employee for damages. See *Humana, Inc. v. Fairchild*, 603 S.W.2d 918 (Ky. Ct. App. 1980).

57. VA. CODE ANN. § 40.1-27 (Repl. Vol. 1986).

58. CAL. LAB. CODE § 1050 (West 1971).

59. "Blacklist" means a list of individuals marked out for special avoidance, antagonism or adverse discrimination. *State v. Dabney*, 77 Okla. Crim. 331, \_\_\_, 141 P.2d 303, 307-08

Several blacklisting statutes authorize civil proceedings for enforcement purposes.<sup>61</sup> Other statutes provide criminal sanctions<sup>62</sup> to encourage compliance.

A recent example of the substantial financial penalty imposed on employers for blacklisting violations is found in *Marshall v. Brown*.<sup>63</sup> In *Marshall*, the plaintiff employee resigned from her job. She later sought employment with another company. When a prospective employer called the former employer for a reference, the inquirer was told that the employee was "erratic," that she brought her problems to the office and that she had married a co-worker causing him to have a mental breakdown.<sup>64</sup> The plaintiff was not hired. After learning about the conversation, the plaintiff sued under California's anti-blacklisting statute which provides a civil remedy for misrepresentations that prevent a worker's prospective employment.<sup>65</sup> The jury found that the former employer was liable for compensatory and punitive damages. A judgment was entered for \$165,000.<sup>66</sup>

*Marshall* is just one example of the substantial monetary penalty that employers will face for blacklisting. The availability of such severe penalties for blacklisting is only one example of the attempts legislatures are making to regulate employee references.

## 2. Other Employee Reference Legislation

Legislatures around the country have made efforts to control the references given by employers. Several states have expressly allowed employers to give extensive references as long as they are truthful.<sup>67</sup> Virginia

(Okla. Crim. App. 1943); see also *Dick v. Northern Pac. Ry.*, 86 Wash. 211, \_\_\_, 150 P. 8, 12 (1915). According to one state code, a blacklisting may arise from *any understanding* by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment. ARIZ. REV. STAT. ANN. § 23-1361 (1983).

60. For example, Alabama, Arkansas, Colorado, Connecticut, Nevada, New York, Oklahoma, Oregon, Utah, Washington and Wisconsin have express statutory language prohibiting "blacklisting." See 8 EMPLOYMENT COORDINATOR (Research Inst. Am.) 82,933-36 (Sept. 16, 1985).

61. 9 EMPLOYMENT COORDINATOR (Research Inst. Am.) 99,631 (Jan. 15, 1985) (for example, Indiana, Iowa, Kansas, Montana, Oklahoma and Texas authorize civil proceedings).

62. *Id.* at 90,251 (California, Indiana, Iowa, Kansas, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Utah, Virginia, and Wisconsin authorize criminal sanctions).

63. 141 Cal. App. 3d 408, 190 Cal. Rptr. 392 (1983). For a discussion of this case see TERMINATION, *supra* note 55, at ¶ 52,301.

64. *Id.* 141 Cal. App. 3d at \_\_\_, 190 Cal. Rptr. at 394.

65. *Id.*; see *supra* note 58.

66. For a discussion of the damages assigned and an explanation of their computation, see TERMINATION, *supra* note 55, at ¶ 52,301.

67. See, e.g., CAL. LAB. CODE § 1053 (West 1971) (a truthful statement concerning termi-

allows an employer to make "a truthful statement [upon request] of the reason for such discharge" and to comment on the "character, industry and ability of such person who has *voluntarily* left employment."<sup>68</sup> Most states require such an employer reference to be in writing.<sup>69</sup> In Texas, a former employee is entitled to a complete copy or true statement of *any* communication made by his former employer to any employer with whom he is seeking employment within ten days after a demand in writing is made.<sup>70</sup> Although varying in content,<sup>71</sup> these statutes are evidence of legislatures' attempts to regulate employer references for the benefit of employees.

### 3. Service Letter Statutes

As early as 1905, the Missouri legislature had enacted a law which required employers, upon the request of an employee, to furnish a letter stating the nature of his employment.<sup>72</sup> Service letter statutes, requiring an employer to give a letter to an employee regarding his services upon termination of employment, have been enacted in twelve states.<sup>73</sup> Service

nation of an employee may be furnished, although if the statement conveys information different from that expressed by its words, there is prima facie evidence that the statute has been violated); COLO. REV. STAT. § 8-2-114 (1973) ("nothing in [the blacklisting statute] shall prevent a former employer . . . from imparting a fair and unbiased opinion of a workman's or employee's qualifications when solicited"); see also 8 Empl. Coordinator (Research Inst. Am.) ¶¶ EP-22,940, -22,948 (Oct. 15, 1984 & Sept. 16, 1985) (listing other similar statutes).

68. VA. CODE ANN. § 40.1-27 (Repl. Vol. 1986) (emphasis added).

69. See, e.g., IOWA CODE ANN. § 730.1 (West 1979); TEX. REV. CIV. STAT. ANN. art. 5196 § 5 (Vernon 1971).

70. TEX. REV. CIV. STAT. ANN. art. 5196 § 2 (Vernon 1971).

71. For example, in Montana, an employer may not furnish to any prospective employer the reasons for an employee's discharge if the employer has refused to furnish the employee with a written statement containing such reasons. MONT. CODE ANN. § 39-2-801 (1985). In Nevada, upon an employee's demand, an employer *must* furnish a truthful statement of the reasons for the discharge or a reference of "meritorious services." NEV. REV. STAT. § 613.210(4) (1985).

72. For a history of the Missouri Service Letter Statute, see Comment, *Missouri's Service Letter Statute: Its Reach, Effect and Constitutionality*, 52 UMKC L. REV. 641 (1984). According to a somewhat typical statute, "[i]t shall be unlawful for any employer . . . [t]o refuse to furnish, upon written request of any employee whose services have been terminated, a service letter setting forth the tenure of employment, occupation classification and wage rate paid the employee." KAN. STAT. ANN. § 44-808 (1981). "Most states that provide for a service letter do *not* require the letter unless the employee makes a request for such a letter. Not many employees make such a request." TERMINATION, *supra* note 55, at ¶ 42,101; see also *Worth v. Monsanto Co.*, 680 S.W.2d 379 (Mo. Ct. App. 1984) (discussing what constitutes a sufficient request under the Missouri Service Letter Statute).

73. CAL. LAB. CODE § 1055 (West 1971) (applies only to employees of public utilities); IND. CODE ANN. §§ 22-6-3-1, -6-3-2 (Burns Repl. Vol. 1986); KAN. STAT. ANN. § 44-808(3) (1981); ME. REV. STAT. ANN. tit. 26, § 630 (Supp. 1986); MO. REV. STAT. § 290.140 (1986); MONT. CODE ANN. §§ 39-2-801, -802, -803 (1984); NEB. REV. STAT. § 48-867 (1985); NEV. REV. STAT. § 613.210 (1985); OHIO REV. CODE ANN. § 4973.03 (Baldwin 1985) (applies only to railroad

letters may require an employer to state the reason for an employee's termination.<sup>74</sup> If the employee challenges the contents of the letter, an employer must be able to prove that anything stated in the letter is true.<sup>75</sup> Employers who violate these statutes may be liable for pre-established fines<sup>76</sup> or for both compensatory and punitive damages.<sup>77</sup>

In *Rimmer v. Colt Industries*,<sup>78</sup> the court stated that the purpose of such statutes is to assure "that a worker's ability to sell his skills to a potential employer would not be hampered by a previous employer's refusal to truthfully describe his work history."<sup>79</sup> While obviously beneficial to employees,<sup>80</sup> service letters have been criticized as placing an unfair burden on employers.<sup>81</sup> In reality, service letters may actually be an inef-

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employees); OKLA. STAT. ANN. tit. 40, § 171 (West 1986) (pertains only to employees of public service corporations and their contractors); TEX. REV. CIV. STAT. ANN. art. 5196 (Vernon 1971); WASH. ADMIN. CODE R. § 296-126-050 (1970). See generally Annotation, *Validity, Construction, and Application of Statute Requiring Employer, on Employee's Request, to Provide Written Statement of Employee's Service Record and Reason for Termination of Employment*, 24 A.L.R. 4th 1115 (1983) (discussing the construction and application of service letter statutes).

74. At common law there was no duty for an employer to provide a letter of recommendation or "service letter" to any employee he had discharged unless the contract for employment imposed such a duty. *Carr v. Montgomery Ward & Co.*, 363 S.W.2d 571, 574 (Mo. 1963); see also *Egloff v. Wilcox Elec. Co.*, 529 F. Supp. 190, 192 (W.D. Mo. 1981) (quoting *Carr*, 363 S.W.2d at 574), *aff'd*, 694 F.2d 1102 (8th Cir. 1982). Today a service letter requires a stated reason for termination of employment. MO. REV. STAT. § 290.140 (1986).

75. The burden of proof is placed on the employer and the jury determines if the reason for termination stated in the letter is the true reason. In one case where the employee was able to recover \$25,000 punitive damages, the court stated, "Accordingly, [the employee] has no burden of proving the true reason for [the] discharge; his burden is negative in character because such true reason is peculiarly within the knowledge of the employer, and [the] burden of showing the truth of the asserted reason for discharge is on the employer." *Elmer v. Texaco, Inc.*, 518 F.2d 807, 810 (8th Cir. 1975) (quoting *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197, 203 (Mo. 1972)). But see *Green v. N.L.T. Computer Serv. Corp.*, 649 S.W.2d 475 (Mo. Ct. App. 1983) (employee needs to prove that the reason given by the employer is untrue).

76. See, e.g., IND. CODE ANN. §§ 22-6-3-2, 34-4-32-4 (Burns Repl. Vol. 1986) (failure to provide a letter is a misdemeanor punishable by fine up to \$500).

77. See, e.g., MO. REV. STAT. § 290.140 (1986) (punitive damages may be awarded if employer fails to provide a letter within the required 45 day limit). No punitive damages shall be based on content of the letter and actual damages are recoverable only when the plaintiff can show that a prospective employer asked to see the letter and held the letter against plaintiff. *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736 (8th Cir. 1985).

78. 656 F.2d 323 (8th Cir. 1981).

79. *Id.* at 328 (citing *Cheek v. Prudential Ins. Co.*, 192 S.W. 387, 389 (1916)). An additional purpose of the statute is to help a potential employer "to ascertain the degree of intelligence, honesty, capacity and efficiency of the job applicant." *Rimmer*, 656 F.2d at 328 (quoting *Cheek*, 192 S.W. at 389).

80. "The law is maintained for the benefit of the employee, not subsequent employer." TERMINATION, *supra* note 55, at ¶ 42,101.

81. Some questions arise concerning the ethical behavior that these statutes promote. For example, suppose an employee is dismissed for some suspected unworthy behavior, such as

fective control on employer conduct due to the limited enforcement of the statutes.<sup>82</sup>

#### 4. Access to Personnel Files and References

An area of common legislative concern is the ensuring of a means by which an employee can gain access to his personnel file.<sup>83</sup> Many states have recently granted private-sector and public-sector employees the right to inspect their personnel files.<sup>84</sup> These statutes allow employees to review, copy and dispute records in their files, but exclude the employees'

dishonesty or theft. If an employee requests a letter and none is given, the employer exposes himself to punitive damages. If an employer gives a letter detailing his suspicions, he opens himself up to the possibility of a defamation suit. *See supra* text accompanying notes 15-41. If an employee asserts a claim under this statute along with a discrimination charge, he may win on one or both unless the employer can prove that the reason for termination stated in the letter is the true reason. *See TERMINATION, supra* note 55, at ¶ 20,063; Comment, *supra* note 72, at 664.

82. Unfortunately, employees gain little from the existence of the statute. *See Cordon v. Trans World Airlines*, 442 F. Supp. 1064, 1067 (D. Kan. 1977) (even if reasons that are stated are false, an employee may not bring suit under the service letter statute as long as a letter has been issued); *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986) (en banc) (court found defendant employer to have violated statute but awarded only \$1.00 in actual damages); *Stark v. American Bakeries Co.*, 647 S.W.2d 119, 123 (Mo. 1983) (en banc) (holding that the statement that the employee's "work was unsatisfactory" was too vague to satisfy the service letter statute but awarded only \$1.00 compensatory damages). *But see Neighbors v. Kirksville College*, 694 S.W.2d 822 (Mo. App. 1985) (employee was able to assert a cause of action for defamation based on the contents of the service letter her employer drafted).

83. "References continue to be a particular target for reform; numerous lawmakers and commentators have singled them out as a particular infringement on employee rights." Duffy, *supra* note 6, at 449 (citing *The Report of the Privacy Study Commission* (Washington, D.C.: G.P.O. 1977)); *see Walker, Employee Access to Personnel Files: An Emerging Trend*, 1 LAB. & EMPLOYMENT LAW NEWSLETTER No. 6, at 18 (1985); Leech, *The Illinois Personnel Records Statute: New Rights for Employees, New Risks for Employers*, 73 ILL. B.J. 386 (1985).

84. According to one statute, the term "personnel file" includes "any formal or informal employee evaluations and reports relating to employee's character, credit, work habits, compensation and benefits, and non-privileged medical records . . . relating to the employee which the employer has in his possession." ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1985). At least ten states have granted private and/or public sector employees access to their personnel files. CAL. LAB. CODE § 1198.5 (West Supp. 1987); CONN. GEN. STAT. ANN. § 31-1286 (West Supp. 1986); DEL. CODE ANN. tit. 19, §§ 719-24 (Repl. Vol. 1985); ILL. ANN. STAT. ch. 48, ¶ 2001 (Smith-Hurd 1986); KAN. STAT. ANN. § 45-215 (Cum. Supp. 1985); ME. REV. STAT. ANN. tit. 26, § 631 (Supp. 1986); MICH. COMP. LAWS ANN. § 423.503 (West Cum. Supp. 1986); NEV. REV. STAT. § 613.080 (1986); N.H. REV. STAT. ANN. § 275:56 (Cum. Supp. 1986); OR. REV. STAT. § 652.750 (Repl. Vol. 1983); PA. STAT. ANN. tit. 43, § 1321-24 (Purdon Supp. 1986); WASH. REV. CODE ANN. § 49.12.240 (Cum. 1987); WIS. STAT. ANN. § 103.13 (West Cum. Supp. 1986). Virginia currently has no such legislation. For a good discussion of state laws governing personnel file data see Menard & Morrill, *The Employer and the Law of Privacy in the Workplace—The U.S. Model to Date*, 9 N.C.J. INT'L L. & COMM. REG. 93, 102-04 (1983).



right to view reference letters contained in the file.<sup>85</sup> However, a few states have not mandated such an exclusion; thereby allowing an employee the opportunity to see his former employer's references if kept in his file.<sup>86</sup> As this trend expands and greater access to personnel files and references is attained,<sup>87</sup> employers who wrongfully disseminate unfavorable references may be faced with an increasing number of reference lawsuits.<sup>88</sup>

### B. Regulation by the Federal Government

The federal government has not enacted any legislation specifically governing employee reference practices.<sup>89</sup> However, the recently enacted Fair Credit Reporting Act<sup>90</sup> may expose employers to reference suits initi-

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85. See, e.g., CAL. LAB. CODE § 1198.5 (West Supp. 1986); CONN. GEN. STAT. ANN. § 31-128a(3) (West Supp. 1986); WIS. STAT. ANN. § 103.13(6) (West Supp. 1986). These statutes remove letters of reference received by the employer from "personnel documents" which an employee shall have a right to review.

86. See, e.g., ME. REV. STAT. ANN. tit. 26, § 631 (West Supp. 1985); PA. STAT. ANN. tit. 43, § 1322 (Purdon Supp. 1986).

87. "With the recent growth of interest in employee rights, privacy and employment-at-will issues, it is expected that more states will expand employee's access to their work records." Walker, *supra* note 83, at 18. Critics have suggested the need for federal legislation to establish nationwide uniform policies making an employer liable to an employee for disclosure of an employee's personal information. Proponents of this idea have drafted a federal "Fair Labor Disclosure Act." Duff & Johnson, *supra* note 5, at 760.

88. Employee access to personnel files will protect employees by allowing them to know how they have been evaluated and aiding their efforts to redress unfair criticism. Leech, *supra* note 83, at 388. At the same time, employers will be exposed to increased liability resulting from employees disgruntled after reviewing their files. *Id.* at 390.

Furthermore, many states have enacted Fair Credit Reporting Acts modeled after a similar federal act. These acts will allow employees to see their references. See *infra* notes 89-92 and accompanying text.

89. The only federal legislation that is relevant is the Privacy Act of 1974 which is incorporated into the Administrative Procedures Act, 5 U.S.C. § 552a (1982), and is designed to safeguard the right of personal privacy against the invasion by agencies that collect and use personal data. Under the Privacy Act, individuals are guaranteed the right to gain access to their records. 5 U.S.C. § 552a(d)(1). For a more detailed overview of the requirements of the act see 15 FEDERAL PROCEDURE: LAWYER'S EDITION §§ 38:1-38:348 (Law. Co-op. 1983). For an analysis of how employee's privacy needs are expressed through federal legislation, see Reibert, *Federal Protection of Employment Record Privacy*, 18 HARV. J. ON LEGIS. 207 (1981).

90. 15 U.S.C. § 1681 (1982).

For a discussion about the disclosure of information under the Fair Credit Reporting Act, see Menard & Morrill, *supra* note 84, at 98-100. In addition, several states have enacted their own version of a fair credit reporting act modeled after the federal version. See, e.g., CAL. CIV. CODE § 1786 (West Supp. 1983); KAN. STAT. ANN. §§ 50-701 to -722 (1983); MD. COM. LAW CODE ANN. §§ 14-1110 to -1218 (1983); N.M. STAT. ANN. § 56-3-1 (1978); TEX. REV. CIV. STAT. ANN. art. 9016 (Vernon Supp. 1986). For example, Arizona provides that an employer that makes an adverse employment decision with regard to an individual must, "upon written request, disclose the name and address of any consumer reporting agency that has furnished . . . a consumer report . . . considered . . . in making the determina-

ated by employees. By allowing employees to see their current or past employer's references,<sup>91</sup> the federal government has opened avenues for employees to have notice of adverse references and to have access to information needed to bring a reference suit against the employer. For example, an executive search firm hired to do research on a person's background would initiate extensive reference checking. Because of the federal disclosure requirement, an employee would eventually see what former employers have said or written.<sup>92</sup> An employee upset over what has been disclosed in the report is likely to bring suit.

#### V. REFERENCE SUITS BROUGHT BY EMPLOYEES BASED ON TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

An employee may seek to hold a former employer liable in tort for interference with prospective employment.<sup>93</sup> The tort of interference with employment developed early at common law<sup>94</sup> to protect a person's "expectancies"<sup>95</sup> in obtaining employment. According to the Restatement of Torts, "[o]ne 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."<sup>96</sup> However, the employee has the burden of proving that the employer interfered with a reasonable employment prospect.<sup>97</sup>

tion." ARIZ. REV. STAT. ANN. § 44-1693(A)(3) (West Supp. 1985). Virginia has enacted no such legislation.

91. The Fair Credit Reporting Act requires that an employee be notified of an investigation of his credit or *personal background* and that a copy of this report be made available to him, if the investigation is made by an outside agency. *See, e.g., Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983). "[T]he user [a lender or employer] of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report." *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 171 (5th Cir. 1975) (quoting 15 U.S.C. § 1681m(a) (1974)).

92. *See, e.g., Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (1975), *cert. denied*, 423 U.S. 1087 (1976) (physician brought action against a consumer reporting agency under the Fair Credit Reporting Act for inaccurate information contained in a report furnished for employment purposes).

93. *See PROSSER, supra note 12, § 130, at 1005-31; 45 AM. JUR. 2D Interference § 51 (1969); RESTATEMENT (SECOND) OF AGENCY § 374(3) (1958); Annotation, Liability for Interference with At Will Business Relationship, 5 A.L.R. 4TH 9, § 18(a) (1981); Annotation, Liability of One Who Induces or Causes Third Person Not to Enter into or Contrive a Business Relation with Another, 9 A.L.R. 2D 228, § 8 (1950).*

94. PROSSER, *supra note 12, § 130, at 1005.*

95. "[S]ince a large part of what is most valuable in modern life depends upon 'probable expectancies,' . . . courts must . . . protect them from undue interference." *Id.* at 1006 (citing *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 53 A. 230 (1902)).

96. RESTATEMENT OF TORTS § 766(B) (1939).

97. Courts have dismissed claims of interference with prospective employment brought against employers where the plaintiff-employee failed to sustain his burden. *See, e.g., Becket v. Welton Becket & Assoc.*, 39 Cal. App. 3d 815, —, 114 Cal. Rptr. 531, 535 (1974)

### A. *Claims Brought Alleging Intentional Interference*

The few cases<sup>98</sup> in the area of alleged employer interference suggest that a plaintiff must be able to prove that the former employer intended to interfere with the employee's prospective employment.<sup>99</sup> When an employee is unable to substantiate "malice", as required to prove a defamation claim,<sup>100</sup> he may still have a cause of action for interference by demonstrating his former employer's wrongful intent to prevent re-employment.<sup>101</sup>

An example of an employer's interference claim is *Geyer v. Steinbronn*.<sup>102</sup> In *Geyer*, the defendant was held liable for \$185,000 in damages for communicating a false and defamatory employment reference which caused plaintiff not to be hired by a prospective employer.<sup>103</sup> The court explained that it was not necessary for the plaintiff to prove that there was a "bad motive" on the part of the defendant.<sup>104</sup> Instead, it was sufficient for the jury to infer from the defendant's state of mind and possible motives that defendant intended to interfere with plaintiff's prospective contractual relation.<sup>105</sup>

(employee failed to demonstrate sufficient future economic loss); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, —, 302 N.W.2d 307, 314 (1981) (employee failed to demonstrate interference with a specific business relationship).

98. There are relatively few cases on alleged employer interference. See *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Marshall v. Brown*, 141 Cal. App. 3d 408, 190 Cal. Rptr. 392 (1983); *Owens v. Williams*, 322 Mass. 356, 77 N.E.2d 318 (1948); *Willner v. Silverman*, 109 Md. 341, 71 A. 962 (1909); *Musso v. Miller*, 265 A.D. 57, 38 N.Y.S. 2d 51 (1942).

99. See, e.g., *Huskie v. Griffin*, 75 N.H. 345, —, 74 A. 595, 596 (1909). Plaintiff must show that he

quit the defendant's employ in an honorable manner; that the defendant, with knowledge of the facts, represented that the plaintiff's departure was dishonorable; that this was *done with the intent* to cause the new employer to act to the plaintiff's damage, and that such damaging action resulted from this cause.

*Id.* at —, 74 A. at 596; see also *Torbett v. Wheeling Dollar Sav. & Trust Co.*, 314 S.E.2d 166 (W. Va. 1983) (discussing claim for tortious interference in the employer-employee context).

100. See *supra* note 25 and accompanying text.

101. Note the close similarity between interference claims and the possible violation of an anti-blacklisting statute. A plaintiff-employee may be able to assert both at the same time. See, e.g., *Marshall*, 141 Cal. App. 3d at —, 190 Cal. Rptr. at 397-98 (plaintiff asserted both violation of anti-blacklisting statute and interference with prospective employment claim).

102. 506 A.2d 901 (Pa. Super. 1986).

103. *Id.* at 906-08.

104. *Id.* at 910.

105. *Id.* at 910; see also *Scholtes*, 548 F. Supp. at 496-97 (discussing the elements required to establish a cause of action for interference with prospective advantage). See generally PROSSER, *supra* note 12, § 130, at 1009-12.

### B. *Claims Arising Out of Negligent Interference*

An employee may prevail against a former employer when the negligent dissemination of incorrect information leads to interference.<sup>106</sup> A suit for interference that does not meet the requisite intent of the defendant to interfere is not impossible, but it must depend on the existence of some special reason for finding a duty of care.<sup>107</sup>

A claim based on negligent interference arose in *Quinones v. United States*.<sup>108</sup> In *Quinones*, the plaintiff had willfully terminated his employment after years of outstanding service as a federal employee.<sup>109</sup> His applications for subsequent employment were refused by prospective employers because they were told, among other incorrect information, that the plaintiff was "discharged for misconduct."<sup>110</sup> The plaintiff brought suit alleging a failure to use due care in maintaining his personnel records resulting in damage to his reputation. The court recognized that a duty to use due care in keeping and maintaining employment records existed and held that a cause of action could be maintained for a breach of this duty.<sup>111</sup> This duty arose because the federal administrative regulations governing the maintenance of personnel files "contemplate[d] the dissemination of information to prospective employers and impose[d] certain safeguards [because] a risk of injury to [an] employee's reputation was contemplated."<sup>112</sup>

Courts consistently have been willing to recognize an employer's duty not to wrongfully interfere with an employee's efforts to obtain subsequent employment. Consequently, an employee may prevail in an action against his former employer when the negligent maintenance and dissemination of employee information leads to interference with future employment opportunities.

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106. In other situations, courts have recognized lawsuits for interference based on negligent acts. See PROSSER, *supra* note 12, § 130, at 1008.

107. *Id.*

Courts have willingly recognized the employer's duty not to interfere with a former employee's prospective employment. In *Hundley v. Louisville & N.R. Co.*, 105 Ky. 162, \_\_\_, 48 S.W. 429, 430 (1898), the court, expressly noting the employer's duty not to interfere with a former employee's attempts to secure employment, stated, "[t]o deprive [the employee] of his trade or calling is to condemn, not only him, but perchance a wife and children, to penury and want. Public interests, humanity, and individual rights, alike, demand the redress of a wrong which is followed by such lamentable consequences."

108. 492 F.2d 1269 (3d Cir. 1974).

109. *Id.* at 1272 (plaintiff "received several grade promotions, commendations and awards for the performance of his duties").

110. *Id.*

111. *Id.* at 1281.

112. *Id.* at 1269. Plaintiff also claimed that this interference arose out of defendant's breach of "duty to accurately represent plaintiff's past employment history to prospective employers." *Id.* at 1280-81.

## VI. REFERENCE SUITS FOR MISREPRESENTATION BROUGHT BY EMPLOYEES, OTHER EMPLOYERS, OR THIRD PARTIES

### A. *The Basis for a Claim of Misrepresentation Brought by a Subsequent Employer*

Employers, employees and third parties can bring claims under a theory of misrepresentation.<sup>113</sup> Misrepresentation is a distinct tort designed to compensate an individual for physical harm<sup>114</sup> or pecuniary loss<sup>115</sup> incurred as a result of reliance on false assertions or non-disclosures made by another party. Employers should clearly be held liable to other employers for any intentional false assertions,<sup>116</sup> or willfully failing to convey all the relevant information about a person who later causes damage or commits a crime after changing jobs.<sup>117</sup> A lawsuit based on an intentional misrepresentation may arise, for example, where a doctor leaves his job after being implicated in connection with a rape charge at the hospital

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113. "Misrepresentation" means "any manifestation by words or conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." *Best v. Culhane*, 677 S.W.2d 390, 394 (Mo. Ct. App. 1984); *Pasko v. Trela*, 153 Neb. 759, —, 46 N.W.2d 139, 143 (1951); *Seavy v. State*, 21 A.D.2d 445, —, 250 N.Y.S.2d 877, 880 (1964). For an explanation of misrepresentation as a tort action, see PROSSER, *supra* note 12, §§ 105-10, at 725-70.

114. Liability for physical harm as a result of misrepresentation extends to all those who are likely to be injured by some action taken in reliance upon information given. RESTATEMENT (SECOND) OF TORTS § 311 comment b (1965). See generally Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 755-56 (1984) (discussing physical harm resulting from unpublished misrepresentations).

115. Liability for pecuniary loss is limited to those individuals for whose benefit and guidance the information was given. See Note, *supra* note 114, at 754-55.

116. Intentional misrepresentation is often classified as "deceit." See PROSSER, *supra* note 12, § 105, at 726. Deceit may occur when an employer intentionally gives a false reference knowing that the prospective employer intends to rely on it. See *Kolikof v. Samuelson*, 488 F. Supp. 881, 883 (D. Mass. 1980) ("[T]he tort of misrepresentation, requires that the tortfeasor must 1) know that he is making a false statement and 2) intend to induce reliance of his victim.").

117. An employer may intentionally give a favorable reference on a former bad employee or an unfavorable reference on a good employee in order to injure the prospective employer who happens also to be a business competitor. In other situations, deliberate false assertions have created liability. See *Aimonetto v. Farmers Ins. Group*, 291 F. Supp. 777, 778 (D. Wyo. 1968) (representation of a party that he owned a building upon which he was purchasing an insurance policy, when in fact negotiations for purchase of building were incomplete, was a "misrepresentation"); *Austin v. Wilkerson, Inc.*, 519 P.2d 899, 904 (Okla. 1974) (turning back mileage on a used automobile constitutes "misrepresentation" which will support an action by the buyer of the automobile against the seller).

Additionally, a willful non-disclosure would arise where a former employer intentionally fails to disclose that an employee was fired because he lacked the requisite skill needed to perform the job. According to Keeton, courts in recent years have been willing "to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." PROSSER, *supra* note 12, at 739.

where he works. He is then employed by a second hospital. The first employer fails to mention the rape charge when the prospective employer calls for a reference. When the doctor is implicated in a rape at the second hospital, and his prior misconduct is discovered, the second employer could file suit against the first.<sup>118</sup>

Liability might also be assigned to an employer for negligent misrepresentations.<sup>119</sup> A negligent misrepresentation arises from either negligently asserting an untrue fact<sup>120</sup> or the unintentional failure of an employer to communicate some relevant characteristic.<sup>121</sup> Traditionally, negligent misrepresentations have arisen where one party relied on information communicated by another, and thereby suffered economic loss in a bargain transaction or commercial setting.<sup>122</sup> However, in *Johnson v. State*,<sup>123</sup> the

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118. See example cited in Johnson, *supra* note 1.

119. See PROSSER, *supra* note 12, § 107, at 745-48; Goodhart, *Liability of Innocent but Negligent Misrepresentations*, 74 YALE L.J. 286 (1964). Courts have not explored negligent misrepresentation in the employer-employee reference context although cases exist in other areas. See, e.g., *French Market Plaza Corp. v. Sequoia Ins. Co.*, 480 F. Supp. 821 (E.D. La. 1979) (fire insurer's duty to provide correct information concerning terms of policy created basis for cause of action for negligent misrepresentation); *Arizona Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 14 Ariz. App. 486, 484 P.2d 639 (1971) (title company which informed contractors that there would be sufficient funds available to pay them for their work was liable for negligent misrepresentation even though it had no duty to speak since it had duty to exercise reasonable care in making representations about ascertainable facts); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (accountants held liable for negligently made report on which plaintiff relied); *Thurber v. Russ Smith, Inc.*, 128 Vt. 216, 260 A.2d 390 (1969) (negligent misrepresentation by a garage to automobile owner that car was in perfect operating condition was actionable).

Critics speculate that to allow claims for negligent misrepresentation is to create "unlimited liability" because of a "momentary lapse from proper care." *Beeck v. Kapalis*, 302 N.W.2d 90, 97 (Iowa 1981) (quoting PROSSER, *supra* note 12, at 708); see also *Ultramares Corp.* at 170, 174 N.E.2d at 444 (the court expressed concern over "liability in an indeterminate amount for an indeterminate time to an indeterminate class"). See generally Note, *Negligent Misrepresentation: A New Trap for the Unwary?*, 27 LOY. L. REV. 1184 (1981) (discussing the serious implications of holding employers liable for their negligent misrepresentations).

120. See, e.g., *Rosenthal v. Blum*, 529 S.W.2d 102 (Tex. Ct. App. 1975) (patient brought action to recover against a treating physician on a theory that physician negligently diagnosed him and misrepresented extent of injuries thereby causing patient to settle his claim for damages against insurance company for a lesser sum than he would have otherwise).

121. See, e.g., *United States v. Neustadt*, 366 U.S. 696 (1961) (buyer of home who relied on FHA appraisal of home and later discovered foundation was inadequate, relied on theory of negligent misrepresentation seeking recovery).

122. *Id.* at 706.

123. 69 Cal. 2d at 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

Liability in [a cause of action for negligent misrepresentation] arises only where there is a duty, if one speaks at all, to give the correct information . . . . There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals or good

court upheld a foster mother's action for negligent misrepresentation when she was assaulted by a boy placed in her home by state youth authorities. The foster mother had relied on the state youth authorities to volunteer any necessary warnings regarding the character of the youth she was to take into her home.<sup>124</sup> The court held that legal redress was available for defendant's failure to give reasonable warnings of the "homicidal tendencies, and . . . background of violence" of the youth.<sup>125</sup> Likewise, failure of an employer to disclose the negative qualities of a former employee may create liability for any resulting harm to third parties, although the law is unexplored on this issue.<sup>126</sup>

### B. *The Basis for a Claim of Misrepresentation Brought by a Former Employee*

An employee may also be able to successfully assert a cause of action for negligent misrepresentation<sup>127</sup> against a former employer. The employer's liability arises from the fact that there is a relationship between the employer and the former employee such that "in morals and good conscience," the employee is justified in relying on his employer to exercise reasonable care in giving out information about him.<sup>128</sup> For example, in *Zampatori v. United Parcel Service*,<sup>129</sup> all the elements<sup>130</sup> required to

conscience the one has the right to rely upon the other for information; and the other giving information owes a duty to give it with care.

*International Prod. Co. v. Erie R.R. Co.*, 224 N.Y. 331, 338, 155 N.E. 662, 664, *cert. denied*, 275 U.S. 527 (1927), *as found in* *Bivas v. State*, 97 Misc. 2d 524, \_\_\_, 411 N.Y.S.2d 854, 857 (Ct. Cl. 1978).

124. *Johnson*, 69 Cal. 2d at \_\_\_, 447 P.2d at 355, 73 Cal. Rptr. at \_\_\_.

125. *Id.* at \_\_\_, 447 P.2d at 354, 73 Cal. Rptr. at \_\_\_.

126. "Attorneys say the law is largely unexplored on this issue, which might typically involve one company suing another for failing to convey all the relevant information about a person." *Johnson*, *supra* note 1, at 8.

127. It is unlikely that a cause of action for intentional misrepresentation could be asserted by an employee against his former employer because in order to assert such an action, the plaintiff must be the party who was intended to rely on the misrepresentation. PROSSER, *supra* note 12, at 741-45. Consequently, the cause of action for intentional misrepresentation most likely lies with the subsequent employer. If the employee wants to bring action on the intentional misrepresentation of his former employer to a potential employer, the situation arising from the publication of false information to a third party would be more fitting for an action based on defamation or interference with prospective advantage (injurious falsehood). *See, e.g., Bivas*, 97 Misc. 2d at \_\_\_, 411 N.Y.S.2d at 858.

128. *Bivas*, 97 Misc. 2d at \_\_\_, 411 N.Y.S.2d at 857-58 (holding that a cause of action for negligent misrepresentation requires the finding of a duty to supply correct information based on the relationship between the parties). In *Bivas*, the court found that the former student of a college was justified in asserting a cause of action for negligent misrepresentation against the college based on the plaintiff's right to rely on the college exercising due care in giving out correct information concerning completion of requirements for a degree in response to inquiries from prospective employers. 97 Misc. 2d at \_\_\_, 411 N.Y.S.2d at 858.

129. 125 Misc. 2d 405, 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984).

130. The necessary elements required in an action for negligent misrepresentation are:

support an action for negligent misrepresentation were met where the employee was discharged after his employer relied on the negligent misrepresentations of a private detective agency falsely accusing the employee of theft, even though no privity existed between the employee and the detective agency.<sup>131</sup> Holding that the lack of privity between the employee and the detective agency would not prevent the employee from proceeding with his action, the court reasoned that liability did not arise from the parties relationship but instead from the common-law duty "to act and to speak with care" so as not to injure another.<sup>132</sup> Similarly, an employer may be subjected to a suit by a former employee who was injured as a result of negligent misrepresentations given to a prospective employer.<sup>133</sup>

### C. *Employer's Liability to Third Parties Arising from Misrepresentations to a Prospective Employer*

A third party may also hold an employer liable for misrepresentations occurring during a reference inquiry. For instance, in *Gutzan v. Altair Airlines, Inc.*,<sup>134</sup> an employee who was raped by a co-worker with a prior rape conviction filed suit against both the employer and the party that

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- (1) knowledge or its equivalent that the information is required for a serious purpose;
  - (2) that the party to whom it is given intends to rely and act upon it;
  - (3) injury in person or property because of such reliance; and
  - (4) the relationship of the parties, arising out of contract or otherwise, is such that in morals or good conscience, one party has the right to rely upon the other for information and the other owed a duty to give it with care.

*Id.* at \_\_\_, 479 N.Y.S.2d at 472 (citing *International Prods. Co. v. Erie R.R. Co.*, 244 N.Y. 331, 338, 155 N.E. 662, 664, *cert. denied*, 275 U.S. 527 (1927)).

131. In *Zampatori*, the question considered by the New York Supreme Court on motion for summary judgment was "whether an employee who does not himself rely upon a negligent misrepresentation but who claims to have been directly affected because of his employer's reliance thereon, may bring an action for damages claimed to have been suffered as a result." *Id.* at \_\_\_, 479 N.Y.S.2d at 471. The court stated that this question was one of first impression. *Id.*

132. *Id.* at \_\_\_, 479 N.Y.S.2d at 474.

133. *Contra* *Graney Dev. Corp. v. Taksen*, 92 Misc. 2d 764, 400 N.Y.S.2d 717 (1978) (decided same year but prior to *Zampatori*). In *Taksen*, the negligently made statement was not made to the plaintiff but to a third person and it was not the plaintiff who relied on the statement. Based on these facts, the court held that the plaintiff could not recover under a theory of negligent misrepresentation because a recovery should only be allowed where the misrepresentation is negligently communicated to one who relies upon it to his damage. *Id.* at \_\_\_, 400 N.Y.S.2d at 719. According to the court, "[i]f the doctrine of negligent misrepresentation can apply to this case where slander is also a remedy, the elements of the tort of slander will be radically changed . . . [and] the doctrine of qualified privilege will be abolished." *Id.* at \_\_\_, 400 N.Y.S. 2d at 718. This assumption is drawn from the conclusion that if negligence, rather than malice, becomes the predicate for liability, the qualified privilege presently granted to an employer making statements about his employee to a person who is considering hiring that employee would be lost.

134. 766 F.2d 135 (3d Cir. 1985).



had referred the known rapist to the employer.<sup>135</sup> Although the co-worker had been employed for approximately one year prior to the rape in this case, the jury determined that the "plaintiff's injur[ies were] caused by the negligence of both defendants."<sup>136</sup> In deciding for the plaintiff, the court held that "one who negligently gives false information to a party" may be liable for "physical harm to a third party" caused when the recipient of the information places "reasonable reliance on it" and unknowingly hires a person with dangerous propensities.<sup>137</sup> The employer was not held solely liable because the "decision to hire . . . [the rapist and] to afford him no special supervision" was apparently founded on "unwarranted assumption[s]" and reassurances from the party that referred the worker "that he posed no danger to . . . fellow workers."<sup>138</sup>

Due to the important informational link between employers, former employers can expect to be sued when a misleading reference leads to a negligent hiring suit brought by a third party.<sup>139</sup> Employers are becoming more likely to file suits over faulty references as they are increasingly being held liable for the tort of negligent hiring.<sup>140</sup>

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135. *Id.* at 136 (the party who referred the dangerous worker was an employment agency). *But see* Janssen v. American Hawaiian Cruises, Inc., 731 P.2d 163 (Haw. 1987) (former ship's waiter who had been sexually assaulted by ship's former chef unsuccessfully sued former employer and union which had referred chef for employment).

136. *Gutzan*, 766 F.2d at 139.

137. *Id.* at 139-41. The court relied on RESTATEMENT (SECOND) OF TORTS §§ 311, 324A (1965), holding that "a defendant . . . that negligently performs a service or makes a misrepresentation involving a risk of physical harm to a third person, may be liable for the injury." *Id.* at 140; *see also* Gooden v. Tips, 651 S.W.2d 364 (Tex. Ct. App. 1983) (physician held liable to third party in negligence for failure to warn patient who later caused automobile accident about the effects of drugs the physician prescribed which later contributed to patient causing plaintiff's injuries).

138. *Gutzan*, 766 F.2d at 141. Interestingly, the court held that "the lapse of one year alone would not be sufficient for a finding that a duty [to protect the employee] had shifted [to the employer alone]." *Id.*

139. By redistributing liability to the source of the wrongful reference (most likely a former employer), the law places responsibility on the party that did know the negative propensities of the employee and failed to prevent the eventual resulting damage or criminal conduct. "[T]here is [a] general belief that victims suffering a loss because someone's failure to supply correct information should be compensated." Note, *Negligent Misrepresentation: A New Trap for the Unwary?*, 27 LOY. L. REV. 1184, 1184 (1981).

140. Courts are recently experiencing a rebirth of the tort of negligent hiring and retention. *See* Comment, *Torts—Negligent Hiring and Retention—Availability of Action Limited by Foreseeability Requirement*, F & T Co. v. Woods, 10 N.M. L. REV. 491 (Summer 1980); *Negligent Hiring: Employers Liability for Acts of an Employee*, 7 AM. JUR. TRIAL ADVOCACY 603, 604 n.7 (1984) (listing 27 states that recognize a negligent hiring cause of action); *see also* Becken v. Manpower, Inc., 532 F.2d 56 (7th Cir. 1976) (establishing negligent hiring tort in Illinois where employer hired two felons to move contents of a jewelry store); *Pontiacs v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983) (Minnesota recognizes negligent hiring—case of first impression); F & T Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979) (New Mexico recognizes this tort for the first time). Virginia courts have not yet recognized this tort.

Employers have been held liable for the acts of their employees based on claims of negligence<sup>141</sup> in ascertaining those deficiencies which should have revealed a potential for causing harm to others.<sup>142</sup> An employer is expected to make an adequate investigation into a prospective employee's work history and background.<sup>143</sup> An important element of any negligent hiring claim is whether the employer had actual or constructive notice of the employee's incompetence.<sup>144</sup> Where an injured plaintiff is unable to

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The tort of negligent hiring is based on the liability of an employer for placing a person with known dangerous propensities in a position where he can be a threat to others. *See, e.g., Henderson v. Nolting First Mortgage Corp.*, 184 Ga. 724, \_\_\_, 193 S.E. 347, 353 (1937); *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, \_\_\_, 388 P.2d 824, 829 (1964). Therefore, a plaintiff must prove that an employer breached his duty of care in selection or retention of the servant. *Bradley v. Stevens*, 329 Mich. 556, \_\_\_, 46 N.W.2d 382, 384 (1951). *See generally* Loftus, *Employer's Duty to Know Deficiencies of Employees*, 16 CLEV.-MAR. L. REV. 143 (1967); Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI. [-] KENT L. REV. 717 (1977); Comment, *Torts—Master and Servant—Negligent Hiring—Employer Owes a Duty to the General Public to Use Reasonable Care in Hiring and Retaining Employees*, *Evans v. Morsell*, 9 U. BALT. L. REV. 435 (1980) (includes discussion of prima facie elements of the tort as developed through case authority); Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296 (1973); Comment, *Torts—Recognition of Negligent Hiring Expands Employer Liability—Ponticas v. K.M.S. Investments*, 10 WM. MITCHELL L. REV. 361 (1984); 53 AM. JUR. 2D *Master & Servant* § 422 (1970); RESTATEMENT (SECOND) OF TORTS § 307 (1965); RESTATEMENT (SECOND) OF AGENCY § 213 (1958); Annotation, *Liability of Employer, Other Than Carrier, for a Personal Assault Upon Customer, Patron or Other Invitee*, 34 A.L.R.2d 372, 390 (1954).

141. The employer's liability is based on his own primary negligence. *Porter v. Grennan Bakeries*, 219 Minn. 14, \_\_\_, 16 N.W.2d 906, 909-10 (1944) (negligent hiring does not require the act of the employee to trigger liability). *See generally* PROSSER, *supra* note 12, § 71, at 469-70.

142. *See, e.g., Stewart Warner Corp. v. Burns Int'l Sec. Serv., Inc.*, 353 F. Supp. 1387 (1973) (plaintiff sued for value of goods destroyed in a fire set by a security guard employed by defendant). The extent of an employer's liability can be quite far reaching. *See, e.g., Kendall v. Gore Properties, Inc.*, 236 F.2d 673 (D.C. Cir. 1956) (employer-landlord was held liable for murder of a tenant committed by the employee janitor. This indicates the extent of liability for negligent hiring that will be imposed when the conduct of the employee is far beyond what might reasonably be foreseen as the scope of employment).

143. *See, e.g., Abott v. Payne*, 457 So.2d 1157 (Fla. Dist. Ct. App. 1984); *Weiss v. Furniture in the Raw*, 62 Misc. 2d 283, 306 N.Y.S.2d 253 (Civ. Ct. 1969) (it is unreasonable for an employer to fail to conduct a pre-employment investigation; such failure constitutes a breach of the employment duty); *see also* *Welsh Mfg. Div. of Textron v. Pinkerton's, Inc.*, 474 A.2d 436, 441 (R.I. 1984) (court noted that not only was the employer under a duty to check references, but because "job applicants generally produce references who are certain to produce favorable reports." the employer should check and seek other relevant information that might not otherwise be uncovered.) *But see* *Evans v. Morsell*, 284 Md. 160, \_\_\_, 395 A.2d 480, 484 (1978) (an employer ordinarily has no duty to check into the criminal record of a prospective employee).

144. *See* *Slaton v. B & B Gulf Serv. Center*, 178 Ga. App. 701, 344 S.E.2d 512 (1986) (Employers were not liable for negligently hiring employee who assaulted customer absent evidence employer knew, or should have known, of the employee's alleged violent propensities. Employers' prior reference check on employee was sufficient to show no knowledge of employee's nature.); *see also* Note, *Torts—Master and Servant—Negligent Hir-*

successfully assert a claim for negligent hiring based on an inability to show that the employer "knew or should have known"<sup>146</sup> of the employee's dishonest or dangerous propensities, the plaintiff may alternatively seek to hold a previous employer liable for misrepresentation arising out of the inaccurate references given to the current employer.

## VII. CONCLUSION

"[A] memo came down from the eighth floor personnel department . . . . Henceforth, it read, managers are not to talk to anyone calling to ask about employees . . . . The policy was firm, dates of employment, and job titles only. No opinions."<sup>146</sup>

The "standard" reference policy of most employers has become, in effect, a "no" reference policy.<sup>147</sup> This approach has developed because requests for information about employees put employers in a double bind.

If an employer responds to requests for information by doing anything more than verifying factual information<sup>148</sup> about the employee, such as

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*ing—Employer Owes a Duty to the General Public to Use Reasonable Care in Hiring and Retaining Employees: Evans v. Morsell*, 9 U. BALT. L. REV. 435, 442-44 (1980) (discussing the element of whether an employer knew or should have known of the deficiency). See generally RESTATEMENT (SECOND) OF AGENCY § 213 comment d (1958).

145. In several cases, an employer was not held liable for the tort of negligent hiring because the plaintiff was not able to show that the employer "knew or should have known" of the negative characteristics of the employee. *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. Dist. Ct. App. 1986); *Slaton*, 178 Ga. App. 701, 344 S.E.2d 512 (1986); *Edwards v. Robinson-Humphrey Co.*, 164 Ga. App. 876, \_\_\_, 298 S.E.2d 600, 603 (1982) (employer not liable where employees misstatements in employment application showed employer only that employee had a propensity for lying, not for the violent behavior for which plaintiff was seeking to hold employer liable); *Welsh Mfg., Div. of Textron v. Pinkerton's, Inc.*, 474 A.2d 436, 440 (R.I. 1984).

An employer may avoid liability for negligent hiring by plaintiff's failure to substantiate that the employer "knew or should have known" of the employee's violent tendencies. *Slaton*, 178 Ga. App. at \_\_\_, 344 S.E.2d at 514. For example, in *Slaton*, the employer stated that they "communicated with [the employee's] former employers and references and [were] told that [the employee] was a trustworthy employee who had no known problems." *Id.* In this situation, if the employee was known to be dangerous, the plaintiff might be able to assert a cause of action for misrepresentation against the parties who gave false references. See *supra* text accompanying notes 133-37.

146. Johnson, *supra* note 1, at 8.

147. Duffy, *supra* note 16, at 444.

148. Without signed authorization from the employee, an employer should comment on no more than a former employee's job title, salary, and employment dates. [Employ. Alert] EMPLOYMENT COORDINATOR 4 (May 16, 1985) (suggesting that a prospective employer send a signed release relating to defamation liability from the employee along with the request for information); 8 EMPLOYMENT COORDINATOR (Research Inst. Am.) 82,933 (Oct. 15, 1984) (suggesting that an employer include release forms in the employment application asking the applicant to release both the requestor and provider of past employment information from liability for defamation and interference).

job title and salary, there is a risk of a lawsuit by a disgruntled employee. This challenge can take the form of a defamation suit, an interference with prospective employment claim, an alleged blacklisting violation or a discrimination charge.

Alternatively, if the former employer fails to disclose information that could alert a prospective employer to some undesirable trait of a worker, the former employer might be open to a misrepresentation suit filed by a future employer or a third party injured by the worker. Incorrect verification of factual personal information concerning an employee can lead to a suit by the employee for interference or by the future employer for misrepresentation.

An employer's safest course is a policy of limited disclosure.<sup>149</sup> Only in situations where an employer could reasonably foresee a risk of physical or monetary harm to others as a result of hiring the individual in question should any factual information concerning an employee's background be disseminated by the employer. Employers can take precautions to protect themselves from the threat of future employee reference law suits by keeping opinions about the employee out of any references.<sup>150</sup> An outgrowth of this advice is the development of an employers "no" reference policy.

Kyle E. Skopic

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149. TERMINATION, *supra* note 55, at ¶ 52,301; [Employ. Alert] EMPLOYMENT COORDINATOR 4 (May 16, 1985); Johnson, *supra* note 1; *see also* Lekich v. International Business Machs., Corp., 469 F. Supp. 485, 489 (E.D. Pa. 1979) (former employee could not maintain action for either defamation or intentional interference with prospective employment where employer released only employee's dates of employment and position to prospective employer); Buffolino v. Long Island Sav. Bank, No. 1908E (N.Y. App. Div. Jan. 12, 1987) (available Feb. 22, 1987, on LEXIS, States library, Omni file). In *Buffolino*, plaintiff brought an action for defamation based on a letter of reference sent by the defendant employer to a prospective employer which merely provided the dates of employment along with a statement that it is the defendant's policy to provide no other information to a potential employer. The letter further stated that "[the] failure to comment on an individual's character does not reflect on the individual." The court held that the "letter can in no reasonable manner be construed as impugning [the employee's] character or reputation" and therefore could not support a cause of action for defamation. *Id.*

150. As an added measure of protection, the employer may request that the employee sign a statement releasing the employer and any provider of information from liability in connection with the disclosure of information. For example:

I authorize [the Employer] to make any investigation of my personal or employment history and authorize any former employer, person, firm, corporation, credit agency, or government agency to give [the Employer] any information they may have regarding me. In consideration of [the Employer's] review of this application, I release [the Employer] and all providers of information from any liability as a result of furnishing and receiving this information.

Geslewitz, *Reviewing Personnel Practices and Documents to Avoid the Risk of Litigation*, 32 PRAC. LAW. 75, 78 (Jan. 1986).

