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The Graziadio School of
Business and Management

SPRING 1999

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Defamation Vs. Negligent Referral

A policy of giving only basic employee references may lead to liability

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Application...

Make managers in your organization aware of the risks of giving negligent references.

In 1977, a prospective employer had little difficulty obtaining references for a job applicant from former employers. By 1987 it was another story. Most employers had adopted the policy of providing only the basics: dates of employment, salary, and title. They feared that revealing more information about former employees could expose them to defamation suits by disgruntled former employees unable to find new employment. By 1997, new theories of liability emerged that made a blanket policy of simply giving "name, rank and serial number" of former employees a more dangerous practice. This is especially true when an employer is aware of a former employee's tendency toward, or history of, violence or sexual misconduct.

Reference-checking has taken on new importance with the dramatic increase in workplace violence. **Former employers can be sued for negligent misrepresentation or negligent referral if the employee is involved in some incident at the new workplace that might have been predicted based on prior behavior.** Negligent referral or misrepresentation includes the failure to disclose complete and accurate information about former employees. On the other hand, current employers increasingly face the possibility of being sued for negligent hiring if they fail to adequately check the backgrounds of their employees and an employee behaves in some inappropriate manner.

Society at large has an interest in safe workplaces. To help achieve this, thirty-two states so far have passed laws providing varying degrees of immunity to former employers who provide honest references about their former employees. However, it is too early to tell whether the immunity given to employers under these state laws is sufficient protection for them to feel comfortable giving truthful and accurate references about their former employees to prospective employers.

Post-Employment References and Defamation

Defamation is currently the most common cause of action used by former employees to challenge a reference given by a former employer. A growing trend is the practice of alleging defamation in wrongful-termination lawsuits, a practice virtually unheard of prior to the 1990s.

Defamation: The *Prima Facie* Case - State defamation laws vary slightly. However, generally defamation is defined as "an unprivileged publication of false statements to third parties that tends to harm the reputation of the plaintiff in the community." Courts have interpreted defamation broadly in recent employee reference cases.

Defamation: Defenses - Three significant defenses exist for defamation claims and these also apply in the employee-reference context. First, truth is an absolute defense. A claim for defamation cannot be maintained if the truth of the matter is established. Another possible defense is that of consent. If an individual knowingly and voluntarily signed a release authorizing the former employer to provide references, that could constitute a defense against defamation.

However, the most common defense is that of a qualified privilege. Qualified privilege means (a) the employer believed in good faith that the information was true when uttered, (b) the information served a legitimate business purpose, and (c) it was provided only to an appropriate person who had a legitimate business interest in receiving the information. This privilege has generally been extended to post-employment references.

However, a qualified privilege is subject to being "abused." It is not available as a defense if an employer knows that the information he or she is giving to a new employer is false or probably false, if it is shared with persons who do not have a "need to know," or if malice can be established.

Defamation: Compelled Self-Publication - The Minnesota Supreme Court created an expanded definition of defamation called "compelled self-publication" in 1986 in the case of *Lewis v. Equitable Life Assurance Co. Soc. of U.S.* Prior to this, a successful defamation claim had required that the defendant (e.g., the former employer) be the one to make the defamatory statements to a third party. In the Lewis case, four employees refused the company's request to change their expense account records after they had been submitted in order to conform to a new company policy. They argued that the reports were accurate as submitted and that they had followed the initial instructions they had been given. The employees were terminated for "gross insubordination." When the four former employees were seeking new employment, they had to explain to prospective employers why they had been fired. The Court ruled the need for them to make these explanations should have been anticipated and was grounds for defamation, even though the former employer was not the one who said it. Most courts still

view this doctrine with suspicion, although courts in Texas, California and New York have accepted it.

Defamation Lawsuits: Impact on Employers - Only a small number of defamation suits are brought against employers each year. Fewer still are successful. However, the fear of litigation is often sufficient to keep information about former employees from being provided. These charges can be very expensive to defend against even if they have no merit.

Employment References and Negligence

Defamation claims are not the only types of lawsuits employers must consider. Employers may find themselves liable under other legal theories.

Negligent Referral: Giving a bad reference - In *Robinson v. Shell Oil*, Robinson, a former employee of Shell Oil, filed a complaint with the EEOC charging Shell with racial discrimination after Shell had terminated him. Shell gave him an unfavorable reference when he applied for another job after filing the initial complaint. He then filed a second complaint with the EEOC alleging that the poor reference was in retaliation for filing the racial discrimination charge.

This case raised the question of whether former employees, as well as current employees, are covered under Title VII of the 1964 Civil Rights Act. The court ruled that they are. They are therefore protected from retaliation by employers for seeking to enforce the protections provided. The Court found that not including former employees in the definition of "employee" under this title would be contrary to the primary purpose of the legislation. This broad interpretation opens the door for the anti-retaliation argument to be used with other laws as well, for example, those pertaining to age discrimination or disability. It may even be used by "whistleblowers" who publicize legal violations by their companies. An employee could potentially assert a claim of retaliation against an employer who provides a truthful, but negative, reference, and thus create a new set of employer problems.

Employers cannot protect themselves from such claims by giving little or no information if normal policy is to give considerably more information for former employees. The employer could possibly be subjected to a disparate treatment claim in that situation. Actions that normally protect firms from defamation claims may subject them to employment discrimination claims.

Negligent Referral: Giving a Good Reference - The California Supreme Court in 1997 permitted a student who alleged sexual molestation by a teacher to sue that teacher's previous employer which had provided that student's school with a favorable reference. The former employer failed to mention in the reference that the school had received complaints of sexual harassment and

improper touching by that teacher. The letter of recommendation for the employee in this case praised his skills and unconditionally recommended him for an administrative position. He was hired by another school district where he allegedly sexually assaulted a 13 year old student. The court did not say that a former employer had an affirmative duty to a prospective employer to provide references; the decision was based on the fact that the employer provided a positive reference that omitted key pertinent facts.

The California Supreme Court decided that the positive recommendation given by the former employer amounted to "misleading half-truths" for purposes of negligent misrepresentation. Further, the Court reasoned that "liability may be imposed if the recommendation letter amounts to an affirmative misrepresentation presenting a foreseeable and substantial risk of harm to a third person." Finally, the Court held that the defendants owed a duty to the plaintiff not to misrepresent facts in describing "the qualifications and character" of the former employee, when the misrepresentations presented "a substantial and foreseeable risk of physical injury" to the plaintiff. It went on to add that "in the absence of resulting physical injury, or some special relationship between the parties, the writer of the letter of recommendation should have no duty of care extending to third persons for misrepresentations concerning former employees."

A problem with the court's analysis is that none of the prior complaints about the former employee had been confirmed through any form of evidentiary hearing in which the employee was accorded due process. This creates a major problem for employers. If they disclose unverified allegations, they risk being guilty of defamation. If the allegations are actually false, they risk ruining the life of an innocent person. Yet this decision suggests that allegations may have to be disclosed if they relate to behaviors that may cause a substantial and foreseeable risk of harm to someone else.

Negligent Referral: Giving a Neutral Reference - *Jerner v. Allstate Insurance Co.* involves an employee who was fired and then given a neutral reference by the former employer. When he was later fired by his new employer, he then returned to the second employer's place of business and shot five people, killing three of them. The gunman, Paul Calden, worked for Allstate Insurance Company for only nine months. He exhibited some bizarre behavior during that time. He refused to have his photograph taken, asserting that his image couldn't be captured on film; he claimed that he was from another planet; and he compiled a list of co-workers and wrote the word "blood" next to their names. In fact, Calden's behavior at Allstate was so extreme that his supervisor called the sheriff's department and the FBI to find out if they were investigating him. He was finally terminated when he was found carrying a gun in his briefcase.

Allstate had a policy of not giving any recommendation letters for former employees to subsequent employers. Nevertheless, they gave

Calden a letter of recommendation in spite of his behaviors. The letter stated that he had voluntarily resigned because his position had been eliminated in restructuring. Allstate apparently provided the letter because the company did not want him to get angry over his firing. Calden was later hired by Fireman's Fund based on the recommendation. When Fireman's Fund later fired him, he went to the company cafeteria and shot five supervisors involved in his firing, killing three of them. Their families sued Allstate for failing to disclose his true work history. Allstate eventually settled for an undisclosed sum.

Negligent Hiring: Negligent hiring is a relatively new tort theory. It is being used by third parties who are injured by an employee to obtain recovery against the employer who hired that employee without an adequate background check. It is based on the common law concept that an employer has a general duty to protect its employees, customers and visitors from injury caused by an employee that the employer knows, or should have known, poses a risk of harm to third parties. An employer's implicit duty is to protect third parties from injury or harm by exercising reasonable care in the hiring process according to this argument. The problem employers face is being forced to hire individuals without a key piece of information -- an honest and complete job reference from a former employer.

Conclusion

Employers today face a much more complex set of rules about providing references for former employees than was true only a decade ago. The "cut and dried" rule of issuing only the bare minimum of information possible is no longer reasonable and safe. Following such a course of action may help insulate an employer from liability under defamation claims. However, the "cut and dried" approach may open up the possibility of liability under the theory of negligent misrepresentation or negligent referral. **Each employee reference must be evaluated in light of overall company policy. It must also take into account the facts in each individual case.**

Managers should continue to exercise extreme caution in giving references for former employees, even in states with laws granting immunity to employers for giving such references. It is too early to tell whether these laws will provide adequate protection for employers because very few court cases have interpreted these statutes. However, a blanket policy of providing only cursory information to avoid defamation claims may result in a company failing to disclose certain information about some former employees that could lead to equally expensive liability for the company on other grounds. **The best advice for employers is to say as little as possible except in those situations where the employee's behaviors could endanger others in the new workplace.** Not revealing information in that case is legally risky for an employer. In addition, employers have an ethical responsibility to those who may become unsuspecting victims of former employees if the company refuses to share important information.

Some Tips about Giving References

- Develop a written policy that states exactly what the policy is regarding giving references. It should state what information will be given and how it will be given – by whom, to whom, and in what format. However, make it flexible enough that you can evaluate individual cases that may raise particular issues.
- Review and update the policy on a regular basis.
- Consider establishing the rule as part of your policy that you will only respond to written requests for references and responses will only be in writing. It is preferable that someone in human resources be the designated person to provide references. Information provided should be based on documented information in the employee's file.
- Good employment practice suggests that the employer discuss the employee's performance with him or her on a regular basis, carefully document the facts about the employee's performance, and share information in that employee's personnel file with the employee. Access to this information should be limited only to those who have a clear and critical need to know. Employees should understand that any references will be based on what is in the file.
- If an inquiry is made by phone, and you do choose to give verbal information, get the name, title, and phone number of the person requesting the information, verify that the number is indeed that of the company, and then call back to verify the caller's identity.
- Consider only verifying information provided by employers requesting references rather than volunteering information.
- Whenever possible, obtain a written release from the former employee that authorizes providing references before doing so. Employees could sign such a release when hired. This will not give complete protection, but it may help the former employer argue that the employee consented to having the information released.
- Record all information about a reference at the time it is given: date and time; name, title and company of the person requesting the information; name and title of the person responding; a statement of the information provided, and the form in which it is provided. A standard form is helpful for this. Attach copies of any letters written.
- The best advice for employers is still to say as little as possible or just verify employment dates and title except in those situations where the employee's behavior could endanger the well-being of others in the workplace.

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LAST UPDATED : Monday, 03-May-1999 17:28:28 PDT