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Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal

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Table of Contents

I. Introduction 1383
II. The Contraction of Employer Rights and the Rise of No-Reference Policies 1389
  A. The Erosion of the Employment At-Will Doctrine . . . 1389
  B. The Narrowing of the Qualified Privilege 1390
  C. Federal and State Legislation to Protect Employee Rights 1391
  D. The Diminished Presence of Labor Unions 1392
III. Common-Law Causes of Action Against Improper Employment References 1393
  A. Defamation Lawsuits Against Employers That Provide Job References 1393
  B. The Elements of Defamation 1396
    1. The Defamatory Statement 1397
    2. Publication 1400
    3. The Fault Requirement 1401
    4. The Harm Requirement 1402
  C. Employer Defenses to Defamation Actions 1402
    1. Truth 1403
    2. Consent 1404

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3. Absolute Privilege 1404
4. Constitutional Privilege 1405
5. Qualified Privilege 1407

IV. Other Common-Law Sources of Employer Liability for Job References 1412
A. Interference with Economic Advantage 1412
B. Negligent Misrepresentation 1415
C. Intentional Misrepresentation 1417
D. Negligent Hiring 1418

V. Recent Legislative Initiatives: The Shield Laws 1420
A. The Rebuttable Presumption of Proper Behavior 1421
B. The Type of Information Protected 1421
C. To Whom Reference Information May Be Disclosed . 1422
D. The Standard of Proof to Rebut the Presumption Protecting Employers 1422

VI. The Need for Reform 1423
A. Few Successful Lawsuits, but Many Real Concerns . . 1424
B. The Beneficent Employer's Dilemma 1425
C. The Social Impact of the Current System 1427

VII. The Challenge: No Perfect Solutions 1430
A. The Need to Balance Competing Interests 1431
B. The Right to Be Wrong 1433

VIII. Options and Recommendations for Reform 1434
A. Imposing Affirmative Duties of Disclosure on Employers 1435
1. Affirmative Duties in General 1435
2. *Tarasoff v. Regents of the University of California* 1436
3. *Tarasoff* and an Employer's Duty to Disclose . . . 1438
4. Concerns About Imposing an Affirmative Duty of Disclosure 1442
B. Reforming the Qualified Privilege in Defamation and Related Laws 1447
1. The Complexity and Confusion of Modern Defamation Law 1448
2. Qualified Privilege and Employment References . 1450
3. State Legislative Initiatives to Expand Employer Protections 1451

4. Critical Elements in Crafting an Appropriate Qualified Privilege 1454
5. Qualified Privilege: A Recommended Approach . . 1458
C. Contractual Waivers of Liability: Express and Implied 1459
D. Attorney Fees: A Limited Proposal to Make the Loser Pay 1461
E. Administrative Declaratory Judgments: No Privileges, Limited Damages 1463
1. The Advantages of an ADR Administrative Remedy 1465
2. A Recommended Approach 1465
F. Summary of Recommendations 1468
IX. Conclusion 1469

I. Introduction

On December 13, 1994, American Eagle Flight 3379 crashed near Raleigh-Durham International Airport, killing fifteen people on board. After a ten-month probe, the National Transportation Safety Board concluded that the plane's captain made several mistakes immediately before the plane crashed. Among other things, the pilot misread a warning light on the instrument panel and then improperly handled the aircraft. Prior to seeking employment with American Eagle, the pilot had resigned from another airline to avoid being fired for failing a critical flight test. The pilot's former employer never conveyed this information to American Eagle. When queried about its failure to obtain the critical information, American Eagle responded that it "strongly believes" airlines should share information about pilots when they apply for jobs. American Eagle admitted, however, that it never shares information about its own pilots. The company said that it feared being sued by employees who want their records to be kept private. As a result, American Eagle has asked Congress to enact legislation that would give airlines immunity from such lawsuits.[1]

As illustrated above, during the past decade employers have become increasingly reluctant to discuss the qualifications of former employees with prospective employers for fear of defamation and other lawsuits. We

1. *See* James Rosen & Craig Whitlock, *Pilot Faulted in RDU Crash*, NEWS & OBSERVER (Raleigh), Oct. 25, 1995, at 1A.

believe that the consequences of these so-called "no reference" policies[2] are disastrous, and we see a strong need to reinstate the free flow of information among employers. In addition to the American Eagle tragedy,[3] we offer two other recent examples to illustrate the point.

In 1993, a former employee of the Fireman's Fund Insurance Company in Florida shot three executives to death. In a subsequent lawsuit (settled out of court), plaintiffs alleged that the employee's former employer, Allstate Insurance Company, despite abundant evidence of the employee's violent tendencies, provided a neutral reference because of both the fear of the former employee's violent tendencies and the specter of being sued in connection with a negative reference.[4]

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2. This phenomenon and its consequences have been discussed in a number of law journal articles over the last decade. *See generally* Celeste L. Frank, *Providing References on Employees Today*, 55 TEX. B.J. 132 (1992); John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797 (1989); David C. Martin & Kathryn M. Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE REL. L.J. 43 (1987); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992); Robert A. Prentice & Brenda J. Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L. J. 207 (1987); O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305 (1988); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45 (1995); Valerie L. Acoff, Note, *References Available Upon Request . . . Not! — Employers Are Being Sued for Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755 (1994); Ann M. Barry, Comment, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264 (1989); Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687 (1989); Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517 (1993); Pamela G. Posey, Note, *Employer Defamation: The Role of Qualified Privilege*, 30 WM. & MARY L. REV. 469 (1989); Kyle E. Skopic, Comment, *Potential Employer Liability for Employee References*, 21 U. RICH. L. REV. 427 (1987); Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (1991); Charles D. Tiefer, Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143 (1977); Debora K. Kristensen, *Employment Defamation: Employer Liability — Up, First Amendment Privileges — Down*, BARRISTER, Fall 1994, at 29; *see also infra* note 11 (listing news and business articles discussing issue).

3. For other airline tragedies involving incompetent pilots whose former employers failed to pass on records of incompetence, see A.G. Newmeyer, III, *Hiring in the Dark: The Reference Sham*, WASH. POST, Dec. 29, 1995, at A23, and Julie Schmit & John Ritter, *Marginal Pilots Put Passengers' Lives at Risk*, USA TODAY, Nov. 26, 1995, at A1.

4. *See* Jerner v. Allstate Ins. Co., No. 93-09472 (Fla. Cir. Ct. 1993) (unreported), *cited in* David E. Rovella, *Laws May Ease the Risky Business of Job References*, NAT'L

In 1990, the estate of a Michigan nursing home employee who had been savagely beaten and murdered by a co-worker sued the co-worker's former employer, alleging that the former employer negligently failed to divulge to the prospective employer information about the employee's violent behavior.[5] At trial, the former employer freely conceded that, despite its knowledge of the employee's dangerous nature, it followed its policy of disclosing to prospective employers only the dates of employment of a former employee.[6] The former employer had instituted this policy to avoid the possibility of lawsuits. On appeal, the Michigan Court of Appeals reluctantly concluded that the law recognizes no duty on the part of an employer to divulge negative information about a former employee.[7]

Regrettably, although the former employers of these dangerous employees possessed records that might have prevented these tragedies, the employers refused to disclose this information to the prospective employers — nor did they have to do so. At present, the law neither provides incentives for employers to pass on information, whether positive or negative,[8] about former employees[9] nor imposes a duty to disclose such information.[10] Indeed, the thrust of the law has worked against society's

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L.J., Oct. 23, 1995, at B1.

5. *See* Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100, 101-02 (Mich. Ct. App. 1990).

6. *Id.* at 102.

7. *Id.* at 102-03.

8. *See id.* at 102 (noting that "[t]here is . . . nothing about the conditional privilege which magically transposes it into a legal obligation requiring employers to disclose adverse information concerning a former employee").

9. To the contrary, as we shall discuss, an employer that does give a reference on a former employee may find itself subject to a lawsuit raising a number of tort theories: defamation, intentional interference with prospective economic advantage, negligent referral, invasion of privacy, and intentional infliction of emotional distress. *See infra* notes 52-197 and accompanying text (discussing various employee causes of action). The employer may also find itself subject to liability on a number of federal statutory claims including charges of discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994) (prohibiting discrimination in employment against persons because of race, sex, religion, color, or national origin), the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994) (prohibiting discrimination against persons because of age), and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (prohibiting discrimination against individuals because of person's disability), to name a few. Further, an employer also may face lawsuits based on state privacy and "antiblacklisting" statutes as well as "state service" letter laws. *See infra* notes 38-49 and accompanying text (discussing statutorily based causes of action).

10. The consequence of an absence of a duty to disclose information about a former employee is clearly demonstrated in *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d

interest in having such information disclosed. During the past ten years, employers have adopted strict nondisclosure policies regarding requests for references on former employees in hopes of avoiding costly lawsuits.[11]

The current reluctance of employers to provide references originates in the explosion of federal employee rights laws over the last several decades[12] coupled with a proliferation of state privacy laws.[13] The concur-

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100 (Mich. Ct. App. 1990). *See supra* notes 5-8 and accompanying text (discussing *Moore*). The *Moore* court found that the former employer, even knowing of the employee's murderous propensities, had no duty to disclose this information in the absence of foreseeability. *Moore*, 459 N.W.2d at 103; *see also infra* notes 262-313 and accompanying text (discussing employer duties).

11. *See, e.g.*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 1995 REFERENCE CHECKING SURVEY (noting that 635 respondents stated that they or their staff had refused to give references for fear of lawsuit); Ross H. Fishman, *When Silence Is Golden; Providing Employment References*, NATION'S BUS., July 1991, at 48, 49 ("It is widely believed that the safest and most conservative position is to refuse to provide references."); D. Scott Landry & Randy Hoffman, *Walking the Fine Line on Employee Job Reference Information*, LA. B.J., Feb. 1996, at 457 ("In recent years, many employers, including many law firms, have adopted strict non-disclosure policies regarding former employees in order to avoid costly lawsuits."); Michael R. Losey, *Reference-Checking Protocols Leave Everyone in the Dark*, MANAGING OFF. TECH., Nov. 1995, at 33 ("Today, due to an alarming increase in legal threats, too many firms have tight-lipped policies when it comes to giving references."); Phillip M. Perry, *Cut Your Law Practice's Risks When Giving References for Former Support Staff*, LAW PRAC. MGMT., Sept. 1994, at 54 (quoting Vincent J. Appraises, then chair of the American Bar Association's Labor and Employment Law Section: "We tell our clients not to get involved in references of any kind. Just confirm or deny whether the person has been employed for a particular period of time and that's it. End of discussion."); Terry Boyd, *Mum's the Word on Ex-Employee Job References*, BUS. FIRST (Louisville), Oct. 23, 1995, at 1 ("For more and more companies, giving out employee references is becoming a 'damned if you do, damned if you don't' dilemma. With suits over job references mounting, attorneys and executives say fewer businesses will say anything when queried about ex-employees."); Tamar Lewin, *Boss Can Be Sued for Saying Too Much*, N.Y. TIMES, Nov. 27, 1987, at B26 ("Many employers have become so frightened of . . . lawsuits that they will no longer provide references, but will only confirm a worker's dates of employment and job title."); Frances A. McMorris, *Ex-Bosses Face Less Peril Giving Honest Job References*, WALL ST. J., July 8, 1996, at B1; Newmeyer, *supra* note 3 ("Many employers have adopted the NRSN approach — giving name-rank-serial-number-type information about former employees."); *see also* Prentice & Winslett, *supra* note 2, at 207; Saxton, *supra* note 2, at 45; Horkan, *supra* note 2, at 517.

12. *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t (1994); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

13. For a thorough discussion of workplace privacy rights, see IAN MICHAEL SHEPARD ET AL., WORKPLACE PRIVACY: EMPLOYEE TESTING, SURVEILLANCE, WRONGFUL DISCHARGE AND OTHER AREAS OF VULNERABILITY (BNA Special Report No. 133, 2d ed. 1987).

rent corporate retrenchment of the late 1980s and the early 1990s has also created employer fears that middle managers pushed out the door will step into the courtroom. Finally, a number of large jury verdicts in the mid-1980s in employee tort actions over defamatory references has fed the reluctance to say anything about former employees.[14]

A number of recent surveys have confirmed employer reluctance to provide references. In 1995, the Society for Human Resource Management conducted a survey of more than 1300 human resource managers to determine the frequency of employer reference-checking.[15] Sixty-three percent of the respondents stated that they or members of their organization had refused to provide information about former employees for fear of being sued.[16] Nearly forty percent stated that human resource professionals should refuse to provide job-related information to prospective employers, even if the information was honest and factual.[17] This was so even though only seventeen percent had ever been challenged by a disgruntled former employee alleging that the organization had provided an inaccurate reference.[18] Paradoxically, almost three-quarters of the respondents stated that reference-checking was more important in seeking to hire the best possible employees than ever before.[19]

Two other recent surveys also demonstrate the magnitude of the problem. In a 1993 study,[20] two-thirds of the two hundred executives surveyed by Robert Half International stated that companies are providing less information during reference-checks than three years ago, while eighty

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14. *See generally, e.g.*, Sigal Const. Corp. v. Stanbury, 586 A.2d 1204 (D.C. 1991) (awarding former construction project manager $250,000 for defamation when his former employer abused qualified privilege); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612 (Tex. App. 1984) (awarding insurance salesman $1.9 million for defamatory remarks made by his employer in which he was unfairly called, among other things, "a zero"). The notoriety of such lawsuits has led many employers to conclude that they face a "litigation explosion." Although these concerns are real, they are probably exaggerated. *See infra* notes 224-29 and accompanying text.

15. *See generally* SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 1995 REFERENCE CHECKING SURVEY, *supra* note 11.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Interestingly, only two percent of those responding stated that they actually had been sued for negligent hiring because they hired an individual who later harmed another employee or who committed a crime while an employee. *Id.*

20. Robert Half International, Inc., *Survey Shows Employers Find It Harder to Check References*, Jan. 1993 (Press Release) [hereinafter Robert Half Survey]; *see also* Saxton, *supra* note 2, at 45-46 (discussing Robert Half Survey).

percent of them indicated that they sometimes gave excessively positive references because of the fear of lawsuits.[21] Additionally, in 1993 a survey of two dozen Fortune 500 companies found that none currently provided references.[22] As justification for this information withholding, an attorney for a management law firm bluntly stated, "[p]eople are litigation-happy, and lawyers help stir the pot."[23]

Although states recently have begun to enact so-called "shield laws" that protect employers that provide job references,[24] and a number of scholars have recommended reforms to the current common law,[25] our review of the statutes and of the proposed recommendations leads us to conclude that none of these proposals adequately addresses the problem. In order to encourage the free flow of information between past and prospective employers, this Article recommends the adoption of a series of measures to assuage the fear of large tort damages for employers that give job references.

In support of our recommendations, we first examine the contraction of employer rights in connection with reference-checking that has occurred over the last several decades. We then discuss the multitude of torts that surround the giving of references — most notably, defamation, employer interference with employee economic advantage, employer liability for negligent misrepresentation or intentional misrepresentation, and finally, negligent hiring. Further, we analyze the shield laws adopted by a large number of states to address the employee-reference problem and discuss the implications of the recommendations of others in this area. Finally, we recommend an administrative Alternative Dispute Resolution (ADR) system to provide an expeditious, fair, and inexpensive method of resolving employer-reference disputes.

Our concern is to restore the social balance that has become tilted in the last decade toward protecting employee rights at the expense of the interests of society. Although we wholeheartedly support workers rights, we believe that the rights of the individual worker need to be tempered in the interests of the health and safety of the public.

21. Robert Half Survey, *supra* note 20.

22. *See* Tim Weiner, *Companies Stop Giving References*, FRESNO BEE, June 7, 1993, at C4 (discussing survey conducted by Alan Schonberg, chief executive officer of Management Recruiters International of Cleveland).

23. *Id.*

24. *See* McMorris, *supra* note 11 (discussing fact that 25 states have passed some form of laws providing employers with protection from defamation for releasing information about former employees); *see also infra* notes 198-210, 331-43, and accompanying text (discussing shield laws).

25. *See supra* note 2 (listing scholarship proposing reform).

II. The Contraction of Employer Rights and the Rise of No-Reference Policies

Some commentators have suggested that today's climate of employer caution in providing references is a consequence of the evolution of employee rights, a trend that has involved both modifications of the common law and increases in legislative protection of employees.[26] Although much of this evolution has been necessary to assure employees a significant measure of equality in the workplace, it has also made it more difficult for employers to operate in a fair and efficient manner. We briefly review developments in this area.

A. The Erosion of the Employment At-Will Doctrine

The erosion of the employment at-will doctrine has been one of the most important developments in employment law over the last several decades. The erosion has taken place through the emergence of a host of common-law exceptions that now make it more difficult for employers to discharge employees.[27] Pursuant to these exceptions, employees now commonly recover damages upon proof that their discharge resulted from violations of an implied contract,[28] was in violation of the exercise of a statutory right,[29]

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26. *See, e.g.*, Barry, *supra* note 2, at 264-65. ("The development of workplace privacy rights has caused a dramatic increase in the number of defamation lawsuits brought against employers by current or former employees. . . . In response to this threat, and in an attempt to avoid liability, employers have greatly restricted communications concerning former and current employees.").

27. "Wood's Rule," as the doctrine originally was named in honor of its creator, provided that the employer could dismiss an employee hired for an indefinite period of time for good reason, bad reason, or no reason at all. *See, e.g.*, Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds by* Hutton v. Watters, 179 S.W. 134 (Tenn. 1915). This rule and its virtual demise have been the subject of numerous articles. *See generally* Sami M. Abbast et al., *Employment at Will: An Eroding Concept in Employment Relationships*, 38 LAB. L.J. 21 (1987); Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); David S. Hames, *The Current Status of the Doctrine of Employment-at-Will*, 39 LAB. L.J. 19 (1988); Larry S. Larson, *Why We Should Not Abandon the Presumption That Employment Is Terminable at Will*, 23 IDAHO L. REV. 219 (1986); Cornelius J. Peck, *Unjust Discharge of Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Ellen Rust Peirce et al., *Employee Termination at Will: A Principled Approach*, 28 VILL. L.R. 1 (1982).

28. *See, e.g.*, Bondi v. Jewels by Edward Ltd., 73 Cal. Rptr. 494, 496 (Cal. Ct. App. 1968).

29. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973); Sventko v. Kroger Co., 245 N.W.2d 151, 152 (Mich. Ct. App. 1976).

or violated the public interest.[30]

Some commentators suggest that the increase in employee litigation — and in defamation claims in particular[31] — is attributable to the demise of the employment at-will doctrine: "Egregious abuses of employees by employers, once considered irremediable by courts that automatically invoked the talismanic employment at-will doctrine, are increasingly being punished by courts that are willing to replace stodgy precedent with searching inquiries into the equities of the situation."[32]

B. The Narrowing of the Qualified Privilege

The courts have also shifted from the interests of employers toward the rights of individuals by narrowing the common-law qualified privilege in defamation actions.[33] As one commentator noted, "[c]ourts . . . have diluted the protection [of the qualified privilege] by using low-threshold standards to defeat [it] . . . and to shift the burden of defense to employers."[34] Further, courts have withdrawn employer statements from the protection of the qualified privilege although these statements historically were subject to that protection. For example, the protection of the privilege formerly extended to the right of an employer to discuss with employees the misconduct or reason for discharge of other employees.[35] However, court decisions

30. *See, e.g.*, Percival v. General Motors Corp., 400 F. Supp. 1322, 1324 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976); Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959); Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974).

31. Such suits may be brought to remedy adverse personnel decisions, especially in those states which have *not* adopted significant exceptions to the employment at-will doctrine and which permit only a limited number of common-law actions directed at wrongful discharge. *See* Lewis et al., *supra* note 2, at 800.

32. Prentice & Winslett, *supra* note 2, at 208.

33. *See infra* notes 52-151 and accompanying text (discussing defamation and its application in employment context).

34. Posey, *supra* note 2, at 471; *see* Skopic, *supra* note 2, at 432; Tiefer, *supra* note 2, at 156; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that *Gertz* rule, which restricts awards of presumed and punitive damages to cases in which actual malice is proved, does not apply to defamatory statements that "do not involve matters of public concern"); Great Coastal Express, Inc. v. Ellington, 334 S.E.2d 846, 850 (Va. 1985) ("[I]n light of the reduced constitutional value of speech involving no matters of public concern . . . the state interest [in compensating a private individual for injury to reputation] adequately supports awards of presumed and punitive damages — even absent a showing of [*New York Times*] malice." (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 761)).

35. *See, e.g.*, Deaile v. General Tel. Co. of Cal., 115 Cal. Rptr. 582, 585 (Cal. Ct. App. 1974); Louisiana Oil Co. v. Renno, 157 So. 705, 708 (Miss. 1934); Ramsdell v.

in a number of states today demonstrate that such information is less often considered to fall within the qualified privilege.[36] In fact, one state court has withdrawn the mantle of the qualified privilege entirely from employer references that include allegations of criminal activity by the employee.[37]

C. Federal and State Legislation to Protect Employee Rights

In tandem with the judicial expansion of employee rights, legislatures at both the federal and state level have increased employee rights significantly over the last several decades. At the federal level, various antidiscrimination statutes, such as Title VII of the Civil Rights Act of 1964,[38] the Age Discrimination in Employment Act of 1967,[39] and the Americans with Disabilities Act of 1990,[40] have dramatically expanded employee rights. Employees have used these statutes to challenge negative and defamatory job references based on discriminatory views. For example, in *Bilka v. Pepe's, Inc.*,[41] an employee successfully sued his employer for discrimination, alleging that he received a negative reference in retaliation for bringing a discrimination charge against the employer.[42]

Enactment of the Fair Credit Reporting Act[43] has opened up another opportunity for employees to sue their employers for defamation. The Act provides that in an investigation made by an outside agency the employee must be notified of the investigation of both the employee's credit and the

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Pennsylvania R. Co., 75 A. 444, 445 (N.J. 1910); Ponticelli v. Mine Safety Appliance Co., 247 A.2d 303, 307 (R.I. 1968); Kroger Co. v. Young, 172 S.E.2d 720, 727 (Va. 1970); *see also* Tiefer, *supra* note 2, at 156.

36. *See, e.g.*, Thomas v. Howard, 168 A.2d 908, 910 (D.C. 1961); Drennan v. Westinghouse Elec. Corp., 328 So. 2d 52, 55 (Fla. Dist. Ct. App. 1976); Arison Shipping Co. v. Smith, 311 So. 2d 739, 741 (Fla. App. 1975); Galvin v. New York, New Haven & Hartford R.R., 168 N.E.2d 262, 266 (Mass. 1960); Sias v. General Motors Corp., 127 N.W.2d 357, 360 (Mich. 1964).

37. *See* Harrison v. Arrow Metal Prods. Corp., 174 N.W.2d 875, 886-88 (Mich. 1969).

38. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994).

39. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-624 (1994).

40. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

41. 601 F. Supp. 1254 (N.D. Ill. 1985).

42. Bilka v. Pepe's, Inc., 601 F. Supp. 1254, 1256 (N.D. Ill. 1985); *see also* Ferguson v. Mobil Oil Corp., 443 F. Supp. 1334, 1336 (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, 337 (D. Mass. 1976); Skopic, *supra* note 2, at 435 n.45.

43. 15 U.S.C. §§ 1681-1681t (1994).

employee's personal background, which may include job information. Because the law provides employees with notice of adverse references, it gives them access to the references used against them. Once apprised of a negative reference, the employee may bring a defamation charge against a former employer.[44]

At the state level, "antiblacklisting" statutes[45] have been enacted to prohibit employers from interfering with the right of employees to obtain other employment. These laws significantly chill an employer's motivation to provide references. An employer is subject to civil fines, and even criminal fines in some states, for violations.[46] Employer references have also been determined to be subject to "service letter" laws, which require an employer to give former employees a reason for their discharge.[47] If an employee objects to the contents of the service letter, the employee may challenge it, thereby requiring the employer to prove the truth of the letter's contents. Violations of these statutes give rise to fines and the possibility of compensatory and punitive damages.[48]

Finally, more than two-thirds of the states have adopted some form of privacy statute that can serve as the basis for employee suits.[49] With such a patchwork of common-law and legislative control over employee references, one should not be surprised at employers' reluctance to respond when queried about former employees.

D. The Diminished Presence of Labor Unions

In recent years, as unions have lost ground in providing redress of workplace wrongs, individuals have taken on employers themselves, fortified with legislative[50] and common-law[51] weapons that were nonexistent prior to

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44. *See, e.g.*, Hoke v. Retail Credit Corp., 521 F.2d 1079, 1080 (4th Cir. 1975) (doctor sued consumer reporting agency for defamation for information published in report that was furnished for employment purposes).

45. Antiblacklisting statutes historically have been used to prevent employers from sharing lists of employees known to have engaged in union organizing efforts with other employers. *See* Saxton, *supra* note 2, at 54 n.30 (listing states that have enacted anti-blacklisting statutes).

46. *Id.* at 55.

47. *See* Skopic, *supra* note 2, at 439-41 (discussing service letter statutes); *see also* Saxton, *supra* note 2, at 57-58.

48. *See* Skopic, *supra* note 2, at 439-41 (discussing service letter statutes); *see also* Saxton, *supra* note 2, at 57-58.

49. *See* Skopic, *supra* note 2, at 437 n.55.

50. Employment litigation previously often dealt with the breach of certain workplace statutes such as the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1994); the Fair

the last few decades. This swing of the pendulum toward a broad recognition of individual employee rights in the workplace represents a 180-degree shift from the relationship of the master and servant that dominated our country prior to the Industrial Revolution.

III. Common-Law Causes of Action Against Improper Employment References

In Part III, we examine the following array of torts to which an employer may be subject if the employer disseminates references to prospective employers: defamation, tortious interference with employee economic gain, intentional misrepresentation, and negligent misrepresentation. We also examine the liability of the employer pursuant to the tort of negligent hiring for failure to investigate employee backgrounds sufficiently.

A. Defamation Lawsuits Against Employers That Provide Job References

The idea that a person can be injured by words which impugn that individual's character or ability to work[52] has been recognized since the Middle Ages.[53] Originally, the ecclesiastical courts of England had exclu-

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Labor Standards Act, 29 U.S.C. §§ 201-219 (1994); the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)(1) (1994); and the Employee Retirement Income Security Act, 29 U.S.C. § 1140 (1994). Legislative litigation in today's workplace more frequently deals with discrimination against individual employees on the basis of sex, race, national origin, religion, or color (Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994)); age (Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994)); or disability (Americans with Disabilities Act of 1990, 29 U.S.C. §§ 12101-12213 (1994)).

51. *See infra* notes 152-97 and accompanying text (discussing common-law causes of action).

52. Because the law of defamation originally was not tailored with the workplace in mind, several commentators have criticized the general common-law principles of defamation as courts apply them to the employer/employee relationship. The authors of one article lamented about common-law defamation principles:

> [T]hey do not function well in the employment setting for which they were never intended. It is these long-standing principles that create inequities, spawn expensive and lengthy litigation, and are ill-adapted to an environment in which entities must communicate massive amounts of personnel information. Chilling workplace communication stifles the free flow of evaluations, ratings, and assessments and may ultimately harm the very interest the law of defamation should protect.

See Lewis et al., *supra* note 2, at 809.

53. For a discussion of the history of defamation law, see generally HAROLD POTTER,

sive jurisdiction over defamation cases,[54] and it was only in the mid-1500s that common-law courts claimed jurisdiction over this cause of action.[55] Even then the cause of action was not available to everyone. In particular, servants were not entitled to sue their masters for defamation.[56] This was not of much concern at the time, however, because the "contract" between the master and servant was typically a lifetime contract of servitude and references generally were not an important issue.[57]

When the common-law courts took jurisdiction of libel and slander actions, they permitted recovery only in those cases in which the offensive language impugned one's abilities in a trade, business, or profession.[58] Unfortunately, this definition exempted common laborers who had no professional training in their jobs.[59]

As England shifted from an agrarian to an industrial economy during the eighteenth century, treatises written at the time showed a change in the law of defamation.[60] This change, reflecting a new respect for laborers of all

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AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS (4th ed. 1958); BRUCE W. SANDFORD, LIBEL AND PRIVACY §§ 2.1-.4 (2d ed. 1996); Frank Carr, *The English Law of Defamation: With Especial Reference to the Distinction Between Libel and Slander* (pts. 1 & 2), 18 LAW Q. REV. 255, 388 (1902); Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); W.S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* (pts. 1-3), 40 LAW Q. REV. 302, 397 (1924), 41 LAW Q. REV. 13 (1925); Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Jerome Lawrence Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969); Van Vechten Veeder, *The History and Theory of the Law of Defamation* (pts. 1 & 2), 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904). Also, see Lewis et al., *supra* note 2, at 802 n.24 and Barry, *supra* note 2, at 267 n.14.

54. *See* R.H. Helmholz, *Canonical Defamation in Medieval England*, 15 AM. J. LEGAL HIST. 255, 255 (1971); Lewis et al., *supra* note 2, at 802.

55. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 364 (2d ed. 1979); Lewis et al., *supra* note 2, at 803.

56. *See* J.H. BAKER, *supra* note 55, at 190-98; Lewis et al., *supra* note 2, at 803.

57. *See* J.H. BAKER, *supra* note 55, at 190-98; Lewis et al., *supra* note 2, at 803.

58. *See* Veeder, *supra* note 53, at 558; Lewis et al., *supra* note 2, at 804.

59. A seventeenth-century case illustrates this exemption. In *Bell v. Thatcher*, 86 Eng. Rep. 184 (K.B. 1669), a mail carrier sued his employer for defamation because the employer had accused him of stealing. Although a lower court found for the plaintiff, the King's Bench reversed, stating that "such an employment [is not such] that an action should lie for scandalizing . . . the plaintiff . . . [who] seems to be little more than a common porter." *Id.*

60. *See* FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 187 (1818). Holt states:

> Every man has a right to the fruits of his industry, and, by a fair reputation and character in his particular business, to the means of making his industry fruitful. At common law therefore an action lies for words which slander a man in his trade, or defame him in an honest calling.

kinds, permitted them to sue for defamation regardless of their professional standing. From case reports at both the federal[61] and the state level,[62] it is evident that American courts adopted the English common-law defamation principles as they applied to employees.

As originally set forth in the common law, defamation was a strict liability offense, that is, liability arose upon proof of a statement's falsity irrespective of the speaker's degree of care in uttering it, thus underscoring the importance placed on a citizen's reputation.[63] Although states had a strong interest in protecting individual rights, including the right to protect one's good name, states had an equally if not more compelling interest in the free flow of information about employees' qualifications. To protect employees' interests, states provided various exceptions or "privileges," one of which was the qualified privilege.[64] Thus, historically, the common law

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Id. at 217-18. Interestingly, Holt's treatise goes on to discuss an exception to the above statement, which describes the employer's qualified privilege as we know it today:

> An action will not lie by a servant against a former master, for a letter written by him, in giving a character of the servant, unless the latter prove the malice, as well as falsehood of the charge; even though the master makes specific charges of fraud. So communications which respect a man's trade, when confidential, are not actionable. Thus A. may lawfully state to B. in an unreserved manner, his opinion of C's conduct and character provided it be done *bona fide*, whatever may be the charges which are imputed to him.

Id. at 219-20 (citations omitted); *see also* Lewis et al., *supra* note 2, at 806-07; *infra* notes 126-51, 314-68, and accompanying text (discussing application of qualified privilege in employment cases in United States).

61. *See generally, e.g.*, White v. Nicholls, 44 U.S. (3 How. 266) 439 (1845).

62. *See generally, e.g.*, Ware v. Clowney, 24 Ala. 707 (1854); Obaugh v. Finn, 4 Ark. 110 (1842); Butler v. Howes, 7 Cal. 88 (1857); Howe Mach. Co. v. Souder, 58 Ga. 65 (1877); Hake v. Brames, 95 Ind. 161 (1883); McCauley v. Elrod, 27 S.W. 867 (Ky. Ct. App. 1894); Wiel v. Israel, 8 So. 826 (La. 1890); Fresh v. Cutter, 20 A. 774 (Md. 1890); Gassett v. Gilbert, 72 Mass. (6 Gray) 94 (1856); Rammell v. Otis, 60 Mo. 365 (1875); Brown v. Orvis, 6 How. Pr. 376 (N.Y. 1851); Cole v. Neustadter, 29 P. 550 (Or. 1892); *see also* Lewis et al., *supra* note 2, at 809 n.79.

63. As *Prosser and Keeton* notes, a defendant published at his own peril. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 804 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS, topic 3, tit. A, note (1977) (Scope Note on Conditional Privileges) [hereinafter RESTATEMENT SCOPE NOTE]; Lewis et al., *supra* note 2, at 816; Paetzold & Willborn, *supra* note 2, at 129; Daniloff, *supra* note 2, at 693; Horkan, *supra* note 2, at 522. As noted earlier, however, the common law did acknowledge certain defenses, one of which was the qualified privilege of an employer to discuss with a prospective employer the qualifications of a former employee. Yet the employer lost the conditional privilege if the employer abused it. *See, e.g.*, Burton v. Crowell Publ'g Co., 82 F.2d 154, 154-56 (2d Cir. 1936); Bromage v. Prosser, 4 B. & C. 247, 107 Eng. Rep. 1051 (1825).

64. *See* KEETON ET AL., *supra* note 63, § 113, at 805.

balanced employer and employee rights by holding that a party with a conditional privilege fell outside the normal strict liability for a defamatory communication.

Although the states applied strict liability to defamation for well over one hundred years, the United States Supreme Court overruled this law in the mid-1960s. Concerned that the strict liability standard did not sufficiently protect the free flow of ideas, the Supreme Court, for the first time in its history, reviewed a state libel action and concluded that important constitutional principles applied in such a case.[65] The Court's decision, *New York Times Co. v. Sullivan*,[66] began a process of expanding constitutional rights in defamation that substantially affects the law today. As we shall discuss, despite the possible benefits of less restrained discourse prompted by these rulings, they injected an unwelcome note of complexity and confusion in the law that creates significant disincentives for employers to provide job references.[67]

B. *The Elements of Defamation*

As it exists today, defamation provides liability for the publication of injurious falsehoods about individuals based on negligence or some greater

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65. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 300 n.3 (1964) (noting that Court was considering issue for first time); *see also* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 7 (1983).

66. 376 U.S. 254 (1964). The case involved a police commissioner who had won the largest libel award ever granted in the state of Alabama by successfully claiming that he had been libeled by the publication in *The New York Times* of an advertisement that requested contributions for a civil rights group. Professor Smolla aptly describes the political climate in which the decision took place:

> The *New York Times* decision to some degree embodied legal and cultural inclinations that were waiting to be crystallized into more sharply contoured doctrine. The case came before the Court at a time in American history that could not help but influence all legal thought related to free expression. It is no accident that the *New York Times* decision came just as the cultural turbulence of the 1960's was about to be unleashed in full force. The struggle for genuine equality for blacks that followed *Brown v. Board of Education*, 347 U.S. 483 (1954), was intimately bound up with the protection of defiant and rebellious speech. Many of the most important legal decisions that helped give impetus to the civil rights movement were not equal protection cases, but rather First Amendment cases protecting strategies of mass protest.

See Smolla, *supra* note 65, at 8 n.51.

67. In fact, most constitutional privileges may not apply to employment-reference cases involving only private parties, but the legal confusion about whether they apply causes considerable difficulty. *See infra* notes 113-25 and accompanying text.

degree of fault. The *Restatement (Second) of Torts* identifies the elements of a cause of action for defamation as follows:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting at least to negligence on the part of the publisher; and
(d) either actionability of the statement irrespective of social harm or the existence of special harm caused by the publication.[68]

In the employment context, an employer defames an employee if the employer publishes a false statement concerning the employee that is without privilege and that injures the employee's reputation. For example, former employees have sued their employers for defamation based on allegedly false accusations of sexual harassment,[69] for publication of a termination letter that contained allegedly false and defamatory remarks,[70] for statements by the former employer's agents that the employee was "a zero,"[71] and for the statement that the employee was fired "for cause."[72]

1. *The Defamatory Statement*

According to the *Restatement (Second) of Torts*, a statement is defamatory if it "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 or dealing with him."[73] Statements in a reference that adversely and falsely

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68. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

69. *See* Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 310 (5th Cir. 1995).

70. *See* Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373, 1375 (D. Mass. 1980).

71. *See* Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 617 (Tex. App. 1984).

72. *See* Carney v. Memorial Hosp. & Nursing Home, 475 N.E.2d 451, 453 (N.Y. 1985).

73. RESTATEMENT (SECOND) OF TORTS § 559 (1977). The Supreme Court has yet to address the issue of whether the Constitution requires that the plaintiff bear the burden of proving the statement is false or whether the defendant bears the burden of proving the statement is true. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 5.05-5.07 (1986); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986); Hutchinson v. Proxmire, 443 U.S. 111, 133-34 n.16 (1979). The Supreme Court, however, has held that the First Amendment requires that the plaintiff prove that the statement was false if the statement was made by a media defendant involving a matter of public concern. *See Milkovich*, 470 U.S. at 19-20. Some states have held, at least in dicta, that a private figure plaintiff has the burden of proving the falsity of a defamatory statement made by a nonmedia, as well as a media, defendant. *See, e.g.*, Moss v. Stockard, 580 A.2d 1011, 1022-23 n.23 (D.C. 1990).

reflect on an employee's abilities are defamatory, and the courts have so held in numerous cases, whether the defamatory statement was oral or written.[74]

A statement can be either fact or opinion.[75] Employers historically have been permitted to voice personal opinions concerning former employees without being subject to liability for defamation.[76] At one point, the Supreme Court seemed to endorse this distinction strongly. In *Gertz v. Robert Welch, Inc.*,[77] the Court stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[78]

Although a majority of the federal circuit courts of appeals interpreted this language to mean that statements of fact are actionable while statements of opinion are not,[79] a 1990 Supreme Court decision, *Milkovich v. Lorain Journal Co.*,[80] has cast doubt on this proposition. In *Milkovich*, the Court declared that freedom of expression "is adequately secured by existing constitutional doctrine without creation of an artificial dichotomy between 'opinion' and fact."[81] A number of courts have interpreted *Milkovich* to

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74. *See, e.g.*, Davis v. Ross, 754 F.2d 80, 84-86 (2d Cir. 1985) (finding that letter of reference written by Ross to prospective employer defamed plaintiff-employee); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 617-21 (Tex. App. 1984) (finding that oral statements made by employer's agents to third party defamed employee). Libel refers to defamation by printed or written words while slander refers to defamation by oral words. KEETON ET AL., *supra* note 63, § 111, at 771. Although libel originally was treated more seriously under common law than slander, the distinction today is limited. *See* SMOLLA, *supra* note 73, at § 1.04[3]; Barry, *supra* note 2, at 269-70.

75. As a rough rule of thumb, facts assert matters that are empirically verifiable. Opinions express the speaker's attitude or feelings on a subject.

76. *See, e.g.*, Kirkland v. City of Peekskill, 634 F. Supp. 950, 951 (S.D.N.Y. 1986); Burns v. Supermarkets Gen. Corp., 615 F. Supp. 154, 158 (E.D. Pa. 1985); Adler v. American Standard Corp., 538 F. Supp. 572, 576 (D. Md. 1982), *aff'd in part, rev'd in part*, 830 F.2d 1303 (4th Cir. 1987); *see also* Lewis et al., *supra* note 2, at 810 n.87.

77. 418 U.S. 323 (1974).

78. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).

79. *See, e.g.*, Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1286 (4th Cir. 1987) (stating that "[t]he constitutional distinction between fact and opinion is now firmly established in the case law of the circuits"); Ollman v. Evans, 750 F.2d 970, 974-75 n.6 (D.C. Cir. 1984) (listing federal circuit court decisions that adopted fact/opinion dichotomy).

80. 497 U.S. 1 (1990).

81. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990). The Court implied that

mean that any statement — even one expressed as an opinion — can serve as the basis for a cause of action for defamation if the statement reasonably implies a false assertion of fact.[82]

The Court's blurring of the distinction between opinion and fact could increase employer liability for defamation. Case law in some jurisdictions indicates that this has occurred in situations when employers' expressions of opinion clearly rest on verifiable underlying facts. For example, in *Davis v. Ross*,[83] singer Diana Ross, in an unsolicited manner, mailed letters concerning a former employee to a number of colleagues stating that Ross was unable to recommend the employee because of her "personal habits." Although the reference contained no specific defamatory facts, in the court's eyes, it did imply that there were statements of fact behind this opinion which were defamatory.[84] The blurring of the fact/opinion distinction adds further to employers' uncertainty in giving job references.[85]

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the lower courts misinterpreted *Gertz*:

> Read in context, . . . the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. Thus we do not think that this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

Id. at 18 (citations omitted).

82. *See, e.g.*, Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995); Unelko Corp. v. Rooney, 912 F.2d 1049, 1053 (9th Cir. 1990); Criticare Sys., Inc. v. Nellcor Inc., 856 F. Supp. 495, 507 (E.D. Wis. 1994); Woodmont Corp. v. Rockwood Ctr. Partnership, 811 F. Supp. 1478, 1482-83 (D. Kan. 1993); Scheidler v. National Org. for Women, Inc., 751 F. Supp. 743, 745 (N.D. Ill. 1990); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1209-10 (D.C. 1991).

83. 754 F.2d 80, 83-86 (2d Cir. 1985).

84. *Id.* at 86; *see also* Holdaway Drugs, Inc. v. Braden, 582 S.W.2d 646, 650 (Ky. 1979) (finding opinion expressed by employer that former employee left under suspicion of drug use actionable as defamation if made with malice). The *Restatement (Second) of Torts* also provides a cause of action for defamation based on opinion if it can be proved that the opinion was based on undisclosed defamatory facts. RESTATEMENT (SECOND) OF TORTS § 566 (1977). *But see* Rosenberg v. American Bowling Congress, 589 F. Supp. 547, 551 (M.D. Fla. 1984) (finding that conclusions of investigatory committee are not actionable unless identified as assertion of fact); Williams v. Kansas City Transit, Inc., 339 S.W.2d 792, 797-98 (Mo. 1960) (finding that statement by employer that internal investigation "appeared to give reasonable grounds for believing" that employee was guilty of theft is not factual assertion giving rise to cause of action for defamation); *see also* Horkan, *supra* note 2, at 521 n.24.

85. *See infra* notes 346-52 and accompanying text.

2. *Publication*

The second requirement for a cause of action for defamation is publication of an unprivileged nature to a third party. Publication of the defamatory matter is essential to liability[86] because defamation is a tort that primarily protects a person's interest in his or her reputation.[87] No loss of reputation can occur if a false statement is uttered solely to the person whom it concerns because such a communication cannot damage the person's reputation in the eyes of the community.[88]

Plaintiffs in general and employees in particular have been given a boost in pursuing defamation cases by a new twist in the judicial interpretation of the publication requirement. At least ten states have recognized a "self-publication" doctrine, first applied to employment-reference cases in *Lewis v. Equitable Life Assurance Society*,[89] which held that employees compelled by prospective employers to repeat defamatory statements by their former employers in job interviews may seek damages from their former employers.[90]

In the *Lewis* case, an employer who terminated several employees for "gross insubordination" for refusing to falsify expense account records, declined to explain the grounds for firing them when queried by prospective employers. The employer's silence compelled the employees to explain the reasons for their termination to prospective employers in order to be considered for jobs. Under these facts, the Minnesota Court of Appeals held that the employer should have foreseen this result and would be liable for placing the employees in such a Catch-22 situation.[91]

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86. RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (1977).

87. *Id.* cmt. b.

88. *See, e.g.*, Campbell v. Willmark Serv. Sys., Inc., 123 F.2d 204, 206 (3d Cir. 1941); Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373, 1379 (D. Mass.), *aff'd* 636 F.2d 1199 (1st Cir. 1980); Udell v. Josephson, 11 N.Y.S.2d 866, 867 (N.Y. Sup. Ct. 1939); Young v. First State Bank, Watonga, 628 P.2d 707, 713 (Okla. 1981); Rivers v. Feazell, 58 S.W.2d 133, 134 (Tex. Civ. App. 1933); *see also* Prentice & Winslett, *supra* note 2, at 211 n.27.

89. 389 N.W.2d 876 (Minn. 1986).

90. *See* Kristensen, *supra* note 2, at 30 (noting that California, Colorado, Georgia, Iowa, Kansas, Michigan, Minnesota, Ohio, and Texas have adopted self-publication doctrine). Examples of cases holding that employees can sue when forced to "self-publish" defamatory material are *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980), *Colonial Stores, Inc. v. Barrett*, 38 S.E.2d 306 (Ga. Ct. App. 1946), *Grist v. Upjohn Co.*, 168 N.W.2d 389 (Mich Ct. App. 1969), *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439 (Tex. App. 1985), and *First State Bank v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980). *But see infra* notes 92-93 and accompanying text.

91. 361 N.W.2d at 881 (reasoning that liability should attach "[w]hen an injured party

Although some jurisdictions have adopted the self-publication doctrine, the majority of states do not support this approach, and a number of states have rejected it.[92] Nonetheless, where the doctrine has been adopted, employers face yet another source of potential liability.

Aside from self-publication cases, publication rarely emerges as central to most employment-reference cases. As one commentator noted, the issue of publication is not typically disputed in situations involving employment references; rather, the employer disputes the nature of the publication, claiming that it was privileged.[93] Thus, the dispute in employee defamation cases typically centers on the issue of abuse of the qualified privilege rather than on the issue of publication.

3. *The Fault Requirement*

For many years, courts imposed liability for defamation without a requirement of fault on the part of the defendant. However, since the case of *Gertz v. Robert Welch, Inc.* — which arguably abolished the common-law rule of strict liability even in cases of private plaintiffs' suing nonmedia defendants[94] — most courts have required a showing of negligence.[95] Thus, an employer generally will be held liable for the publication of a defama-

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operates under a strong compulsion to republish, and that compelled repetition is reasonably foreseeable").

92. *See, e.g.*, Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1554 (10th Cir. 1995) (rejecting self-publication doctrine because vast majority of states do not recognize it); De Leon v. St. Joseph Hosp., Inc., 871 F.2d 1229, 1237 (4th Cir. 1988) (refusing to recognize claim for compelled self-publication because it has not "gained widespread acceptance"); Yeitrakis v. Schering-Plough Corp., No. 93-2187, 1995 WL 151799, at *3-*4 (10th Cir. Apr. 6, 1995) (unpublished) (rejecting self-publication theory in part on basis that only minority of jurisdictions have recognized it); Churchey v. Adolph Coors, Co., 725 P.2d 38, 41 (Colo. App. 1986) ("We perceive no sound reason for weakening the general rule by carving out an exception based on foreseeability in employment termination cases.").

93. *See* Saxton, *supra* note 2, at 70.

94. Although *Prosser and Keeton* states that the *Gertz* standard should not necessarily be interpreted to extend to communications between private individuals concerning private matters, they note that "the American Law Institute has predicted that state law will require as a prerequisite to recovery in any case of defamation a showing of at least negligence with respect to truth or falsity and that such should be the law." KEETON ET AL., *supra* note 63, § 113, at 808; *see also* Daniloff, *supra* note 2, at 699 n.61.

95. *See* Daniloff, *supra* note 2, at 698 n.60 (listing states adopting some form of negligence standard for defamation actions brought by private plaintiffs). A number of noted legal authorities have interpreted *Gertz* to require a negligence standard in these cases. *See* KEETON ET AL., *supra* note 63, § 113, at 807-08; SMOLLA, *supra* note 73, at § 3.01(3).

tory statement concerning an employee only if the employer was negligent in allowing that statement to be made.[96]

4. *The Harm Requirement*

The final element of a cause of action for defamation is that the plaintiff's reputation be harmed.[97] Such harm may arise in one of two ways. The harm may be general in nature, that is, injuring the plaintiff's reputation overall by maligning the plaintiff's professional abilities.[98] To establish a cause of action for defamation of a general nature, the plaintiff need not prove damages, but simply must show that the statement was made and that it was untrue. The second type of injury is that of "special harm."[99] Special harm requires proof of damages with specificity; damages are not presumed. In the employment context, special harm may be demonstrated by showing that the employee failed to obtain employment at a particular organization due to the defamatory statement.

C. Employer Defenses to Defamation Actions

Defamation appears to be among the most frequently invoked lawsuits brought by employees to remedy work-related wrongs ranging from discharge to poor performance evaluations. This is so despite the many

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96. An employer can also be found liable for fault greater than negligence if the employer knowingly publishes a false statement or does so in reckless disregard of the truth. *See* RESTATEMENT (SECOND) OF TORTS § 580B (1977); Paezold & Willborn, *supra* note 2, at 129-30 n.27.

97. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

98. This is libel or slander "per se." *See* KEETON ET AL., *supra* note 63, § 112, at 788 (noting that for certain categories of defamation, such as those that address "the imputation of a crime, of a loathsome disease, and those affecting the plaintiff in his business, trade, profession, office or calling," no proof of damages is required); *see also* RESTATEMENT (SECOND) OF TORTS § 573 (1977) ("One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade, or profession . . . is subject to liability without proof of special harm."); Haas v. Evening Democrat Co., 107 N.W.2d 444, 447 (Iowa 1961); Mayo v. Goldman, 122 S.W. 449, 450 (Tex. Civ. App. 1909); Wilson v. Sun Pub. Co., 148 P. 774, 778 (Wash. 1915); Saxton, *supra* note 2, at 71 n.93.

99. RESTATEMENT (SECOND) OF TORTS §§ 557, 575 (1977). The *Restatement* defines "special harm" as "the loss of something having economic or pecuniary value . . . . Special harm may be a loss of presently existing advantage, as a discharge from employment. It may also be a failure to realize a reasonable expectation of gain, as the denial of employment, which but for the currency of the slander, the plaintiff would have received." *Id.* cmt. b, at 198.

substantial defenses available to employers to challenge such lawsuits.[100] In this section, we discuss the various defenses available to employers in employment-reference cases.

1. Truth

Truth is generally an absolute defense to a cause of action for defamation.[101] In cases in which the employer proves that its statements are true, courts have found for the employer regardless of the impact on the employee's reputation or ability to procure other employment.[102] Commentators have pointed to several fallacies surrounding this defense that make it less useful than it might appear. First, the facts surrounding the basis of the defamatory statement — whether a dismissal or resignation — are rarely free of dispute.[103] If the facts are debatable in the least, the employee may allege defamation, and "[e]ven if the employer is correct and the statements made in the job reference are true, juries tend to be more sympathetic toward the plaintiff ('the little guy') and not the employer."[104]

Second, judicial interpretation has diminished the effect of this defense. For example, in a Wisconsin Court of Appeals decision, *Zinda v. Louisiana-Pacific Corp.*,[105] an employer defended a claim for defamation on the basis of truth — written documentation that the employee falsified employment forms. However, the court found that the employer's application forms were ambiguous and should therefore be construed against the drafter. Despite the clear impropriety of the employee's actions, the employer was unable to use the documents to prove that the employee did, in fact, falsify the forms. This case raises the concern that, even when an employer has tried to document the explanation for termination of an employee, courts will give the employee every benefit of the doubt in an action based on defamation.

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100. *See infra* note 320 and accompanying text (discussing low probability of success in defamation lawsuits).

101. RESTATEMENT (SECOND) OF TORTS § 581A (1977).

102. *See, e.g.*, Brehany v. Nordstrom, Inc., 812 P.2d 49, 57-58 (Utah 1991) (finding that employer was not liable for defamation because employer's comments concerning former employees' use of drugs while on company business were true and, therefore, privileged).

103. *See* Acoff, *supra* note 2, at 760; Jeff B. Copeland, *The Revenge of the Fired*, NEWSWEEK, Feb. 16, 1987, at 46.

104. Acoff, *supra* note 2, at 760-61.

105. 409 N.W.2d 436 (Wis. Ct. App. 1987); *see also* Barry, *supra* note 2, at 290.

2. *Consent*

The other absolute defense to defamation is an employee's consent to publication of an employer's statements concerning the employee.[106] Typically, this defense applies when an employer requests that the employee execute a waiver of liability or give written consent before the employer will provide a reference for the employee.[107] However, a number of courts have eroded this defense by holding that neither consent nor release bars an action for defamation because a party should not be permitted to absolve itself from an intentional tort such as defamation.[108]

3. *Absolute Privilege*

The common law has long recognized an "absolute privilege" with respect to certain statements under particular circumstances. Such statements, even when uttered maliciously and falsely, cannot give rise to a cause of action for defamation.[109]

The policy underlying absolute privilege rests on the assumption that the public interest in having people speak on certain topics or in certain situations outweighs the harm that their potentially false and malicious statements will cause. Absolute privilege attaches to three categories of speech: (1) judicial and administrative hearings, (2) legislative proceedings, and (3) executive communications of state and federal officers concerning public affairs.[110] The absolute privilege also applies to statements between husband and wife, and statements required to be published by law.[111] Within the employment context, employers enjoy an absolute privilege in

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106. RESTATEMENT (SECOND) OF TORTS § 583 (1977) (stating that "the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation"); *see also* Lewis et al., *supra* note 2, at 822.

107. *See, e.g.*, Smith v. Holley, 827 S.W.2d 433, 436-37 (Tex. App. 1992) (finding that employee's execution of consent exculpated employer from liability concerning statements that employer made in reference even if statements were defamatory); *see also* Acoff, *supra* note 2, at 759.

108. *See, e.g.*, Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816, 817-18 (Fla. Dist. Ct. App. 1985); *see also* Acoff, *supra* note 2, at 759. For a discussion of our views on the propriety of permitting employers to require employees to sign liability waivers with respect to job references, see *infra* notes 369-78 and accompanying text.

109. *See, e.g.*, Drummond v. Stahl, 618 P.2d 616, 619 (Ariz. Ct. App. 1980); KEETON ET AL., *supra* note 63, § 114, at 816-20.

110. KEETON ET AL., *supra* note 63, § 114, at 816-23; *see also* RESTATEMENT (SECOND) OF TORTS §§ 585-591 (1977).

111. RESTATEMENT (SECOND) OF TORTS §§ 592-592A (1977).

making statements before quasi-judicial boards such as those addressing unemployment, workers' compensation, and grievance disputes.[112]

4. *Constitutional Privilege*

Beginning with the case of *New York Times Co. v. Sullivan*[113] in 1964, the Supreme Court has spelled out a number of constitutional principles that now govern state tort law in certain circumstances. Taken collectively, these cases establish a "constitutional privilege" that applies to tort cases.

In *New York Times*, the Supreme Court created a new standard — that of "actual malice" on the part of the publisher — which must be met by a public official before he or she can succeed in a defamation case. Specifically, the Court stated:

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[114]

Several years later, in *Curtis Publishing Co. v. Butts*,[115] the Supreme Court further expanded free speech protections by extending the class of defendants protected by the actual malice standard to include "public figures." In a subsequent decision, *Rosenbloom v. Metromedia, Inc.*,[116] the Court again tinkered with defamation standards of proof by ruling that the *New York Times* protections should extend to defamatory falsehoods relating to private persons if the statements concerned matters of "public interest" or "public concern."

In *Gertz v. Robert Welch, Inc.*,[117] the Supreme Court addressed the standard to be applied in private figure libel cases. *Gertz* has had the most

112. *Id.* § 585 cmt. b.

113. 376 U.S. 254 (1964).

114. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

115. 388 U.S. 130 (1967).

116. 403 U.S. 29 (1971).

117. 418 U.S. 323 (1974). The facts of *Gertz* involved the defaming of an attorney by a right-wing news publication which called him a "Communist-front," a "Leninist," and a "Marxist," none of which was true. *Id.* at 325-26. Elmer Gertz had incurred the wrath of the paper by being hired to pursue a civil action against a police officer, Richard Nuccio, who had shot and killed one Ronald Nelson. *Id.* Although Nuccio was in fact convicted of murdering Nelson, Gertz played no part in either the civil or criminal cases against Nuccio, and made no public statements or appearances in connection with the case. *Id.* The trial court ultimately found against Gertz on the theory that the statements made in the

impact on defamation law as it applies to employers and employees, and has set the stage for the interpretation of current defamation laws. In *Gertz*, the Court clarified the standard of proof necessary for private citizens suing for defamation. The Court indicated that the states could devise standards of liability in defamation cases only "so long as they do not impose liability without fault."[118] This constitutes a far lower standard than the one set forth in *New York Times*. As the *Gertz* Court noted:

> The "public of general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions.[119]

Finally, the *Gertz* Court imposed constraints on the states' ability to award punitive damages in defamation cases, stating that punitive damages would not be awarded without proof of actual malice in all cases and that an award of general damages would not be granted without a showing of "actual injury."[120]

The last case in the quartet of Supreme Court cases revising common-law defamation is *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[121] This case addressed the issue of whether a private citizen suing a nonmedia defendant must meet the *New York Times* standard of actual malice to obtain punitive damages. The Court held that the *Gertz* rule did not apply to nonmedia defendants such as a credit agency and that the actual malice standard attached only to publications of public or general interest.[122]

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publication were a matter of public interest and that Gertz had not proved actual malice. *Id.* at 329. The circuit court affirmed, applying *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The Supreme Court granted certiorari and reversed. Gertz v. Robert Welch, Inc., 418 U.S 323, 327-32 (1974); *see also* Smolla, *supra* note 65, at 9-10 n.59.

118. *Gertz*, 418 U.S. at 347.

119. *Id.* at 346.

120. *Id.* at 349-50.

121. 472 U.S. 749 (1985).

122. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761-63 (1985).

Noting that "it is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection,'"[123] the Court pointed out that "[i]n contrast, speech on matters of purely private concern is of less First Amendment concern."[124]

Employers that look to the scope of constitutional privilege to determine whether such a privilege provides protection to those that give employment references are likely to be disappointed. In fact, a careful reading of the cases involving constitutional privilege reveals that few if any constitutional protections established in those cases apply to employment references.[125]

5. *Qualified Privilege*

The qualified privilege is designed to encourage free and open communication between individuals with a common interest in a subject. Employers that provide job references to prospective employers generally qualify for qualified privilege protection. As one court stated, "[w]ithout the protection of the privilege, employers might be reluctant to give sincere yet critical responses to requests for an appraisal of a prospective employee's qualifications."[126] The qualified privilege even permits an employer to publish false and defamatory statements about an employee[127] if

123. *Id.* at 758-59 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citing Thornhill v. Alabama, 310 U.S. 88, 101 (1940))).

124. *Id.* at 759.

125. *See infra* note 392 and accompanying text (summarizing constitutional privilege protections). Having noted the inapplicability of the constitutional privilege to the typical employment-reference case, we nonetheless recommend the adoption through statute of some of the rules of constitutional privilege. *See infra* notes 366-68 and accompanying text.

126. Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 615 (Ind. Ct. App. 1991); *see also* Alford v. Georgia-Pacific Corp., 331 So. 2d 558, 562 (La. Ct. App. 1976) (stating that refusal to recognize privilege "would either tend to stifle communication of qualification and character evaluations, inherently subjective in nature, or alternatively, would breed deception in its wake"); Marchesi v. Franchino, 387 A.2d 1129, 1131 (Md. 1978) ("The common law conditional privileges rest upon the notion that a defendant may escape liability for an otherwise actionable defamatory statement, if publication of the utterance advances social policies of greater importance than the vindication of a plaintiff's reputational interest."); Swanson v. Spiedel, 293 A.2d 307, 310 (R.I. 1972) ("[G]iving such information in good faith to other employers protects the publisher's own interests by insuring that he may seek and receive the same information when about to hire new employees.").

127. *See, e.g.*, Arsenault v. Allegheny Airlines, Inc., 485 F. Supp. 1373, 1380 (D. Mass. 1980) ("Where a defendant relies on a conditional privilege, the truth or falsehood of the allegedly defamatory remark is not material."); Doane v. Grew, 107 N.E. 620, 621-22 (Mass. 1915) (stating that, in absence of proof of malice, recklessness, or ill will,

the communication was made under the proper circumstances to an appropriate person.

In deciding whether an employer's statements qualify for a qualified privilege, the courts must determine that the employer made the statements on a "privileged occasion" and that the employer did not abuse the privilege. Section 595 of the *Restatement (Second) of Torts* sets forth the circumstances under which a publication is conditionally privileged:

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
>
> (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that
>
> (a) the publication is made in response to a request rather than volunteered by the publisher[128] or
>
> (b) a family or other relationship exists between the parties.[129]

Section 595 applies to communications about the character or conduct of an employee by a former employer to a prospective employer under the following circumstances:

> The defamatory imputations . . . must be made for the purpose of enabling that person to protect his own interests, and they must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege. . . . Imputations that have no connection with the work that the servant is to perform, or with the position that he will occupy in the [prospective employer's] employment, are outside the scope of the privilege.[130]

Most states follow the *Restatement*'s approach and recognize the giving of employee references in response to inquiries from prospective employers

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defense of privilege will prevail even if remark was, in fact, false).

128. For example, the court refused qualified privilege protection to unsolicited derogatory statements made by Diana Ross concerning a former employee. *See* Davis v. Ross, 754 F.2d 80, 85-86 (2d Cir. 1985).

129. RESTATEMENT (SECOND) OF TORTS § 595 (1977).

130. *Id.* § 595 cmt. i (1977).

as a privileged occasion,[131] as long as the former employer is able to prove that: (1) the statements were made in good faith; (2) the former employer had an interest to be upheld; (3) the statements were limited in scope to the necessary purpose; (4) they were made on a proper occasion; and (5) publication was made in a proper manner and only to proper parties.[132]

If an employer-defendant can demonstrate that the statement is eligible for a qualified privilege, the employer will prevail in a defamation action unless the plaintiff can demonstrate that the employer abused the privilege.[133] The privilege is subject to abuse in a variety of ways. The *Restatement* provides that the following acts will generally result in forfeiture of the privilege:[134]

> (1) publishing information that the publisher knows to be false, or acting in reckless disregard as to its truth or falsity;[135]

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131. *See, e.g.*, Kenney v. Gilmore, 393 S.E.2d 472, 473 (Ga. Ct. App. 1990) ("A prima facie privilege shields statements made concerning a current or former employee by a current or former employer to one, such as a prospective employer, who has a legitimate interest in such information."); Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 615 (Ind. Ct. App. 1991) (finding that "[a]s a general rule an employee reference given by a former employer to a prospective employer is clothed with the mantle of a qualified privilege"); Alford v. Georgia-Pacific Corp., 331 So. 2d 558, 561-62 (La. Ct. App. 1976) (recognizing qualified privilege for communications between former and prospective employers when statements are made in good faith and for legitimate purpose); Erickson v. Marsh & McLennan Co., 569 A.2d 793, 805 (N.J. 1990) (applying qualified privilege to employer's communications in response to unsolicited inquiries from prospective employers of discharged employee); Swanson v. Speidel Corp., 293 A.2d 307, 309-10 (R.I. 1972) (recognizing qualified privilege in communications between former and prospective employers); *see also* Jacron Sales Co. v. Sindorf, 350 A.2d 688, 697-98 (Md. 1976); Wynn v. Cole, 243 N.W.2d 923, 927 (Mich. Ct. App. 1976); Cash v. Empire Gas Corp., 547 S.W.2d 830, 833 (Mo. Ct. App. 1977); Rogozinski v. Airstream By Angell, 377 A.2d 807, 818 (N.J. Super. Ct. Law Div. 1977); Walsh v. Consolidated Freightways, Inc., 563 P.2d 1205, 1210 (Or. 1977); Calero v. Del Chem. Corp., 228 N.W.2d 737, 744 (Wis. 1975); Hett v. Ploetz, 121 N.W.2d 270, 272-73 (Wis. 1963); KEETON ET AL., *supra* note 63, § 115, at 828-31.

132. Jenkins v. Wal-Mart Stores, Inc., 910 F. Supp. 1399, 1427 (N.D. Iowa 1995); *see also* Knudsen v. Chicago & N.W. Trans. Co., 464 N.W.2d 439, 442 (Iowa 1990); Brown v. First Nat'l Bank of Mason City, 193 N.W.2d 547, 552 (Iowa 1972).

133. *See* Circus Circus Hotels, Inc. v. Witherspoon, 657 P.2d 101, 105 (Nev. 1983); RESTATEMENT (SECOND) OF TORTS § 619 (1977).

134. RESTATEMENT (SECOND) OF TORTS §§ 600, 603-605A (1977).

135. The prevailing rule among the states appears to be that employers do not lose the privilege by mere negligence in publishing statements about former employees. *See* Donald Paul Duffala, Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employees' Work Record or Qualification*, 24 A.L.R. 4th 144, 150 (1983); *see also* Boston Mut. Life Ins. Co. v. Varone, 303 F.2d 155, 160 (1st Cir. 1962); Jacron Sales Co. v.

(2) publishing the defamatory matter for a purpose other than that for which the privilege was intended;
(3) publishing the information to parties outside the scope of the intended privilege;
(4) publishing defamatory matter which the publisher does not reasonably believe is necessary to accomplish the purpose for which the privilege was granted;
(5) publishing unprivileged matter along with the privileged matter.[136]

The privilege may be lost not only if the employer abuses it, but also if the employer acts with malice. Unfortunately, the states do not offer a consistent definition of the term "malice." Although the malice standard is the one most often used to prove breach of the qualified privilege,[137] courts remain split on the definition of the term.[138] Some courts[139] use the common-law definition of malice that examines the intent of the pub-

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Sindorf, 350 A.2d 688, 699 (Md. 1976); Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 515 (Tex. Civ. App. 1970). The first *Restatement of Torts* adopted a lesser standard, that of liability if the employer lacks belief or reasonable grounds for belief in the defamatory matter. RESTATEMENT OF TORTS §§ 600-601 (1938). The *Restatement (Second) of Torts* adopts a higher standard in response to the *Gertz* decision. Explanation for the standard is set forth as follows:

> The traditional common law system of a set of conditional privileges with possible loss of the privilege through its abuse . . . involves a process of balancing competing interests in accordance with the facts. The traditional balance at common law had been attained in the past by holding that a person having a conditional privilege was not subject to the normal strict liability for a defamatory communication but was liable only if he did not believe the statement to be true or lacked reasonable grounds for so believing.

RESTATEMENT (SECOND) OF TORTS § 600 cmt. a (1977). This adjustment of the conflicting interests has now been subjected to necessary modification by the holding of the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that strict liability in defamation is unconstitutional and that a publisher can be held liable only if the publisher was at least negligent regarding the falsity of the statement.

136. *See* RESTATEMENT (SECOND) OF TORTS §§ 600, 603-605A (1977).

137. Duffala, *supra* note 135, at 150.

138. A number of authorities have bemoaned the concept of malice in defamation cases. Most notably, Dean Prosser wrote that "[t]he word 'malice'. . . has plagued the law of defamation from the beginning." KEETON ET AL., *supra* note 63, § 115, at 833; *see also* LAWRENCE H. ELDREDGE, THE LAW OF DEFAMATION § 93, at 509 (1978); Saxton, *supra* note 2, at 73; Daniloff, *supra* note 2, at 710 n.130; *infra* notes 339-43 and accompanying text.

139. *See, e.g.*, Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980). The court took pains to explain why it chose to adopt the common-law definition of "malice" over the *New York Times* definition, stating that the former focuses on the defendant's attitude toward the truth of what he has said rather than on his attitude toward the plaintiff. *Id.* at 258; *see also* Jacron Sales Co. v. Sindorf, 350 A.2d 688, 691 (Md. 1976); Calero v. Del Chem. Corp., 228 N.W.2d 737, 744-48 (Wis. 1975).

lisher including "ill will, bad or evil motive, or such gross indifference or reckless disregard of the rights of others as to amount to a willful or wanton act."[140] Other courts equate common-law malice with "bad faith,"[141] still others with "disinterested malevolence,"[142] "ill will,"[143] or a "wrongful act done intentionally without just cause or excuse."[144] Indeed, one court, seemingly in fear of leaving any definition out, defined malice as

> some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or what, as a matter of law, is equivalent to malice, that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff.[145]

A small number of courts apply the actual malice standard set forth by the Supreme Court in *New York Times*.[146] This standard, a higher standard than that found in the common law,[147] requires that the publisher have known that the defamatory statement was false or have acted in reckless disregard of whether the statement was false.[148] Although a majority of

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140. Marathon Oil Co. v. Salazar, 682 S.W.2d 624, 631 (Tex. App. 1984); *see* Daniloff, *supra* note 2, at 711 n.134 (listing cases using common-law definition of malice with multitude of interpretations on theme); *see also* Duffala, *supra* note 135, at 186-89.

141. Goforth v. Avemco Life Ins. Co., 368 F.2d 25, 31 (5th Cir. 1966); Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204, 1214 (D.C. 1991) ("In this jurisdiction, we have equated common law malice with 'bad faith.'").

142. Brewster v. Boston Herald-Traveler Corp., 188 F. Supp. 565, 569 (D. Mass. 1960).

143. Manguso v. Oceanside Unified Sch. Dist., 200 Cal. Rptr. 535, 539 (Cal. Ct. App. 1984).

144. Quinones v. United States, 492 F.2d 1269, 1275 (3d Cir. 1974).

145. Great Coastal Express, Inc. v. Ellington, 334 S.E.2d 846, 851 n.3 (Va. 1985) (quoting Preston v. Land, 255 S.E.2d 509, 511 (Va. 1979)).

146. 376 U.S. 254 (1964).

147. As one court recently noted, "only clear and convincing proof will support recovery." Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 313 (5th Cir. 1995) (choosing to adopt "actual malice" standard for employer-employee defamation action). Furthermore, mere negligence is clearly insufficient to overcome the privilege. *Id.*

148. *See id.* The Supreme Court of Texas defined actual malice in the following terms:

> Actual malice is not ill will; it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true. "Reckless disregard" is defined as a high degree of awareness of probable falsity, for proof of which the plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." An error in judgment is not enough.

Id.

courts have rejected the *New York Times* standard for private defamation cases,[149] a handful of courts have chosen to adopt it.[150]

There is, therefore, a confusing patchwork of conflicting standards that are applied to defamation claims, and the employer is caught in the middle. With such a confused interpretation of abuse of the privilege and application of the term "malice," the employer is uncertain which standards will be applied when that employer gives a reference. The fact that so many diverse standards apply is reason enough to keep one's mouth shut.[151]

IV. Other Common-Law Sources of Employer Liability for Job References

In Part IV, we discuss several other tort theories that could influence an employer's decision whether to give references on former or current employees. Although these approaches tend to be invoked less often than defamation, they nonetheless represent sources of concern for employers that give references.

A. Interference with Economic Advantage

The first theory, intentional interference with prospective economic advantage,[152] is often brought with a claim for defamation. That is, the employee alleges that the employer that gave a false and defamatory job reference interfered with the employee's opportunity for other employment. Most plaintiffs that sue for defamation include a claim for intentional interference with prospective economic advantage to buttress their allegations that the employer acted intentionally and to emphasize the economic damage created by the employer's falsehood. This theory rarely serves as

149. *See* Duffala, *supra* note 135, at 150.

150. *See, e.g.*, *Duffy*, 44 F.3d at 313; Knudsen v. Chicago & N.W. Transp. Co., 464 N.W.2d 439, 443 (Iowa 1990); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 695 (Md. 1976). Some courts have adopted the actual malice standard in order for a private figure to recover punitive damages. *See In re* IBP Confidential Bus. Documents Litig., 797 F.2d 632, 647 (8th Cir. 1986).

151. Even this tactic may not be foolproof because of the self-publication doctrine. *See* Lewis v. Equitable Life Assur. Soc., 361 N.W.2d 875, 880-81 (Minn. Ct. App. 1985); *see also supra* notes 89-91 and accompanying text (discussing *Lewis*).

152. *See, e.g.*, Delloma v. Consolidation Coal Co., 996 F.2d 168, 170-71 (7th Cir. 1993); Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 490 (W.D. Ark. 1982); Marshall v. Brown, 190 Cal. Rptr. 392, 394 (Cal. Ct. App. 1983); Willner v. Silverman, 71 A. 962, 964 (Md. 1909); Owens v. Williams, 77 N.E.2d 318, 320-21 (Mass. 1948); Stelzer v. Carmelite Sisters, 619 S.W.2d 766, 768 (Mo. Ct. App. 1981); Musso v. Miller, 38 N.Y.S.2d 51, 52-53 (N.Y. App. Div. 1942); Geyer v. Steinbronn, 506 A.2d 901, 909-10 (Pa. Super. 1986).

the basis for an independent cause of action.[153]

The *Restatement (Second) of Torts* defines the tort of intentional interference with prospective economic advantage as follows:

> One who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.[154]

The employee bears the burden of proving that the employer *intentionally* interfered with the employee's job prospect.[155] Further, the employment prospect must be one that was clearly within the grasp of the employee absent the negative reference given by the former employer. A mere expectancy of employment is not sufficient to meet the requirements of this cause of action.[156]

Since the early origins of this tort, there has been general acceptance of the principle that a purely malicious motive, such as spite or a desire to do harm by an employer to an employee, is sufficient but not necessary to find that the employer intentionally and improperly interfered with the plaintiff's prospective employment.[157] An employee may prevail in this cause of action simply by showing that a former employer improperly intended to interfere with the employee's future employment.[158] However, some courts have held that the plaintiff must show malice in those cases in which the employer's statements are privileged.[159]

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153. *See* KEETON ET AL., *supra* note 63, § 129, at 992; *see also, e.g.*, Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487, 490 (W.D. Ark. 1982) (considering case in which employee brought suit for both contractual interference and defamation). On occasion, employees have used this tort independently. *See, e.g.*, Delloma v. Consolidation Coal Co., 996 F.2d 168, 170 (7th Cir. 1993) (considering suit against former employer alleging contractual interference based on employer's false reference).

154. RESTATEMENT (SECOND) OF TORTS § 766B (1977); *see also* KEETON ET AL., *supra* note 63, § 129, at 978-84; Saxton, *supra* note 2, at 65.

155. Skopic, *supra* note 2, at 443-44.

156. *See* KEETON ET AL., *supra* note 63, § 130, at 1010 n.49. *But see id.* at 1006 (noting that expectancies for "future contractual relations" have been protected).

157. *See, e.g.*, Wheeler-Stenzel Co. v. American Window Glass Co., 89 N.E. 28, 29 (Mass. 1909); Carnes v. St. Paul Union Stockyards Co., 205 N.W. 630, 631 (Minn. 1925); Jones v. Leslie, 112 P. 81, 83-84 (Wash. 1910).

158. *See* Skopic, *supra* note 2, at 444.

159. *See, e.g.*, Delloma v. Consolidation Coal Co., 996 F.2d 168, 171 (7th Cir. 1993).

An employer that provides an honest reference on a former employee is not likely to be liable for contractual interference unless the employer acts with evil motive or wrongful intent to prevent contractual relations.[160] The employer is in all likelihood protected by a privilege similar to the qualified privilege in defamation cases.[161] *Prosser and Keeton on the Law of Torts* describes the qualified privilege in intentional interference with prospective contractual advantage as follows: "[A]ny purpose sufficient to create a privilege to disturb existing contractual relations, such as the disinterested protection of the interests of third persons, or those of the public, or of the defendant's own property or business interests . . . . will also justify interference with relations which are merely prospective."[162]

The qualified privilege was raised to defeat an employee's claim for contractual interference in *Delloma v. Consolidation Coal Co.*[163] In *Delloma*, the employer, responding to a request for information from a prospective employer, disclosed that the plaintiff had been discharged for sexual harassment of co-workers. The plaintiff was later exonerated and brought an intentional interference with prospective contract claim against his former employer. The court found that the employer was entitled to a privilege similar to that found in defamation cases:

> Generally, a former employer who gives a negative reference to a prospective employer holds some qualified privilege against defamation suits. By analogy, an employer should hold some privilege against tortious interference suits for limited statements in response to a direct request. We conclude, therefore, that an employer may invoke a conditional privilege to respond to direct inquiries by prospective employers.[164]

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160. *See* Saxton, *supra* note 2, at 65 and cases cited therein.

161. *Id.*; *see also Delloma*, 996 F.2d at 171.

162. KEETON ET AL., *supra* note 63, § 130, at 1010-11. *Prosser and Keeton* notes that the qualified privilege is not well-defined, either as to interference with contractual relations or other relations, and that this privilege has not been applied in many cases. *Id.*; *see also* Saxton, *supra* note 2, at 65.

163. 996 F.2d 168 (7th Cir. 1993).

164. *Delloma*, 996 F.2d at 171-72. The Seventh Circuit expressed some concern in granting such a qualified privilege because it perceived a trend in the state law away from permitting employers to make negative statements to third parties about former employees. *Id.* at 172 n.4. The court noted the existence of an Illinois statute which prohibited truthful dissemination of information concerning employee disciplinary action to third parties. *Id.* Nevertheless, the court stated that, "without guidance from the Illinois courts on the applicability of this statute to tortious interference claims, we will follow the generally accepted rule that employers may hold a limited privilege." *Id.*

B. Negligent Misrepresentation

Employers that provide reference information on former employees have a broader band of liability under the tort of negligent misrepresentation than they do under the tort of interference with economic advantage. Liability of the former employer in negligent misrepresentation cases may extend to the other employer, its employees, and any third parties that deal to their detriment with the employee for whom references are supplied.[165]

Two sections of the *Restatement (Second) of Torts* provide useful starting points in analyzing the applicability of this tort to employers that give references on former employees:

> Section 311. Negligent Misrepresentation Involving Risk of Physical Harm
>
> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other, or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
>
> (b) in the manner in which it is communicated.[166]

Liability stems either from failure to make a proper investigation or from knowledge that the information provided was incorrect.[167] Recovery extends to all persons who are likely to be injured in reliance on the information conveyed.[168]

A second section of the *Restatement* addresses a slightly different liability that includes, but is not limited to, misrepresentation:

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165. No reported cases to date hold an employer liable for failure to give a reference to a prospective employer on an employee with dangerous propensities. However, many commentators suggest that such a duty is looming and will be defined in a new tort of "negligent referral." *See* Swerdlow, *supra* note 2, at 1645; Kirk Johnson, *Why References Aren't "Available Upon Request": A New Fear of Lawsuits Is Tightening Everyone's Lips*, N.Y. TIMES, June 9, 1985, at F8; William C. Martucci & Daniel B. Boatright, *Immunity for Employment References*, EMPLOYMENT REL. TODAY, Summer 1995, at 119; Janet Novack, *What If the Guy Shoots Somebody?*, FORBES, Dec. 4, 1995, at 37; Phillip M. Perry, *Cut Your Risk When Giving References*, HR Focus, May 1995, at 15.

166. RESTATEMENT (SECOND) OF TORTS § 311 (1977).

167. *Id.* cmt. d.

168. *Id.* cmt. b.

> Section 323. Negligent Performance of Undertaking to Render Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.[169]

Although few cases apply misrepresentation theories to the employment arena,[170] one case, *Guztan v. Altair Airlines, Inc.*,[171] illustrates the successful use of such causes of action. In *Guztan*, a female employee of Altair Airlines sued the airline and an employment agency when an Altair employee recommended by the employment agency raped her. The accused employee had informed the employment agency during his interview that he had been convicted for rape two years before his interview, but insisted that the victim had been his girlfriend while stationed in Germany and that he was convicted simply because it was a policy of the military courts to appease foreign women who made such charges.[172]

Although this information was passed on to an Altair official, both by the applicant and by the employment agency, the Altair official hired the applicant, but did not reveal the information or take any particular precautions to notify or protect Altair's employees. The employee raped the plaintiff a year later. The jury found that the plaintiff's injury was caused by the negligence of both defendants. On appeal, the court affirmed the liability of both parties, referring to the principles found in Section 311 of the *Restatement (Second) of Torts*[173] that one who "negligently performs a

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169. *Id.* § 323.

170. Most cases addressing the issue of negligent misrepresentation do so in the commercial area where the harm is financial rather than physical. *See, e.g.*, United States v. Neustadt, 366 U.S. 696, 697-701 (1961) (buyer used theory of negligent misrepresentation when she relied to her detriment on FHA appraisal that failed to discover serious problems with house). *But see* Johnson v. State, 447 P.2d 352, 354-55 (Cal. 1968) (foster mother successfully sued for negligent misrepresentation in connection with foster child who was placed in her home and who subsequently assaulted her). In *Johnson*, the plaintiff argued that she had relied on the state youth authorities to give her any necessary warnings about the youth. The court agreed that the state authorities had a duty to warn the plaintiff of the "homicidal tendencies, and . . . background violence" of the youth. *Id.* at 354.

171. 766 F.2d 135 (3d Cir. 1985).

172. Guztan v. Altair Airlines, Inc., 766 F.2d 135, 137 (3d Cir. 1985).

173. The court also invoked RESTATEMENT (SECOND) OF TORTS § 324A (1977), which imposes liability on those who negligently perform an undertaking for another and thereby

service or makes a misrepresentation involving a risk of physical harm to a third person, may be held liable for the injury to the third person caused by defendant's negligence."[174]

In *Zampatori v. United Parcel Service*,[175] an employee sued his employer for improperly discharging him after reading a detective agency's mistaken report that the employee was a thief.[176] The court in that case described the necessary elements of a negligent misrepresentation suit as follows:

> (1) [K]nowledge 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 [to] 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 and 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.[177]

It is possible to extrapolate from cases such as these a potential cause of action by a prospective employer, or his employees, against a former employer for negligent referral.[178] However, courts clearly have not yet established a blanket duty on the part of a former employer to disclose negative information about a former employee to prospective employers.[179]

C. *Intentional Misrepresentation*

There is little doubt that an employer may be held liable for intentional misrepresentation of an employee's references. *Prosser and Keeton* notes that the required intent is "the intent that a representation shall be made, that it shall be directed to a particular person or class of persons, that it shall convey a certain meaning, that it shall be believed, and that it shall be

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cause harm to a third person who was placed at risk. *Guztan*, 766 F.2d at 140.

174. *Guztan*, 766 F.2d at 140.

175. 479 N.Y.S.2d 470 (N.Y. Sup. Ct. 1984).

176. Zampatori v. United Parcel Serv., 479 N.Y.S.2d 470, 471 (N.Y. Sup. Ct. 1984). The employee won the case even though he did not stand in privity with the detective agency. The court held that the lack of privity would not prevent him from bringing his cause of action because the liability did not arise from the parties' relationship, but from a common-law duty "to act and to speak with care" so as not to injure another. *Id.* at 474.

177. *Id.* at 472 (citing International Prods. Co. v. Erie R.R., 155 N.E. 662, 664 (1927)).

178. *See generally* Swerdlow, *supra* note 2. Swerdlow and others argue for the creation of the tort of "negligent referral," proposing that employers should have a duty to warn in referral situations. For our assessment of this theory, see *infra* notes 262-313 and accompanying text.

179. *See infra* notes 262-67 and accompanying text.

acted upon in a certain way."[180] As discussed by one court: "[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."[181]

One case settled before trial illustrates the use of this theory. In *Jerner v. Allstate Insurance Co.*,[182] an employee shot and killed three executives of the Fireman's Fund Insurance Agency in retaliation for his discharge many months earlier. Unbeknownst to those at Fireman's Fund, the gunman had been discharged for carrying a gun to his previous job at the Allstate Insurance Company. In a suit filed for fraudulent misrepresentation, the plaintiffs alleged that Allstate, in an effort "to eliminate an unpleasant and potentially dangerous . . . problem,"[183] gave the employee a reference signed by a company vice president stating that the employee was let go in a downsizing, but failing to give the real reasons for his discharge. The plaintiffs supported their argument that Allstate's actions constituted fraud, among other things, by contrasting Allstate's neutral reference letter to Fireman's Fund with an Allstate supervisor's deposition taken in preparation for trial in which the supervisor conceded that the employee was a "total lunatic" who threatened others.[184]

D. Negligent Hiring

Negligent hiring is a relatively recent tort that applies to situations in which employers hire employees with dangerous tendencies that the employer could have discovered upon reasonable investigation, but did not.[185] Although employers generally are liable only for the acts of their employees occurring within the scope of their employment,[186] the theory of negligent hiring holds employers liable for acts of their employees committed outside the scope of employment.[187]

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180. KEETON ET AL., *supra* note 63, § 107, at 741.

181. Kolikof v. Samuelson, 488 F. Supp. 881, 883 (D. Mass. 1980); *see also* Skopic, *supra* note 2, at 447 n.116.

182. No. 93-09472 (Fla. Cir. Ct. 1993) (settled), *cited in* Rovella, *supra* note 4.

183. *Id.* (quoting plaintiff).

184. *Id.*

185. *See* RONALD M. GREEN & RICHARD J. REIBSTEIN, NEGLIGENT HIRING, FRAUD, DEFAMATION, AND OTHER AREAS OF EMPLOYER LIABILITY (BNA Special Report No. 7, 1988); Saxton, *supra* note 2, at 75; Swerdlow, *supra* note 2, at 1649.

186. RESTATEMENT (SECOND) OF AGENCY §§ 219(1), 228 (1958).

187. *Id.* § 219(2) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . (b) the master is negligent or reckless."); *see also id.* § 213 cmt. d; RESTATEMENT (SECOND) OF TORTS § 317 (1977).

In a negligent hiring suit, the acts for which the plaintiff seeks recovery typically are based on violent behavior or other offenses (such as sexual harassment or theft) of the employee.[188] Liability derives from the employer's duty to protect employees, customers, clients, and visitors from injury caused by an employee that the employer "knows or should know pose[s] a risk of harm to others."[189] The duty is imposed by common law and is breached by an employer that fails to exercise reasonable care to see that those who come in contact with employees are free from risk of harm posed by unfit employees.[190]

If an employer breaches such a duty, the employer may be found liable either for negligent hiring or negligent retention. The duty with respect to negligent hiring arises at the time of hiring. At this point, the employer has the responsibility to conduct a reasonable investigation[191] regarding the employee's suitability for the job. Having failed to determine the employee's suitability for a job, the employer may be liable even for intentional torts or criminal activity committed by the employee outside the workplace.[192]

The extent of this duty is still being defined. Because prospective employers cannot readily glean information from former employers in today's legal climate, the investigation of prospective employees has been made more difficult and may not be as thorough or reliable as it used to be. Under the tort of negligent hiring, the plaintiff, typically a co-worker, customer, or client, seeks to prove that: (1) the employee who caused the injury was unfit for hire; (2) the employer's hiring of the unfit employee was the cause of injury; and (3) "the employer knew, or should have known, of the employee's unfitness."[193]

A recent case in Colorado suggests that the duty to investigate applies to all employees who come into contact with the public, including custodial workers.[194] In this case, a janitor at a McDonald's restaurant assaulted a

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188. *See* GREEN & REIBSTEIN, *supra* note 185, at 7.

189. *Id.*

190. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 283 (1977).

191. The determination of what is reasonable depends on the nature of the job. If, for example, the position involves the carrying of guns, as in the case of a security guard, then the background check is far more comprehensive. GREEN & REIBSTEIN, *supra* note 185, at 5; *see also* Saxton, *supra* note 2, at 75 n.108.

192. *See, e.g.*, Gaines v. Monsanto Co., 655 S.W.2d 568, 570-71 (Mo. Ct. App. 1983) (mail clerk assaulted secretary at her home and court of appeals remanded case for trial, stating that when employee alleges that employer knew or should have known of employee's dangerous propensities, employer may be held liable).

193. *See* GREEN & REIBSTEIN, *supra* note 185, at 8, and cases cited therein.

194. *See* Jim McKay, *Job Reference Roulette*, PITT. POST-GAZETTE, Aug. 6, 1995, at

three-year-old child. The company was required to pay over $200,000 in damages to the child. The employee, who previously had been jailed for child molestation, was recommended for the job by a state agency whose counselor knew of the conviction, but failed to mention it to McDonald's.[195]

The duty to investigate potentially dangerous employees does not end once a worker has been hired. Even if an employee has no history of dangerous behavior prior to seeking employment, the employer must monitor the workplace to ensure that unacceptable behavior does not arise after a hiring decision has been made. The failure to monitor the workplace may give rise to the companion tort of negligent retention, that is, employers that learn or should have learned of their employees' dangerous tendencies must not continue to employ such individuals. For example, turning a deaf ear to complaints of sexual harassment may give rise to a successful negligent retention claim. In *Hogan v. Forsyth Country Club Co.*,[196] an employee complained to the club manager that the chef was sexually harassing her, thereby causing her to be nervous, humiliated, and depressed. The manager failed to act, and the woman successfully sued for negligent retention. On appeal, the court indicated that when an employer has notice of an employee's proclivity to engage in sexually offensive behavior, the employer is liable for the negligent retention of such an employee.[197]

V. *Recent Legislative Initiatives: The Shield Laws*

A number of state legislatures have recently enacted a new generation of shield laws designed to provide greater protection to employers that provide job references.[198] We have examined those statutes enacted in thirteen states, most of which passed within the last twelve to fourteen months.[199] As discussed below, we contend that these statutes, which vary

C1. The case appears to be unreported in federal or state reporters.

195. *See id.* According to a recent survey by the National Institute of Mental Health, the "typical [sex] offender molests an average of 117 children before being stopped." This is so because those who know will rarely report the experience. Even those who are caught — such as a coach, teacher, or other care provider — are generally able to negotiate the nature of future references or exit the situation without a paper trail because the whole matter is so unseemly that people do not want to face the embarrassment and trauma of filing charges. *See* Newmeyer, *supra* note 3.

196. 340 S.E.2d 116 (N.C. 1986).

197. Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 124 (N.C. 1986).

198. *See* McMorris, *supra* note 11; *see also* Tawn Nhan, *New Law Makes Thorough Reference Checks Easier*, CHARLOTTE OBSERVER, May 13, 1996, at 2D.

199. The statutes we surveyed include: ALASKA STAT. § 9.65.160 (Michie 1994); ARIZ.

significantly from state to state, do not provide adequate protection to employers to encourage them to abandon their no-reference policies.[200]

We have examined these statutes with respect to four issues: (1) the establishment of standards that presume that employers have acted properly when providing job references; (2) the type of job-reference information that employers may disclose; (3) to whom job-reference information may be disclosed; and (4) the standard of proof it takes to rebut the presumption in each state.

A. *The Rebuttable Presumption of Proper Behavior*

Most of the states surveyed establish presumptive standards that employers have acted properly in providing job references. In virtually all instances, the states provide a "good faith presumption,"[201] that is, an employee wishing to challenge a negative job reference will bear the burden of demonstrating that the employer did not act in good faith.

B. *The Type of Information Protected*

Most of the state statutes provide that the information subject to the good faith immunity must pertain to "job performance,"[202] although at least one state provides immunity merely for information about the former employee.[203] Several states extend the information subject to the good faith

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REV. STAT. ANN. § 23-1361 (West Supp. 1996); CAL. CIV. CODE § 47 (West 1982 & Supp. 1996); CAL. LAB. CODE § 1053 (West 1989); COLO. REV. STAT. ANN. § 8-2-114 (West 1986 & Supp. 1996); FLA. STAT. ANN. § 768.095 (West 1986 & Supp. 1996); GA. CODE ANN. § 34-1-4 (Supp. 1996); IND. CODE ANN. § 22-5-3-1 (West 1995 & Supp. 1996); LA. REV. STAT. ANN § 23:291 (West 1985 & Supp. 1996); ME. REV. STAT. ANN., tit. 26, § 598 (West 1988 & Supp. 1995); N.M. STAT. ANN. § 50-12-1 (Michie 1995); OKLA. STAT. ANN., tit. 40, § 61 (West 1986 & Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); UTAH CODE ANN. § 34-42-1 (Supp. 1996).

200. *See infra* notes 331-43 and accompanying text.

201. One state, Louisiana, phrases the presumption in the negative: "so long as the employer is not acting in bad faith . . . ." LA. REV. STAT. ANN. § 23:291 (West 1985 & Supp. 1996).

202. *See, e.g.*, ALASKA STAT. § 9.65.160 (Michie 1994); COLO. REV. STAT. ANN. § 8-2-114 (West 1986 & Supp. 1995); FLA. STAT. ANN. § 768.095 (West 1986 & Supp. 1996); ME. REV. STAT. ANN., tit. 26, § 598 (West 1988 & Supp. 1995); N.M. STAT. ANN. § 50-12-1 (Michie 1995); UTAH CODE ANN. § 34-42-1 (Supp. 1996).

203. IND. CODE ANN. § 22-5-3-1 (West 1995 & Supp. 1996) ("An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made.").

presumption to qualifications of an applicant and the reasons for the employee's discharge or voluntary departure.[204] One state, Georgia, provides immunity for statements concerning any violations of state law by the former employee as well as for statements concerning the applicant's ability, or lack thereof, to carry out the job.[205]

C. To Whom Reference Information May Be Disclosed

Almost all the states provide immunity only for statements made subject to a request by a prospective employer or the former employee.[206] Oklahoma requires the consent of the former employee before a former employer can disseminate job information to prospective employers.[207] In most of the states, the request need not be in writing. Only two states require the employer to send a copy to the former employee.[208]

D. The Standard of Proof to Rebut the Presumption Protecting Employers

Of those states that set a specific standard of proof to rebut the good faith presumption in favor of employers that give job references, seven specifically require a "preponderance of the evidence" standard.[209] This is the typical standard in civil actions. We presume that those states that have not specified a standard of proof would apply this standard by default. Three states require that the employee rebut the good faith presumption "by clear and convincing evidence"[210] — a standard that is theoretically higher

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204. CAL. LAB. CODE § 1053 (West 1989) ("Upon request, employer may disclose the reason for the discharge of an employee or why an employee voluntarily left the service of the employer."); LA. REV. STAT. ANN § 23:291 (West 1985 & Supp. 1996) ("accurate information about a current or former employee's job performance or reasons for separation").

205. GA. CODE ANN. § 34-1-4 (Supp. 1996).

206. New Mexico does not specifically require that the request come from a prospective employer to fit within the immunity. N.M. STAT. ANN. § 50-12-1 (Michie 1995).

207. OKLA. STAT. ANN., tit. 40, § 61 (West 1986 & Supp. 1996).

208. *See* ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); COLO. REV. STAT. ANN. § 8-2-114 (West 1986 & Supp. 1996).

209. ALASKA STAT. § 9.65.160 (Michie 1994); COLO. REV. STAT. ANN. § 8-2-114 (West 1986 & Supp. 1996); GA. CODE ANN. § 34-1-4 (Supp. 1996); IND. CODE ANN. § 22-5-3-1 (West 1995 & Supp. 1996); LA. REV. STAT. ANN § 23:291 (West 1985 & Supp. 1996); OKLA. STAT. ANN., tit. 40, § 61 (West 1986 & Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996).

210. FLA. STAT. ANN. § 768.095 (West 1986 & Supp. 1996); ME. REV. STAT. ANN., tit. 26, § 598 (West 1988 & Supp. 1995); UTAH CODE ANN. § 34-42-1 (Supp. 1996).

than the preponderance standard. Whether this higher standard will make a difference in actual litigation is unclear.

Having described the various theories of liability applicable to employment-reference cases and some efforts to reform the law, we now discuss why we believe the law must be changed and then advance several proposals for reform.

VI. *The Need for Reform*

As detailed above, in response to fears of litigation over charges such as defamation,[211] blacklisting,[212] tortious interference with prospective employment,[213] negligence,[214] violating service-letter statutes,[215] racial discrimination,[216] sexual discrimination,[217] or misrepresentation[218] employers increasingly have moved in the direction of nondisclosure of references. Either they have stopped giving references[219] or they have adopted the so-called NRSN approach (name, rank, and serial number) in which employers provide only the most neutral information about current or past employees when asked for references.[220]

Despite their growing refusal to provide references about current or past employees, employers paradoxically continue to seek references aggressively when looking to hire new employees.[221] Their actions in seeking references arise from the same concern that leads them to refuse to provide

211. *See supra* notes 52-151 and accompanying text.

212. *See supra* notes 45-46 and accompanying text.

213. *See supra* notes 152-64 and accompanying text.

214. *See supra* notes 165-79, 185-97 and accompanying text.

215. *See supra* notes 47-48 and accompanying text.

216. *See supra* note 38 and accompanying text.

217. *See supra* note 38 and accompanying text.

218. *See supra* notes 165-84 and accompanying text.

219. Saxton, *supra* note 2, at 47-48 (citing numerous surveys of business managers that indicate that "a significant percentage of companies in the United States are responding to the current employment-reference environment by adopting 'no comment' or otherwise limited reference strategies"); *see also* Acoff, *supra* note 2, at 755; Johnson, *supra* note 165; Newmeyer, *supra* note 3.

220. A number of employers continue to provide strictly neutral information about employees, such as confirmation of employment, title of job, and dates of employment, but balk at sharing information that is in any way evaluative. *See* Peter Dalpe, *Job References Can Be Elusive*, NEW HAVEN REG., Aug. 29, 1995, at D1 (noting that large number of companies "refuse to divulge job-related information to prospective employers — even if the information is honest and factual").

221. *Id.* (noting that reference-checking has increased ten-fold since 1979 scandal involving *Washington Post* reporter who faked her credentials).

references — fear of lawsuits. Employers seeking new employees particularly fear negligent hiring[222] or negligent retention[223] charges if they hire an individual with a discoverable history of dangerous tendencies that the employers failed to unearth.

A. Few Successful Lawsuits, but Many Real Concerns

Interestingly, despite employers' fears of litigation, available statistics suggest that their fears, although real, probably are exaggerated. Notwithstanding the concerns often expressed about a runaway tort system, a recent study by the National Center for State Courts notes that "[a]lthough torts are currently center stage in the civil litigation debate, there is no evidence that the number of tort cases is increasing. In fact, the volume of tort litigation has declined steadily since 1990."[224] These findings extend to employment cases. According to a recent *New York Times* report, "[t]he actual number of cases in which an employee has sued a former boss over a bad reference . . . is relatively small, probably no more than several hundred. Moreover, the cases . . . have been difficult for the plaintiffs to win . . . ."[225]

To say that few employment-reference lawsuits are brought and that fewer are successful is not to say that the problem is insignificant. Some employer concerns about litigation are quite real. In particular, employer worries about the costs, trauma, and inconvenience of litigation — even if employers win lawsuits[226] — appear to be genuine.[227] Moreover, should an

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222. *See supra* notes 185-97 and accompanying text.

223. *See supra* notes 185-97 and accompanying text.

224. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1994: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 7 (1996) [hereinafter NATIONAL CENTER FOR STATE COURTS STUDY]; *see also* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 483-539 (1990) (detailing broad doctrinal change among courts to favor defendants in tort cases beginning in early to mid-1980s); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 603 (1992) (arguing that liability expansion of 1960s and 1970s has come to end and that we may now be in era of liability contraction); Roxanne Barton Conlin, *Litigation Explosion Disputed*, NAT'L L.J., July 29, 1991, at 26. Moreover, juries appear to be more defendant-oriented in recent years. According to Jury Verdict Research, a firm that publishes national jury verdict trends, "juries nationwide have become markedly tougher on people who sue doctors, insurance companies and other deep-pocket defendants, siding less often with plaintiffs. And there is evidence that the size of the awards has leveled off, too." Richard Perez-Peña, *U.S. Juries Grow Tougher on Those Seeking Damages*, N.Y. TIMES, June 17, 1994, at A1.

225. *See* Johnson, *supra* note 165.

226. *See* Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 300 (1994) (noting that in context of defamation litigation, "[a]ll . . . litigation costs money, especially for defendants,

employer lose a case, the odds of being assessed punitive damages — although small[228] — appear to be high compared to other types of tort cases. According to the study by the National Center for State Courts, "[e]mployment-related cases, which almost always include an associated tort claim (e.g., discrimination, harassment), account for 41 percent of all punitive damages awarded."[229]

B. *The Beneficent Employer's Dilemma*

To say the least, employers dislike being placed in a Catch-22 situation that requires them to act in an utterly inconsistent manner — that is, "trying to resist inquiries from other companies while prying for information [themselves]."[230] In fact, those most threatened by this situation likely will be beneficent employers that feel a personal or social commitment to warn

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who pay by the hour for legal services. As a result, defendants effectively lose even when they ultimately prevail in litigation."). Ackerman cites the example of a small scholarly journal that incurred in excess of one million dollars in legal expenses while "successfully" defending a case in which summary judgment ultimately was granted, but not until the case had been litigated for seven years. *Id.* at 300 n.45.

227. Even if an employer wins a lawsuit brought by a disgruntled past or current employee, the employer must still undergo the time, expense, and worry of defending such a suit. These costs are not inconsiderable. *See* Saxton, *supra* note 2, at 76 (noting that under so-called "American Rule," each side in most employment-related litigation must pay its own attorney fees, thereby "foster[ing] conservative reference practices, and . . . discourag[ing] open reference strategies"); Deborah S. Kleiner, *Is Silence Truly Golden?* HRMagazine, July 1993, at B1 ("When you add . . . the costs of legal fees incurred even if the employees' lawsuits are unsuccessful, the expenses of such litigation can be prohibitive."); Dan Rutherford, *Legal Worries Gag Employers on Requests for Worker Referrals*, TULSA TRIB. & TULSA WORLD, Dec. 10, 1995, at B1 (quoting several legal experts as justifying their advice to clients not to give references because of unacceptably expensive costs — as high as $10,000-$25,000 — of defending lawsuits, even if successful); *see also* Roselle L. Wissler, *Media Libel Litigation: A Search for More Effective Dispute Resolution*, 14 LAW & HUM. BEHAV. 469, 471-72 (1990) (noting that, despite fact that media defendants win 90% of reported defamation cases, average time for case to be resolved is four years and average attorney fees are $96,000 in media defamation suits). According to Wissler, "the chilling effect of libel suits today is due more to litigation costs and intrusion into the editorial process than to adverse judgments." *Id.* at 472.

228. Only about four percent of tort cases reported in the study by the National Center for State Courts resulted in the award of punitive damages. *See* NATIONAL CENTER FOR STATE COURTS STUDY, *supra* note 224, at 37.

229. *Id.*

230. Dalpe, *supra* note 220 (paraphrasing employment manager for hospital in Wallingford, Connecticut); *see* Michael R. Losey, *Random Checking: Make It a Company Policy*, MANAGING OFF. TECH., May 1, 1994, at 54, 54 (noting that interviewing and hiring have almost become Catch-22 situations in which "[e]mployers can be sued for divulging too much information about former employees and sued for obtaining too little information about new employees").

others away from hiring dangerous or incompetent employees. What confronts them is a variation of the prisoner's dilemma,[231] in which bestowing beneficence reciprocally produces a favorable outcome, but doing so unilaterally results in an unacceptable outcome for those who act selflessly.

For example, in a universe consisting of only two employers, each would benefit greatly if both sought and shared references freely. If, however, both *sought* reference information, but only one *provided* it, then the "free rider" would receive all of the benefits while sharing none of the risks. That is, free rider employers would have acquired useful reference information, thereby facing the lowest risk of hiring dangerous or incompetent employees (or of being sued for negligent hiring), but they would have divulged no negative reference information, thereby facing the lowest risk of suit by disgruntled past or current employees. In simplified form, this is illustrated below:

	Employer 2 seeks and provides references	**Employer 2 seeks but does not provide references**
Employer 1 seeks and provides references	Both employers benefit from each other's information; however, both face risk of lawsuits from past employees.	Employer 2 receives all of the benefits, but shares none of the risks (free-rides).
Employer 1 seeks but does not provide references	Employer 1 receives all of the benefits, but shares none of the risks (free-rides).	Neither employer benefits from the other's information, but both *may* have a reduced risk of negligent hiring lawsuits.

The table illustrates a particularly perverse aspect of the current system. In the classic prisoner's dilemma, the parties clearly benefit the most when they trust and cooperate with one another,[232] but that is a highly debatable proposition in the employment-reference context. It is possible that an em-

231. *See* Robert Axelrod, *The Problem of Cooperation, in* NEGOTIATION: READINGS, EXERCISES, AND CASES 71-79 (Roy Lewicki et al. eds., 1983) (noting that "prisoners dilemma is simply an abstract formulation of some very common . . . situations in which what is best for each person individually leads to mutual [lack of cooperation,] whereas everyone would have been better off with mutual cooperation").

232. *Id.*

ployer might decide that it would be better off in a completely uncooperative setting, that is, where both employers seek but neither provides information. In such a setting, although the employer would be at an increased risk of hiring bad employees, it would face little likelihood of being sued successfully.[233]

C. *The Social Impact of the Current System*

We find the current system unacceptable for a variety of reasons. First, on a societal level, the system produces a widespread withholding of critical reference information[234] that undermines an economic efficiency.[235] If prospective employers cannot easily obtain reliable information about job applicants, they will either devote an inordinate amount of time and effort seeking it or they will forego it. In either case, the economy's efficiency is undermined. In the former case, personnel investigative costs will grow to onerous levels,[236] and in the latter case, the number of unacceptable hires will grow, producing higher employee turnover[237] and personnel replacement costs.[238]

Second, without useful reference information, prospective employers face greater difficulties in determining which employees present dangers to them, their workers, or to the public. Tragic examples abound regarding the

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233. Because both seek information, although neither acquires it, both arguably would be less likely to be held liable on a negligent hiring claim. Similarly, because neither provides information, past employees would have no basis for suing them for giving negative references.

234. Although no precise count has been made of the number of employment references sought by prospective employers, they surely must number in the millions. *See* Tiefer, *supra* note 2, at 146. Estimates of the number of employers that seek job references range from 50% to over 90%, depending on the size of the industry being examined. *Id.* Professor Saxton argues convincingly that "honest, detailed references from former employers are among the most useful types of information" that prospective employers can use in determining which applicants will be good employees. *See* Saxton, *supra* note 2, at 49.

235. *See* Dalpe, *supra* note 220 (noting that personnel managers say that "current situation hurts the economy by not allowing companies to work efficiently and cooperate with one another").

236. *See* Losey, *supra* note 230, at 56 (citing survey of employment managers at Fortune 500 companies indicating that cost of hiring employee is approximately $9,200, of which major portion is reference-checking).

237. *See* Gregory Stricharchuk, *Fired Employees Turn the Reason for Dismissal into a Legal Weapon*, WALL ST. J., Oct. 2, 1986, at 33 (citing employment expert who "blames inadequate reference information for the high turnover of employees" in California's financial institutions).

238. *See* Losey, *supra* note 230, at 56 (noting that "cost of terminating an employee is anywhere from three to six times the amount it costs to hire").

failure of past employers to warn about pilots with poor flight skills,[239] about troubled employees who carried weapons to work,[240] or about incompetent or sexually predatory physicians.[241] Given the increasing national concern about workplace violence,[242] it seems imperative that employers have access to information that could save lives and avoid injury. Although employers increasingly search criminal records for information about applicants' violent proclivities, doing so is an expensive and time-consuming process.[243] Moreover, employers must tread warily in searching out and using information based on criminal records lest they run afoul of laws that prohibit discrimination based on such records.[244] Were employee-reference information more available, employers would not need to rely so heavily on these alternative sources of information.

Third, not only does reduced access to reference information result in more bad employees being hired, it also places roadblocks in front of outstanding employees. Employees whose former employers refuse to provide

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239. *See supra* note 3 and accompanying text (listing articles discussing cases involving pilot error and discussing same).

240. *See* Rovella, *supra* note 4 (citing example of troubled employee who was fired for carrying weapon at work, but given good reference when he left). Subsequently, the employee was fired from his new job and, in response, murdered three executives at the new job. *Id.*

241. *See* Susan Schmidt, *Out-of-State Move Averts Discipline*, WASH. POST, Jan. 10, 1988, at A17; Michael Specter, *Army Had Evidence on Doctor Accused of Sodomy*, WASH. POST, Dec. 7, 1985, at D1; *see also* P. Budetti, *Title IV, Public Law 99-660: Background and Implications*, 74 FED'N BULL. 363, 365 (Dec. 1987) (citing several "highly visible examples" of incompetent or unprofessional physicians moving from jurisdiction to jurisdiction in exchange for silence or favorable recommendations from their previous organizations).

242. *See* FRANCIS D'ADDARIO, THE MANAGER'S VIOLENCE SURVIVAL GUIDE 8 (1995) (noting that, in 1993, workplace homicides rose 6% to 1063 and that "homicide is the number one cause of death for women on the job . . . the number two cause of death for all workers"); William C. Martucci & Denise Drake Clemow, *Workplace Violence: Incidents — and Liability — on the Rise*, EMPLOYMENT REL. TODAY, Winter 1994/1995, at 463 (noting that "[a]s violent incidents have increased, potential liability for employers has also climbed"); Jonathan A. Segal, *When Charles Manson Comes to the Workplace: Violence in the Workplace*, HRMagazine, June 1994, at 33 ("There are more than 2 million physical assaults in the workplace per year. In addition, more than 7,000 workplace homicides occur annually, accounting for 12 percent of workplace deaths.").

243. *See* Stephen G. Hirsch, *Catch 22: Checking Job References Proves to be Risky Business*, THE RECORD, March 21, 1994, at C1 (noting that publicly available criminal records may be available to employers only in limited circumstances). Moreover, such records typically fail to include arrests that do not result in convictions. *Id.*

244. *Id.*; *see also* Alfred G. Feliu, *Workplace Violence and the Duty of Care: The Scope of an Employer's Obligation to Protect Against the Violent Employee*, 20 EMPLOYEE REL. L.J. 381, 393 (1994) (noting that "[m]ost states prohibit employers from discriminating based on arrest records under any circumstances and on prior convictions unless a direct relationship exists between the prior conviction and the job at issue").

employee references lose the opportunity to have their outstanding records shown to prospective employers. Employers that find themselves unable to get a meaningful reference about a job applicant are less likely to hire the applicant than they are to hire one with good references.[245] Professor Saxton, for example, cites a survey indicating that forty-four percent of responding executives would view a former employer's refusal to comment on an employment candidates's performance as a detriment to that candidate's application.[246]

Fourth, when job references are unavailable prospective employers may turn to less reliable or more inappropriate information. Increasingly, as employers find access to reference information blocked, they seek physical, psychological, and drug tests,[247] some of which may have limited predictive value.[248] Employers may also increasingly look to applicants' credit histories, a practice that raises privacy concerns.[249]

Fifth, although difficult to document empirically, employees who realize that their performance with one employer will never become known to future employers might take a more casual attitude toward doing a good job than those who know that their work history will follow them from job to job. With less at stake in doing a good job, irresponsible employees may devote less attention to their jobs than they would if information about their unacceptable behavior were likely to be passed from employer to employer.

Sixth, because no-reference policies are so offensive, they are often undermined.[250] In some cases, shrewd reference-checkers sidestep restric-

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245. *See* Paul W. Barada, *Check References with Care*, NATION'S BUS., May 1993, at 54 ("Nothing puts up a 'red flag' in the mind of the prospective employer quicker than a reference who is unwilling to talk about a former employee. If a former employer refuses to comment, the caller may assume it's because something is wrong with the applicant."); McMorris, *supra* note 11 (citing human resources manager who complained that "no-reference" policies prevented him from giving "glowing" references); *see also* Kleiner, *supra* note 227, at 117 (noting that "many employers construe a no-reference response as a negative reference").

246. *See* Robert Half Survey, *supra* note 20; *see also* McMorris, *supra* note 11 (citing human resources manager who notes that "no reference" policy penalizes good employees and indicates that he "never hires people whose former employers won't give more complete references").

247. *See* Johnson, *supra* note 165 (noting that "[t]hese days prospective employees are more often required to undergo testing — written psychological examinations and drug-detecting urinalysis").

248. *See* Louis Trager, *Tough Job: Giving, Getting References*, S.F. EXAM'R, July 18, 1993, at E1 (noting limited predictive value of such tests).

249. *See* Johnson, *supra* note 165; *see also* Dalpe, *supra* note 220.

250. *See* Phillip M. Perry, *The Risks of Employment References*, SAVINGS & COMMUNITY BANKER, Feb. 1995, at 32 (noting that there is "dangerous temptation for people to violate no-reference policies").

tions established by companies' human resources departments through appeals to job seekers' former supervisors or co-workers.[251] In others, former employers, through winks and nods, manage to convey their feelings about former employees.[252] In still other instances, regrettably naive former employers will give favorable recommendations for past good employees, but adopt no comment approaches when asked about past employees whom they view negatively. One serious problem with these informal approaches is the high probability of message confusion and misunderstanding. An employer trying to send a signal that a former employee deserves scrutiny may do this so subtly that a prospective employer may miss the signal. Conversely, a message of high approval may be so muted that a prospective employer may read disapproval. Moreover, employers that engage in winks and nods may not truly insulate themselves from liability once their practice is exposed.

VII. The Challenge: No Perfect Solutions

As we have discussed, the law and employers' practices regarding employment references have evolved over time.[253] In recent years, they have placed great weight on the protection of workers against arbitrary and unjust employer actions.[254] Although it is difficult to argue that employers should be given greater discretion to abuse their employees, we note that the courts' expansion of the opportunities for employees to take their grievances to court carries substantial costs both for innocent employers and, more significantly, for the public generally. These costs must be noted and addressed.

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251. *See* McKay, *supra* note 194 ("To get around a company policy on no references, hiring agents often avoid a company's human resources department and seek out a job applicant's former supervisor or coworkers for information. Calling them at home is one trick.").

252. *See* Johnson, *supra* note 165. According to Johnson:

> With all this, companies are still trying to communicate with one another about employees. But, to be safe, many are entering into an odd legalistic dance that involves a great deal of tiptoeing around information and opinion.
>
> Astute prospective employers have learned to listen between the lines. "If an employer really feels strongly about an ex-employee, regardless of the rule, he will say, 'John was terrific, we hated to lose him. However, our official policy is to say this and this,'" said Jose Rivera, a Brooklyn-based attorney who handles employment discrimination cases. "It's a new way of being damned with faint praise if all the employer does is provide a neutral reference — to say, 'yes, the person worked here.'"

Id.

253. *See supra* notes 11-51 and accompanying text.

254. *See supra* notes 11-51 and accompanying text.

A. *The Need to Balance Competing Interests*

Unfortunately, reform rarely comes cost-free. This is particularly so with the issue of employee references. To understand this point, the reader should consider the following scenarios:

> ***Scenario 1. Joe, a harasser, seeks new employment***
>
> Joe and Suzy are colleagues at Apex Manufacturing Company. Joe sexually harasses Suzy for weeks until she complains to her supervisor. Joe is punished and is warned to cease his improper behavior. Despite this, Joe persists and, after an investigation, is fired. Joe promptly seeks employment with Smith Manufacturing Company. Smith's personnel office then seeks a reference from Apex. Apex informs Smith of Joe's history and Joe is turned down for the job. Joe then sues Apex on a variety of tort theories.
>
> ***Scenario 2. Mary, a victim, seeks new employment***
>
> Mary works at Widget Manufacturing Company as Sam's administrative assistant. She is an exemplary employee. Sam sexually harasses Mary. Mary resists Sam's overtures and is immediately fired. Fearful of litigation and hoping to put the matter behind her, Mary decides not to sue Sam or Widget. Thereafter, Mary seeks employment with Quality Manufacturing Company. Sam, still furious at Mary for rebuffing him, angrily states that Mary was terminated for incompetence and insubordination. Quality turns Mary down for the job. Mary then sues Sam and Widget on a variety of tort theories.

In an ideal legal setting, Joe's frivolous lawsuit would not prevail. In fact, given the substantial time, worry, and cost associated with fighting Joe's claim, Apex should be able to have the case dismissed before trial or, at a minimum, to require Joe to reimburse Apex for its costs and attorney fees. Similarly, in an ideal setting, Mary should not only prevail, she should be awarded substantial damages (including punitive damages) for Sam's malicious behavior.

But, here lies the dilemma. To the extent that society develops rules and procedures to protect companies like Apex from frivolous suits, society erects barriers that hamper victims like Mary from obtaining justice. Conversely, to the extent that society provides substantial legal weaponry for victims like Mary, society creates greater opportunities for abuse of the legal system by individuals like Joe who are prepared to press meritless claims because they are desperate, deluded, or calculating.

For example, in addition to being an unrepentant sexual harasser, Joe may be an accomplished liar, able to bamboozle a judge or jury into believing that the charges against him stemmed from a misunderstanding rather

than from his improper behavior. If so, Joe might succeed in a lawsuit in which the burden of proof is low and no particular privilege is accorded to employers' references. On the other hand, if the law imposes a high standard of proof on employment lawsuits or provides employers with a strong privilege against legal claims, Joe might be rebuffed by the courts. Unfortunately, so might Mary in her case against Sam and his company.

Accordingly, we object to approaches that oversimplify the choices available to policymakers. Those who insist that strengthening employers' rights to provide references affects only incompetent or dishonest workers[255] miss the mark as widely as those who insist that expanding employee rights to challenge negative references harms only those who disclose false information.[256] To the contrary, adding protections for well-intentioned employers to provide references necessarily creates the potential for harmful, vindictive employers to avoid being called to task. Similarly, maintaining the current tilt towards employee rights indisputably discourages numerous well-intentioned employers from sharing references, thus easing the way for incompetent or dangerous employees to shift jobs with little difficulty.

Unfortunately, no perfect solution exists.[257] As a starting point, one must optimize the conflicting interests of employers and employees. The interests to be addressed are as follows:

Employers' Interests	Employees' Interests
• Protect workers and managers • Protect customers • Protect property and premises • Promote harmonious and non-disruptive workplace	• Receive fair and honest references • Receive forgiveness and rehabilitation • Have privacy respected

255. *See* McKay, *supra* note 194. McKay cites a human resources specialist who supports greater rights for employers to give references based on the argument that "[i]t's a win-win situation for everyone except for those people who have something serious to hide. . . . Employees who are poor performers, or who are dishonest, they're not going to want this to happen." *Id.* As noted, we find this a simplistic view.

256. *See id.* McKay cites the publisher of a journal devoted to privacy rights as saying, "'[s]ophisticated employers know that they get into trouble only if they disclose untrue information. They deserve no immunity from that any more than any other sector of society.'" *Id.* Again, in our judgment, this view is overly simplistic.

257. *See* Saxton, *supra* note 2, at 113 ("No single proposal can reasonably claim to be a panacea in this complicated context, especially in light of the legitimacy of the sometimes-conflicting interests and concerns of employers and employees.").

Beyond the interests of employers and employees, societal needs also must be considered. Although it might be commendable that employers seek to rehabilitate employees with poor job skills, sexual abuse tendencies, or drug problems, from a societal point of view, rehabilitation must assume a secondary degree of importance in the case of positions such as pilots, day care workers, or truck drivers that expose members of the public to risk.[258] Balancing interests between employers and employees must be done in a manner that does not impose externalities on the public.

B. The Right to Be Wrong

Truth is an elusive goal. In the employment-reference context, in which judgments about an employee's performance typically include subjective assessments of such things as attitude, cooperation, enthusiasm, and competence, one can readily see the difficulties in assessing the truth or falsity of employers' references. A supervisor may be genuinely convinced that an employee is incompetent, but lack "smoking gun" evidence in support of this judgment. Although it is tempting to assert that employers should remain silent unless they have clearly documentable information about an employee's shortcomings, such an approach will likely weed out few problem workers,[259]

258. Along these lines, one might ask whether it is fair to label an employee who hit another employee on one occasion as violent. As one employment lawyer asked: "Is somebody [to be] unemployed for the rest of their life for getting into a fist fight?" *See* McMorris, *supra* note 11. Our answer is that, although we would not impose unemployment for life for such a mistake, we would insist that this information be disclosed and expect the employee to explain to prospective employers why he or she can be trusted not to be violent on the job.

259. For example, in a critical job category — physicians — the medical profession historically has taken action very reluctantly against those accused of incompetence because of the difficulties in proving such a vague charge. A nationwide review of state disciplinary actions by the Inspector General of the Department of Health and Human Services in 1986 revealed that, although state licensing boards disciplined doctors for easily proved charges such as writing improper prescriptions or for drug abuse, virtually none of the boards brought charges of incompetence. *See* OFFICE OF ANALYSIS AND INSPECTIONS, OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICAL LICENSURE AND DISCIPLINE: AN OVERVIEW 13-14 (1986). This reluctance to take action has resulted in the presence of a small, but persistent, group of incompetent medical professionals. *See* Robert C. Derbyshire, *Medical Discipline in Disarray: Retrospective and Prospective*, 19 HOSP. PRAC. 136a, 136b (1984) (estimating that 5% to 10% of doctors are incompetent); Timothy Stoltafus Jost, *The Necessary and Proper Role of Regulation to Assure the Quality of Health Care*, 25 HOUS. L. REV. 525, 538 (1988) (citing studies indicating that between 4% and 30% of physicians are incompetent); Joel Brinkley, *28,000 Doctors Are Feared Unfit*, N.Y. TIMES, May 15, 1986, at A17; Joel Brinkley, *State Medical Boards Disciplined Record Numbers of Doctors in '85*, N.Y. TIMES, Nov. 9, 1986, at A1

thereby increasing the risk that incompetent or dangerous employees will move freely throughout the system.[260] Accordingly, if a proper reference system is to be developed, it must permit some well-intentioned employer opinions about workers' job performances.

An effective system must do more than permit opinions to be expressed. It must also protect honest error — past or current employers must be free, in some circumstances, to make assertions about their employees that turn out to be false or unprovable. Protecting false utterances is perhaps the major purpose behind affording defendants privilege in defamation litigation.[261] If not, courts could simply rule that truth constituted the only defense to defamation claims — an approach they have never taken.

Why should courts accord false statements in employee references any protection? If employers face a standard that requires documentation for or the ability to prove every assertion they make, they will err on the side of extreme caution, resulting either in no comment policies or in the disclosure only of the blandest information. Clearly, a more open exchange of information is needed.

VIII. Options and Recommendations for Reform

Having noted that no reform seems likely to rectify the current situation without introducing some accompanying adverse effects, we nevertheless remain convinced that reform is needed. In Part VIII, we review a number

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(noting that even with dramatic increase in number of disciplinary actions brought against doctors, "most officials believe that too few of the nation's 553,000 licensed physicians are being disciplined. Medical officials estimate that at any given time at least five out of every 100 doctors are so incompetent, drunk, or senile, that they should not be practicing medicine without some form of restriction."). To rectify this situation, Congress enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152 (1994).

260. *See generally supra* note 259.

261. That is, in order to get at the truth, society provides a buffer to utter some false statements so long as they are not made maliciously. According to the *Restatement of Torts*, the idea of privilege provides protection for some false statements because:

> Were such protection not given, true information which should be given or received would not be communicated through fear of the persons capable of giving it that they would be held liable in an action of defamation unless they could meet the heavy burden of satisfying a jury that their statements were true.

See RESTATEMENT SCOPE NOTE, *supra* note 63; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1973) (arguing that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters"); New York Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) (noting that state law against libeling public officials must do more than provide defense of truth; it must also allow for "erroneous statements honestly made").

of proposed reforms and offer our recommendations with respect to these approaches. In particular, we discuss: (1) the desirability of imposing an affirmative duty on employers to disclose to prospective employers negative information about former employees; (2) the need to reform qualified privilege in defamation and related laws; (3) the appropriateness of having employees contractually waive their right to challenge negative employment references; and (4) the usefulness of requiring unsuccessful litigants in employment-reference cases to pay the costs and attorney fees of the winner. Finally, we recommend an administrative ADR approach as an alternative to traditional litigation approaches in employment-reference disputes.

A. Imposing Affirmative Duties of Disclosure on Employers

1. Affirmative Duties in General

An affirmative duty generally requires one to take action to assist another. Despite the unquestionable moral good in having citizens come to the aid of others, the law has always approached the imposition of affirmative duties cautiously.[262] Citizens are required neither to be heroes[263] nor not-

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262. RESTATEMENT (SECOND) OF TORTS § 314 (1977). The *Restatement* indicates: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Id.*; *see also* KEETON ET AL., *supra* note 63, § 56, at 373; Fowler V. Harper & Posey M. Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934). According to *Prosser and Keeton*, the law's posture derives from the classic distinction between "misfeasance" and "nonfeasance." *Id.* The reason for the distinction may be said to lie in the fact that by "misfeasance" the defendant has created a new risk of harm to the plaintiff, while by "nonfeasance" he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs. *Id.*

263. Perhaps the classic case on this point is *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959). In this case, the defendants goaded and taunted Mr. Yania into jumping into a deep trench of water and then stood by while he drowned. *Id.* at 344-45. In ruling against the claims of Yania's estate, the Pennsylvania Supreme Court stated that, "[t]he mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue . . . ." *Id.* at 346.

In listing decisions that deny liability under current law, *Prosser and Keeton* describes some as "shocking in the extreme":

> The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown. A physician is under no duty to answer the call of one who is dying and might be saved, nor is anyone required to play the part of Florence Nightingale and bind up the wounds of a stranger who is bleeding to death, or to prevent a neighbor's child from hammering on a dangerous explosive, or to remove a stone from the highway where it is a menace to traffic, or a train from a place where it blocks a fire engine on its

at-risk rescuers.[264] Of course, duties arise if one, by one's negligence, has placed another in danger,[265] has sought to rescue but has done so in an improper manner,[266] or, through an act of negligence, has exposed someone to an imminent risk in such a manner as to invite rescue by a bystander,[267] but these exceptions traditionally have been fairly limited.

One line of cases that might extend to employment references are those in which one party owes a duty to another because of the special relationship of the two parties.[268] As we shall discuss, some commentators have argued that these cases give rise to a past or current employer's duty to warn about a dangerous employee.

2. Tarasoff v. Regents of the University of California

A California Supreme Court case, *Tarasoff v. Regents of the University of California*,[269] has been advanced as supporting a duty to warn that could extend to employment references. In *Tarasoff*, a patient informed his psychotherapist at the University of California that he intended to murder a young woman upon her return from a summer in Brazil. Although the therapist took steps to have the patient briefly committed, he failed to warn the young woman and when she returned, the patient, who had been released from custody at the direction of the therapist's supervisor, went to the young woman's residence and killed her. Subsequently, the parents of the victim sued the therapist and the University, alleging a negligent failure to warn.

In finding a duty to warn, the California Supreme Court stated:

> Although . . . under the common law, as a general rule, one person owed no duty to control the conduct of another, . . . nor to warn those

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> way to save a house, or even to cry a warning to one who is walking into the jaws of a dangerous machine.

See KEETON ET AL., *supra* note 63, § 56, at 375.

264. *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. a (1977).

265. *See* KEETON ET AL., *supra* note 63, § 56, at 378-82.

266. *See* RESTATEMENT (SECOND) OF TORTS § 323 (1977). Section 323 states:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . . his failure to exercise such care increases the risk of such harm.

Id.; *see also* KEETON ET AL., *supra* note 63, § 56, at 378-82.

267. This is the so-called "danger invites rescue" doctrine first articulated in *Wagner v. International Ry. Co.*, 133 N.E. 437 (N.Y. 1921).

268. *See infra* notes 282-92 and accompanying text.

269. 551 P.2d 334 (Cal. 1976).

> endangered by such conduct . . . , the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct . . . .[270]

In reaching its finding, the court noted that such a duty had been invoked in the following situations: a doctor who negligently failed to diagnose a contagious disease;[271] a doctor who, having diagnosed a contagious disease, failed to warn members of the patient's family;[272] and a government agency that arranged for a dangerous mental patient to work on a local farm without notifying the family of the patient's background.[273]

The court added a point arguably relevant to the employment context. Liability in the *Tarasoff* case did not depend on the court's judgment that psychotherapists are necessarily accurate in predicting a patient's likelihood of committing a violent act. To the contrary, the court acknowledged the difficulty in making such predictions.[274] Nonetheless, in those instances in which a therapist does conclude that a patient poses a serious risk, the court concluded that the therapist must act[275] because the issue ultimately "is one of social policy, not professional expertise."[276]

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270. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976). The court cited RESTATEMENT (SECOND) OF TORTS § 315 (1977), which states that a duty of care may arise from either "(a) a special relation . . . between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation . . . between the actor and the other which gives to the other a right of protection." *Id.*

271. Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970).

272. Wojcik v. Aluminum Co. of Am., 183 N.Y.S.2d 351, 357-58 (N.Y. Sup. Ct. 1959).

273. Merchants Nat'l Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409, 418-20 (D.N.D. 1967).

274. *See Tarasoff*, 551 P.2d at 345. According to the court:

> We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously, we do not require that the therapist, in making that determination, render a perfect performance . . . . Within the broad range of reasonable practice and treatment in which professional opinion and judgment may differ, the therapist is free to exercise his or her own best judgment without liability; proof, aided by hindsight, that he or she judged wrongly is insufficient to establish negligence.

Id.

275. The therapist must act even though he or she may be wrong: "The risk that unnecessary warnings may be given is a reasonable price for the lives of possible victims that may be saved." *Id.* at 346.

276. *Id.* at 345-46. According to the court:

> [T]he ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy, not professional exper-

3. Tarasoff *and an Employer's Duty to Disclose*

Tarasoff has been hailed by Professor Peter Lake as the "*Palsgraf* of its generation, a case with meta-significance which endures beyond its jurisdiction, time, place, and perhaps its particular holding."[277] Professor Lake's conclusion stems, in part, from his sense that *Tarasoff* challenges the traditional approach of the *Restatement (Second) of Torts* that individuals generally owe no duty of aid or rescue to others.[278] As Lake sees it, the law is moving in the direction of requiring citizens to take reasonable efforts to aid or protect others when to do so would take little effort and would pose minimal risk.[279]

Although Lake takes no position whether *Tarasoff* principles should be extended to impose on former or current employers an affirmative duty to warn about dangerous employees, at least two thoughtful commentaries have made this argument recently. In the first, Janet Swerdlow, albeit conceding that no court has yet done so,[280] argues that "it would be reasonable for the courts, when faced with a case of negligent referral, to hold that a former employer had a duty to warn a prospective employer, or in other words, to give an honest, accurate, and complete referral."[281] Swerdlow argues that the duty should arise because, as in *Tarasoff*, employers stand in a special relationship with other critical parties.[282] In the employment context, there

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> tise. . . . In sum, the therapist owes a legal duty not only to his patient, but also to his patient's would-be victim and is subject in both respects to scrutiny by judge and jury.

Id. (quoting John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1067 (1974)).

277. Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 98 (1995).

278. *Id.* at 102. As discussed later, *see infra* notes 295-302 and accompanying text, we do not agree that *Tarasoff* is likely to be interpreted as expansively as Lake suggests.

279. Lake joins other scholars in this view. *See, e.g.*, John M. Adler, *Relying upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867, 869; James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147, 175 (1980).

280. *See* Swerdlow, *supra* note 2, at 1659 ("The *Tarasoff* analysis has not yet been applied in a cause of action for negligent referral. It has, however, been applied in the employment context . . . .").

281. *Id.*

282. "Special relationships" typically include those in which one party holds power over a dependent party or receives economic or other benefits from another party. *See* KEETON ET AL., *supra* note 63, § 56, at 374. The largest group upon whom such an affirmative duty has been imposed are the owners and occupiers of land. *Id.* Other examples would also include a bank and depositor, a passenger and carrier, parent and child, psychotherapist and

are two such relationships: (1) past or current employers with prospective employers and (2) past or current employers with their employees. According to Swerdlow, either relationship triggers a duty.[283]

With respect to the first relationship — that between employers and prospective employers — Swerdlow suggests that a duty arises because employers develop unique knowledge about their employees that generally would not be known by anyone else. When a prospective employer seeks information from a past employer, the prospective employer stands in a "relationship of dependence"[284] because it may not be able to obtain critical information to protect property or persons from any other source. Accordingly, should an employer conclude that a serious risk of harm exists and that the potential victim is readily identifiable, the employer should be required to give a warning to prospective employers that seek reference information.[285] According to Swerdlow, failure to give a warning — either by refusing to disclose any information or by refusing to disclose any negative information — about traits[286] that might have a negative impact on a prospec-

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patient, and doctor and patient.

283. Swerdlow, *supra* note 2, at 1660-63. As discussed later, *see infra* notes 303-13 and accompanying text, we do not believe that the concept of special relationship extends as far as Swerdlow does.

284. Swerdlow, *supra* note 2, at 1661; *see also* RESTATEMENT (SECOND) OF TORTS § 314A (1977). Section 314A indicates that the underlying rationale for liability is the slowly growing recognition that there should be a "duty to aid or protect in any relation of dependence or of mutual dependence." The section lists the following examples of "special relations" that give rise to a duty to aid or protect:

> (1) A common carrier is under a duty to its passengers to take reasonable action
> (a) to protect them against unreasonable risk of physical harm, and
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
> (2) An innkeeper is under a similar duty to his guests.
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id. In setting forth these examples, the *Restatement* expresses the caveat that it has no opinion "as to whether there may not be other relations which impose a similar duty." *Id.*

285. *See* Swerdlow, *supra* note 2, at 1659-60.

286. *See id.* at 1653. According to Swerdlow, examples of such traits might include "possession, use or sale of drugs, sexual or racial harassment, acts of violence, theft, discrimination, sexual misconduct, willful destruction of property, possession of weapons in the work place, safety violations, improper disposal of toxic waste, lack of competence, and falsification of prior credentials." *Id.* Examples of behavior not requiring notification would be "mere laziness, tardiness, or absenteeism." *Id.*

tive employer's property, employees, customers, or other members of the public with whom the prospective employer deals should give rise to liability under the tort of negligent referral.[287]

With respect to the second type of relationship — that between employers and employees — Swerdlow argues that this also constitutes a special relationship that gives rise to a duty to warn prospective employers in appropriate cases.[288] Her rationale derives from sections of the *Restatement (Second) of Torts* that impose duties upon employers to control the conduct of their employees when the employers know or should know that the employees present a risk of harm.[289]

The problem with Swerdlow's master-servant argument is that the vast majority of employment-reference cases do not involve master-servant relationships in which an employer has the authority to "exercise reasonable care so as to control his servant" as called for in Section 317 of the *Restatement (Second) of Torts*. Instead, such cases typically concern *past but severed* master-servant situations in which the existence of a special relationship is dubious at best because the employer has no authority whatsoever over its former employee.

The second commentator who endorses, albeit in a less expansive fashion, an affirmative duty to disclose is Professor Bradley Saxton.[290]

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287. *Id.* at 1670.

288. *Id.* at 1662-63.

289. Swerdlow points to § 315 and § 317 of the *Restatement*. Section 315 states the principle that "[t]here is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct." RESTATEMENT (SECOND) OF TORTS § 315 (1977). Section 317 states:

> § 317. Duty of Master to Control Conduct of Servant
>
> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Id. § 317.

290. *See* Saxton, *supra* note 2, at 94-97.

Saxton concurs with Swerdlow that a special relationship exists both between employers and prospective employers, and between employers and their past or current employees, but Saxton appears to assign different significance to them. Swerdlow emphasizes the relationship between employers and prospective employers,[291] whereas Saxton focuses more on the relationship between employers and employees.[292]

Saxton proposes that a substantially narrower duty be imposed on employers than Swerdlow does. Whereas Swerdlow would require notification about problems such as possession of drugs, lack of competence, or falsification of credentials,[293] Saxton would limit mandatory disclosure to "information that appears reasonably necessary to avert the risk of physical injury to the prospective employer, the prospective employer's employees, or the members of the public with whom the prospective employer's employees will come in contact."[294] Saxton's approach would focus on preventing

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291. *See* Swerdlow, *supra* note 2, at 1660-61.

292. *See* Saxton, *supra* note 2, at 94. According to Saxton:

> The [*Tarasoff* court] relied on the "special relationship" between psychotherapist and patient as the basis for imposing on therapists an affirmative duty to warn third parties. The employer-employee relationship seems closely analogous in pertinent respects to the psychotherapist-patient relationship; most importantly, the employer may acquire special knowledge of an individual's dangerous or criminal tendencies in the course of the employer-employee relationship, just as a therapist may acquire special knowledge of a patient's dangerous tendencies in the course of the therapist-patient relationship. In these circumstances, the "special relationship" between employer and employee could, and I submit should, be used as the basis for imposing on the employer a duty to warn potential "third-party" victims of the employee's future conduct, just as the "special relationship" between psychotherapist and patient was used in *Tarasoff* as the basis for imposing a duty on psychotherapists toward the identifiable targets of their patients' violence.

Id. Although we are not unsympathetic to Saxton's argument, we think that he somewhat reverses the *Tarasoff* court's rationale. He seems to suggest that because an employer may acquire special knowledge of an individual's dangerous or criminal tendencies that the employer, therefore, stands in a special relationship with that individual and has a duty to warn. Yet, this switches premise and conclusion. As we note, *see infra* notes 305-10 and accompanying text, one must have a special relationship with another *before* a duty to warn arises. The relationship must exist independently of any special knowledge about another's dangerous tendencies. Whether employers, as a general matter, have a special relationship with former employees over whom they exercise no control is an issue yet to be decided in any conclusive fashion by the courts.

293. *See* Swerdlow, *supra* note 2, at 1653.

294. *See* Saxton, *supra* note 2, at 97. Under Saxton's approach, an employer would "not generally be required under the duty proposed here to warn a prospective new employer that a former employee dressed badly, used profanity, made bookkeeping errors, had

violence or other dangerous conduct and would not address other undesirable traits.

4. *Concerns About Imposing an Affirmative Duty of Disclosure*

Although we find Swerdlow's and Saxton's proposals intriguing, we see several aspects that cause concern. Despite their suggestion that courts need to take only a small step from the principles of the *Tarasoff* case to the employment setting,[295] we think the distance from that case to their respective proposals may be greater than Swerdlow and Saxton indicate.

As a starting point, we find it interesting if not significant that although *Tarasoff* has gained wide acceptance among courts[296] and state legislatures,[297] and has expanded into several nonpsychotherapist settings,[298] it has not, as

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an abrasive personality, or was generally incompetent." *Id.* We agree with Saxton that any duty to be imposed ought to be limited to instances in which there is physical danger. Indeed, to the extent that we would impose a duty, we would do so in an even narrower fashion than Saxton — limiting the duty to instances in which an employer has learned on a confidential basis that an employee imminently plans to assault a readily identifiable victim or class of victims. *See infra* notes 303-13 and accompanying text.

295. *See, e.g.*, Saxton, *supra* note 2, at 95-96. Saxton argues that the likelihood of disclosing confidential information is substantially less in the employment relationship than in the patient-therapist relationship. *Id.* Accordingly, he suggests that "the arguments for imposition on employers of a 'duty of disclosure' may in certain respects be even stronger than the arguments in *Tarasoff* for imposition on therapists of a 'duty to warn,' at least so long as the employer's 'duty of disclosure' is properly defined and limited." *Id.* at 96.

296. *See* Lake, *supra* note 277, at 98 (stating that *Tarasoff* has been "widely accepted (and rarely rejected) by courts and legislatures in the United States as a foundation for establishing duties of reasonable care upon psychotherapists to warn, control, and/or protect potential victims of their patients who have expressed violent intentions"). According to the analysis in a recent decision by the Missouri Court of Appeals, at least 11 cases have either adopted *Tarasoff* or have adopted a rule imposing even broader liability and three cases have indicated an intention to do so. *See* Bradley v. Ray, 904 S.W.2d 302, 308-09 (Mo. Ct. App. 1995). Only one jurisdiction has rejected *Tarasoff*. *See* Boynton v. Burglass, 590 So. 2d 446, 448-49 (Fla. Dist. Ct. App. 1991); *see also* Swerdlow, *supra* note 2, at 1658 n.76 and cases cited therein.

297. *See* Lake, *supra* note 277, at 98. According to an analysis by the Missouri Court of Appeals in *Bradley*, 904 S.W.2d at 309, at least 15 state legislatures have statutorily imposed a duty to warn in situations similar to that in *Tarasoff*.

298. *See, e.g.*, Molsbergen v. United States, 757 F.2d 1016, 1024 (9th Cir. 1985) (stating that "when an employer gains information about a serious danger to which a readily identifiable former employee has been exposed in the course of his employment, the relative cost or inconvenience of warning him is not substantial, and there is reason to believe that the warning might be of some benefit to its recipient, the California Supreme Court would find that a duty to warn exists"); Division of Corrections v. Neakok, 721 P.2d 1121, 1126-27 (Alaska 1986) (state parole board has special relationship with parolee giving rise to duty to protect or warn foreseeable victims); Soldano v. O'Daniels, 190 Cal. Rptr. 310, 317

far as we can determine, been extended to negligent referral cases. We do not suggest that such a step is out of the question. Indeed, given the expansive reading of *Tarasoff* by some courts[299] and the enthusiastic approval of some commentators,[300] we suspect that it is quite possible that one or more courts will impose liability on a former employer for failing to warn a prospective employer about the dangerous propensities of a former employee. Yet we doubt whether any expansion of *Tarasoff* principles, if it does occur with respect to employment references, will extend beyond limited[301] and

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(Cal. Ct. App. 1983) (bartender has duty to permit patron to call police or to call police himself when bartender knows that third person has been injured); Mann v. State, 139 Cal. Rptr. 82, 86 (Cal. Ct. App. 1977) (state traffic officer owes duty to protect stalled cars when, after stopping and investigating accident, he leaves without placing protective flares on freeway and without warning anyone he was leaving when he should have realized that his actions would place stalled motorists in danger); Eisel v. Board of Educ., 597 A.2d 447, 455 (Md. 1991) (junior high school counselors owe duty to prevent suicides of students and to warn parents of children's suicidal tendencies); Duvall v. Golding, 362 N.W.2d 275, 279 (Mich. Ct. App. 1984) (doctor had duty to inform epileptic patient not to drive automobile); Coath v. Jones, 419 A.2d 1249, 1252 (Pa. 1980) (employer has duty to warn customers about former employee terminated for dangerous tendencies when employer knows that employee might attack customers); Taggert v. State, 822 P.2d 243, 255 (Wash. 1992) (en banc) (parole officers have duty to protect others from reasonably foreseeable dangers engendered by parolees' dangerous propensities).

299. Two cases that push liability to new boundaries are *Soldano v. O'Daniels*, 190 Cal. Rptr. 310 (Cal. Ct. App. 1983) and *Mann v. State*, 139 Cal. Rptr. 82 (Cal. Ct. App. 1977). In *Soldano*, the court imposed a duty to render assistance *even in the absence of any special relationship between the parties*. *Soldano*, 190 Cal. Rptr. at 318. In *Mann*, the court determined that, although there is generally no special relationship between traffic officers and stranded motorists, once an officer has chosen to investigate a stranded motorist and realizes the risks involved in the situation, a special relationship arises, requiring the officer to protect the citizen. *Mann*, 139 Cal. Rptr. at 86.

300. *See generally* Adler, *supra* note 279; Lake, *supra* note 277; *see also* Saxton, *supra* note 2, at 91-99; Schwartz, *supra* note 224, at 701; Swerdlow, *supra* note 2, at 1667-71.

301. As noted above, *see supra* notes 224-29 and accompanying text, courts in the United States are moving to narrow tort liability more than they are moving to expand it. Moreover, although it seems quite likely that the *Tarasoff* precedent will expand throughout the states in the context of psychotherapists — and occasionally in other nontherapeutic settings — one should note that a number of courts have refused the call to be expansive in following *Tarasoff* principles. *See, e.g.*, Homer v. Pabst Brewing Co., 806 F.2d 119, 123 (7th Cir. 1986) (employer that maintained medical department to provide palliative care to its employees did not owe duty of care to persons injured in collision with employee who lost consciousness when driving home after his shift was completed, as employer did not volunteer to protect general public from illnesses that might befall its employees); Lindgren v. Moore, 907 F. Supp. 1183, 1187-89 (N.D. Ill. 1995) (therapist owed no duty to father of patient who alleged that his daughter falsely accused him of sexual abuse after therapy with defendant because no special relationship existed between father and daughter that would give rise to such duty); Doe v. Prudential Ins. Co., 860 F. Supp. 243, 251-53 (D.

particularly compelling cases[302] — insufficient, in our view, to do much to solve the employment-reference crisis that our country currently faces.

Our lack of enthusiasm also stems from our misgivings about the proposition that a job-reference inquiry from a prospective employer to a former employer should impose a broad duty to warn on the former employer. Our position here is not an absolutist one. We can imagine situations in which a duty to warn ought to attach and in which liability ought to arise for a breach of that duty. For example, we support the proposition that liability should apply to former employers that provide favorable references which omit critical information about their employees' dangerous propensities.[303] Our reason is simple — unless the former employers clearly have

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Md. 1993) (insurance company had no special relationship and owed no duty to applicant to disclose that it had rejected her application because she was infected with HIV virus despite her ignorance of condition); Vu v. Singer Co., 538 F. Supp. 26, 31 (N.D. Cal. 1981) (company operating Job Corps center owed no duty to victim of attacks by corps members if it could not foresee plaintiffs would be victims), *aff'd*, 706 F.2d 1027 (9th Cir. 1983); Nally v. Grace Community Church, 763 P.2d 948, 960 (Cal. 1988) (*Tarasoff*-type duty to prevent suicide does not extend to nontherapist counselors and pastor); Anthony v. State, 374 N.W.2d 662, 669 (Iowa 1985) (parole board had no duty to warn when no threats were made); VanLuchene v. State, 797 P.2d 932, 936 (Mont. 1990) (prison officials have no duty to warn general public of release of dangerous criminal whose sentence has expired); Mangeris v. Gordon, 580 P.2d 481, 483-84 (Nev. 1978) (massage parlor had no duty to warn taxicab driver about dangerous propensities of one of its patrons); Trull v. Town of Conway, 669 A.2d 807, 809-10 (N.H. 1995) (when town had no control over highway, town owed no duty to motorists to warn of icy conditions on highway even though police officer had requested that dispatcher notify State Department of Transportation of danger; fact that officer had superior knowledge of hazard created no duty); Rozycki *ex rel.* Rozycki v. Peley, 489 A.2d 1272, 1277 (N.J. Super. Ct. Law Div. 1984) (no duty on wife's part to warn of her husband's dangerous propensities); Rogers v. Department of Parole and Community Corrections, 464 S.E.2d 330, 332 (S.C. 1995) (parole officials owed no duty to warn murder victim when perpetrator was released under furlough program absent specific threat to harm victim despite evidence that perpetrator's conduct indicated possible threat to victim).

302. Our review of the case law convinces us that courts are unlikely to extend the duty to warn beyond instances in which serious physical injury is imminent. Although these cases are of crucial importance, they clearly represent only a fraction of the information that should be conveyed from former employers to prospective employers.

303. Sections 323 and 324A of the *Restatement (Second) of Torts* impose liability on those who undertake to render assistance to others, but do so in a manner that increases the risk of injury either for the person receiving assistance or for third persons injured as a result of their negligent undertaking. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1977). These sections appear to cover the situation we have in mind because a prospective employer (and its employees) may be lulled by a misleading reference into believing that an employee is unlikely to be dangerous. *See also* Randi W. v. Livingston Union Sch. Dist., 49 Cal. Rptr. 2d 471, 473 (Cal. Ct. App 1995) (student molested by school vice principal successfully sued prior school district that, despite knowledge of numerous incidents of

indicated that they are willing to share only positive information, they will create a situation in which prospective employers will be misled about the risks of hiring an employee.

We also support the notion that a limited duty to warn should arise in some factual settings similar to the *Tarasoff* case, that is, when an employer has learned on a confidential basis that an employee imminently plans to assault a readily identifiable victim or class of victims. Although we see a moral duty to act when safety concerns exist, beyond these narrow circumstances we hesitate to impose tort liability for a former employer's refusal to provide references.[304] In our view, silence in such an instance, although regrettable, should rarely give rise to detrimental reliance on the part of a prospective employer and, accordingly, it is hard to see the dependence[305] in such a situation that would warrant considering it a special relationship giving rise to a duty to warn. That is, if a former employer refuses to disclose reference information, the prospective employer will not be able to claim that it was lulled into a false sense of security or detrimentally relied in some fashion. To the contrary, the prospective employer, if anything, may be put on guard that the employee's record needs to be investigated.

Moreover, even if the former employer was the only person who knew of an employee's dangerous tendencies — a situation far less likely to arise in the employment context than in a confidential therapeutic relationship — that fact, standing alone, generally is insufficient to establish a special relationship of the type necessary to impose a duty to warn.[306] Merely because one has unique knowledge of danger to others, one does not stand

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sexual misconduct, gave vice principal favorable job reference when he applied for job in district in which student attended school).

304. We note in passing that this circumstance would rarely arise with respect to employment references because an employer would usually have little knowledge about an employee's intention to assault someone at the site of a prospective employer.

305. According to Swerdlow, it is the "dependence" of the prospective employer on the former employer that gives rise to the special relationship between the parties. *See* Swerdlow, *supra* note 2, at 1661.

306. We acknowledge that some courts have been creative in finding the existence of a special relationship. *See, e.g.*, Mann v. State, 139 Cal. Rptr. 82, 86 (Cal. Ct. App. 1977) (special relationship existed between state traffic officer and stalled motorists when officer, after stopping and investigating stalled cars, left after tow truck arrived without advising anyone he was leaving); Farwell v. Keaton, 240 N.W.2d 217, 222 (Mich. 1976) (special relationship existed between two friends on social venture, giving rise to duty on part of one friend to rescue other); Coath v. Jones, 419 A.2d 1249, 1251 (Pa. Super. Ct. 1980) (employer in special relationship with customers such that employer had duty to warn customers that he had discharged employee with dangerous propensities). Sporadic expansions of the concept of special relationship such as these may continue but, in our view, are not likely to become mainstream holdings.

in a special relationship to others, and one generally assumes no duty to act.[307] Despite scattered calls to impose a duty to assist whenever danger is reasonably foreseeable even in the absence of a special relationship between the parties, courts have generally resisted such entreaties. If, as Swerdlow appears to argue,[308] knowledge of a past employee's dangerous propensities is sufficient to establish a special relationship, then anyone, including a stranger, who becomes aware of danger would have a duty to inform persons at risk of the danger. Among the examples that come to mind of individuals who would have a duty to warn under the principles of Swerdlow's approach[309] are an airline passenger who inadvertently learns the assault plans of the person seated next to her during a flight, a customer in a bar who overhears the assault plans of the inebriated person on a nearby stool, patients in a group therapy session who learn of the assault plans of a fellow patient, and a college student whose roommate confides that he plans to assault another student. The law has not moved, and seems unlikely to move, to impose liability in these situations.[310] Although the moral tug in these situations is powerful, the critical issue is whether society is prepared to impose tort damages, perhaps in the hundreds of thousands (or even

307. *See* RESTATEMENT (SECOND) OF TORTS § 314 (1977) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *Id.* § 315 (1977) (stating that absent special relationship, one generally has no duty to control conduct of third person so as to prevent him from causing physical harm to another); *see also* Doe v. Prudential Ins. Co. of Am., 860 F. Supp. 243, 251 (D. Md. 1993) (finding that insurance company had no duty to disclose to applicant that she had tested HIV-positive when she applied for life insurance even though she clearly did not realize that she was infected); Fahnestock & Co. v. Castelazo, 741 F. Supp. 72, 76 (S.D.N.Y. 1990) (holding that absent special relationship, there is no general duty to warn others of foreseeable risk of harm even if one has knowledge of risk that exists); Wenrick v. Schloemann-Siemag Aktiengesellschaft, 564 A.2d 1244, 1248 (Pa. 1989) (holding that before person can be subject to liability for failing to act in given situation, person must have duty to act; mere knowledge of dangerous situation, even by one with ability to intervene, is not sufficient to create duty to act); Neil J. Squillante, Comment, *Expanding the Potential Tort Liability of Physicians: A Legal Portrait of "Nontraditional Patients" and Proposals for Change*, 40 UCLA L. REV. 1617, 1670 (1993) (challenging view that *Tarasoff* establishes precedent that foreseeability of harm, standing alone, creates special relationship sufficient to establish duty under tort law).

308. *See* Swerdlow, *supra* note 2, at 1660-61.

309. We do not claim that Swerdlow would want to impose liability in these situations. What we argue is that the *principles* she espouses to support liability in employment-reference settings are so inclusive that they sweep in cases like those in our examples.

310. Scenarios such as these do happen. *See, e.g.*, Eleena De Lisser, *Seatmates May Share Their Deepest Secrets or Their Bologna*, WALL ST. J., Aug. 9, 1996, at A1; *see also* RESTATEMENT (SECOND) OF TORTS §§ 314-315 (1977).

millions) of dollars, on citizens — particularly those who are uninvolved and who passively or inadvertently acquire information about another's dangerousness — for failing to act. The prospect of substantial damages, among other reasons, gives us pause when it comes to imposing a duty to warn in the employment-reference context. Those most likely to run afoul of the duty will be small companies without knowledge of the duty and, perhaps, without insurance to cover damages. If employers are to have a general duty to warn of a former employee's dangerous propensities — and we remain open but unconvinced on the point — we prefer that the duty be to alert public authorities about the danger, if it is sufficiently grave, clear, and imminent, rather than to notify prospective employers.[311] In making this point, we hasten once again to note that we share the concern about the choking of reference information that has occurred in recent years, and we strongly second the call for remedial measures to be taken to rectify the situation. However, we prefer an approach that provides positive incentives to employers,[312] rather than the threat of damages, to motivate employers to abandon their current no comment stance when queried about references.[313]

B. *Reforming the Qualified Privilege in Defamation and Related Laws*

Because references involve the communication of either oral or written information, defamation law almost always plays a role in any challenge to a former employer's negative reference. For that reason, virtually all of the

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311. As anyone who has ever read of the Kitty Genovese case in New York (or who has read of other cases in which neighbors stood by without calling police while a terrible crime was committed) knows, there is no such duty generally.

312. We note that Professor Saxton shares our sense that employers should not be called to return to providing references more freely without the assurance that beefed-up protections will be provided them. *See* Saxton, *supra* note 2, at 98 (stating belief that "any attempt to enact or adopt 'duty of disclosure' proposed [in his article] must ensure that an employer is adequately protected from liability to a former employee if the employer is compelled by the duty to disclose admonitory information that the employer may not be able to support with hard evidence"). Saxton's approach is to establish a strong qualified privilege for defamation lawsuits and, in certain instances, provide for recovery of costs and attorney fees by employer-defendants. *Id.* at 98-112.

313. *See, e.g.*, McMorris, *supra* note 11 (noting that in states where new laws provide employers greater protection to provide references, although they do not require disclosure, employment lawyers are starting to advise their clients to disclose information about former employees' violent behavior). If the law were modified as we suggest, *see infra* note 412 and accompanying text, we think it would substantially lessen the frequency of no reference policies without the need for imposing an affirmative duty upon employers to disclose. However, if these policies remain widespread despite added legal protections for employers to warn about former employees, then we would be more enthusiastic about expanding the duty to warn.

reform efforts that have been advanced involve some modification of defamation law — typically an expansion or a clarification of the qualified privilege under applicable state law.[314] Although we see a great deal that is positive in the enactment of these statutes, we dislike some of the features commonly found in them,[315] and we see gaps in them that we think should be filled.[316]

1. *The Complexity and Confusion of Modern Defamation Law*

As a starting point, we share the frustration of those commentators who decry the current complexity and confusion in modern defamation law.[317]

314. *See supra* notes 198-210 and accompanying text. One of the aggravating features of analyzing the law on qualified privilege is that there is precious little uniformity in applying the privilege. *See* Posey, *supra* note 2, at 471 (noting that courts have adopted "widely divergent interpretations of common-law qualified privilege. At worst, the privilege extends only to true statements or is defeated by mere negligence. At best, the privilege extends a protection to employers that is pierced only by actual malice.").

315. *See infra* notes 331-52 and accompanying text.

316. *See infra* notes 331-52 and accompanying text.

317. Professor Robert Ackerman voiced a number of concerns in a 1994 law review article:

> The law of defamation is in disarray. It is confusing. It is unclear. Most critically, it fails to serve its most important objectives: providing an adequate remedy for reputational harm while allowing sufficient protection for speech. The chaotic nature of defamation law is primarily due to the fact that, at present, defamation law involves a juxtaposition of two bodies of law: (1) the archaic state common law of libel and slander, a system arising from medieval roots, and (2) First Amendment jurisprudence, as developed by courts following the United States Supreme Court's landmark *New York Times Co. v. Sullivan* decision in 1964 . . . . As a result, the law of defamation resembles a creature fashioned by committee, or worse yet, one fashioned by several independent committees . . . .

Ackerman, *supra* note 226, at 293; *see also* David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 853 (1986) (arguing that "root of the present libel crisis lies in the fact that reputation can be injured by words, but the common law offers redress only in the form of money damages"); Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 232-33 (1985) (reviewing two-year study of libel litigation and concluding that "law of libel seems to have disturbingly little relationship to the real actions and objectives of the parties, that what is decided in litigation may be substantially irrelevant to the actual dispute, and that the legal rules are encouraging the very conduct sought to be discouraged, and discouraging the conduct sought to be encouraged"); Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 810 (1986) (arguing that current libel law "has developed into a high-stakes game that serves the purposes of neither the parties nor the public"); Paul Gaffney, *A First Amendment Analysis of the Annenberg Libel Reform Proposal*, 1990 U. CHI. LEGAL F. 601, 601 (arguing that Supreme Court's rulings have "unwittingly turned libel law into a giant lottery system . . . . and may have made defamation suits complex beyond the grasp of the typical jury").

Aside from the fact that the law is complex and unclear, defamation operates on misguided assumptions about why plaintiffs bring defamation lawsuits and what remedy plaintiffs truly desire.[318] Moreover, although defamation actions are the lawsuit of choice for employees who have received negative job references,[319] such actions serve those aggrieved poorly because most plaintiffs lose[320] and most lawsuits get derailed on issues such as privilege or fault[321] rather than addressing the critical question of whether or not the allegations in the reference were true.[322] This means that most defamation suits now focus not on truth or falsity, but on the purity or reasonableness of the defendant's thoughts at the time of making the allegedly defamatory statements.[323] As one commentator stated, "[a]s a practical matter, the truth or falsity of the challenged statement is no longer pertinent to the libel action."[324] Although serving the purpose of promoting freedom of expres-

318. *See* Bezanson, *supra* note 317, at 227, 232-33 ("Money rarely seems to be the reason for suing. Most plaintiffs sue to correct the record and to get even."); Wissler, *supra* note 227, at 473 (noting that according to study by Iowa Libel Research Group, most plaintiffs indicate that money damages are of little interest; rather, retraction or vindication are what plaintiffs really seek).

319. *See* Martha Middleton, *Employers Face Upsurge in Suits over Defamation*, NAT'L L.J., May 4, 1987, at 1 (noting that employer defamation actions may account for up to one-third of all defamation actions).

320. *See* Bezanson, *supra* note 317, at 228 (noting two-year study at University of Iowa found that "few libel plaintiffs win" and that in case of lawsuits against media, less than 10% of plaintiffs win).

321. Even if a plaintiff can establish the falsity and defamatory harm of a libel defendant's statement, the plaintiff cannot recover damages absent a showing of fault. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974). Moreover, depending on who the defendant is (e.g., a public figure) or applicable state law, the plaintiff may have to overcome a legal privilege available to the defendant that requires the plaintiff to prove intentional or reckless wrongdoing rather than mere negligence. According to one study, nearly 90% of libel suits are disposed of on grounds that the plaintiff failed to show the defendant's negligence or malice, rather than whether the defendant's statements were false. *See* Barrett, *supra* note 317, at 855 (noting that seven out of eight libel suits are now decided on constitutional privilege grounds); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel?*, 71 IOWA L. REV. 217, 218 (1985).

322. *See* Bezanson, *supra* note 317, at 230 ("As a practical matter, the truth or falsity of the challenged statement is no longer pertinent to the libel action. Liability, when found, is as often rested on a finding of abuse of privilege . . . .").

323. *See* Barrett, *supra* note 317, at 855 (noting that cases such as *New York Times* and *Gertz*, by requiring plaintiffs to prove fault, have shifted focus of libel suits away from question of falsehood and to constitutionally mandated question of defendant's state of mind); Gaffney, *supra* note 317, at 606 (noting that "most critics agree that libel suits now center, not on the veracity of the statement, but the defendant's state of mind when it was made").

324. *See* Bezanson, *supra* note 317, at 230; *see also* Ackerman, *supra* note 226, at 301

sion, especially for the media,[325] the new safeguards effectively guarantee that plaintiffs who have been defamed and who have suffered as a result will be without redress unless they can prove that the defendant acted negligently or with malice.[326]

2. *Qualified Privilege and Employment References*

Just as defamation lawsuits are the remedy of choice for aggrieved employees, qualified privilege is the first line of defense for sued employers.[327] Although truth remains a defense to defamation claims,[328] employers (or rather their attorneys) rarely choose to defend on that basis alone. The problem with such a defense is that the employer may have given a job reference that cannot easily be documented, consists mainly of unverifiable opinion, or contains some falsehoods of which the employer is unaware. Moreover, even if the employer feels confident that it can prove the allegations in a job reference, the employer may not want to rely on the unpredictability of a jury, which may be extremely sympathetic to a worker denied employment because of the employer's negative reference. Accordingly, employers, almost without fail, will exhaust all opportunities to have the case decided on the basis of a qualified privilege rather than to have the case decided on truth or falsity.[329]

As previously discussed, employers that turn to qualified privilege find a confused and confusing body of law awaiting them.[330] Of course, such a confused state buttresses the advice of those lawyers who advise their clients to adopt no comment policies.

(arguing that "[i]ssues of truth or falsity, fairness, and redress for injury are lost in the gamesmanship that dominates this tort like no other").

325. *See* Wissler, *supra* note 227, at 471 (noting that "constitutional privileges have succeeded in protecting media defendants from large money judgments").

326. *Id.* at 473. Whether the plaintiff will have to prove negligence or malice will vary according to the identity of the defendant and the law of the forum state.

327. *See supra* notes 126-51 and accompanying text.

328. *See* KEETON ET AL., *supra* note 63, § 116, at 839-42; *see also supra* notes 101-04 and accompanying text.

329. *See* Ackerman, *supra* note 226, at 301 (noting that most cases do not address issues of truth or falsity, but revolve around whether or not defendant has met requirements either of constitutional or qualified privilege).

330. *See supra* notes 126-51, 317-26, and accompanying text; *see also* Posey, *supra* note 2, at 483-87 ("The difficulty arises in determining from case law the scope of an employer's qualified privilege. Courts differ widely on what parties share the requisite interests and duties to invoke the privilege and on what is required of the plaintiff to defeat the privilege.").

3. *State Legislative Initiatives to Expand Employer Protections*

As noted previously, a number of state legislatures in recent years have sought to assist employers by expanding the qualified privilege in defamation and related lawsuits.[331] Although their statutory language often uses terminology most relevant to defamation actions, states have not limited the scope of their reforms to defamation lawsuits. Accordingly, these reforms should extend to causes of action such as negligence, tortious interference with prospective employment, blacklisting, and the like. Regrettably, these approaches have not solved the problem. Although we applaud the general stiffening of employer defenses, we see problems with a number of the approaches the states have adopted.

First, the dramatic variations in current state law reform efforts[332] guarantee that employers with multistate operations or employers that receive out-of-state job-reference inquiries will develop policies geared to the law of the least protective states or will simply not provide references.[333] This situation, to say the least, produces suboptimal outcomes and cries out for national uniformity, that is, federal legislation.[334]

Second, despite the states' good intentions, a number of the standards that states have adopted present such logical inconsistencies and read so poorly that employers that hoped for clearer and stronger protections to enable them to share employee-reference information surely will be disappointed.[335] At the extreme, these statutes appear to narrow and to undermine

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331. *See supra* notes 198-210 and accompanying text.

332. *See infra* notes 333-34 and accompanying text. The "privilege" or "immunity" statutes are not uniform. They run the gamut from states that provide broad protection for employer references (e.g., Indiana provides immunity for references unless the plaintiff can prove they were "known to be false at the time the disclosure was made," *see* IND. CODE ANN. § 22-5-3-1 (West 1995 & Supp. 1996)) to states that appear, perhaps unwittingly, to have narrowed the existing privilege (e.g., Colorado and Tennessee now protect only "truthful, fair and unbiased" information, *see infra* note 335 and accompanying text).

333. *See* Saxton, *supra* note 2, at 77 (noting that "[o]ne result of the multiplicity of standards that may potentially determine an employer's liability for employment references is that employers and their counsel are encouraged to favor conservative, 'no comment' reference strategies").

334. *See* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 553 (1991) ("Libel law is a field that cries out for some uniformity. Today intrastate speech is even rarer than intrastate commerce. Defamers are rarely subject to one state's law, and unless they are, they must tailor their speech to the least protective state law to which they may be subject."), *cited in* Ackerman, *supra* note 226, at 302 n.56; *see also* Posey, *supra* note 2, at 493-94 (arguing that, at minimum, courts should seek to discover and consider other jurisdictions' approaches).

335. Colorado and Tennessee seem tied for the most poorly drafted statutes. We cite

existing legal protections unwittingly.[336]

Third, few states do a good job of defining two critical terms: "good faith" and "malice." This failure is particularly troubling because many statutes require one to understand malice in order to determine the meaning of good faith. For example, a number of statutes provide that disclosures about workers by past or current employers to prospective employers will receive immunity from civil liability except for those that lack good faith. Employers cannot demonstrate good faith if they acted with malice.[337] Regrettably, the legislatures rarely indicate how to interpret these terms. For example, is the term "good faith" to be read *subjectively*, that is, honestly believed but unreasonable falsehoods are protected, or *objectively*, that is, only honestly believed falsehoods with some reasonable basis are protected?[338] Few states spell out their approach on this point.

Tennessee's statute, which is quite similar to Colorado's:

> 50-1-105 Providing information to prospective employers — Good Faith
>
> Any employer that, upon request by a prospective employer or a current or former employee, provides truthful, fair and unbiased information about a current or former employee's job performance is presumed to be acting in good faith and is granted a qualified immunity for the disclosure and the consequences of the disclosure. The presumption of good faith is rebuttable upon a showing by a preponderance of the evidence that the information disclosed was:
>
> (1) Knowingly false;
>
> (2) Deliberately misleading;
>
> (3) Disclosed for a malicious purpose;
>
> (4) Disclosed in reckless disregard for its falsity or defamatory nature; or
>
> (5) Violative of the current or former employee's civil rights pursuant to current employment discrimination laws.

TENN. CODE ANN. § 50-1-105 (Supp. 1996). Aside from the fact that a number of the terms need elaboration in order to be understood, the statute is internally inconsistent. As currently drafted, only information that is "truthful, fair and unbiased" qualifies for the statutory immunity. Yet if this information and only this information qualifies, why would there be a need for a presumption of good faith? "[T]ruthful, fair and unbiased" information, by definition, is not false, misleading, malicious, or recklessly disclosed. Clearly, someone goofed in drafting this statute. *See also* COLO. REV. STAT. ANN. § 8-2-114 (West 1986 & Supp. 1996) (presenting similar problems).

336. *See* COLO. REV. STAT. ANN. § 8-2-114 (West 1986 & Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996).

337. *See, e.g.*, OKLA. STAT. ANN., tit. 40, § 61 (West 1986 & Supp. 1996) (stating that presumption of "good faith" is rebutted if employer that provided job reference "acted with malice").

338. Most courts appear to follow the subjective test in interpreting state law. *See* Horkan, *supra* note 2, at 523 (noting that most courts that have ruled on meaning of term define it as "a subjectively honest, though possibly unreasonable, belief that the information

A similar problem arises with respect to the term "malice." Although the Supreme Court adopted a reasonably clear definition of this term in its landmark *New York Times* decision,[339] a number of states use the term in a different sense.[340] For example, Oklahoma provides that one can rebut the presumption that an employment reference was made in good faith upon a showing that the information "was false and the employer providing the information had knowledge of its falsity or acted with malice or reckless disregard for the truth."[341] This statute incorporates the *New York Times* "actual malice" standard, but adds an additional element — that of "malice." In our view, adding this element not only creates confusion but is also unnecessary.[342] That is, so long as an employer discloses information in response to the request of a prospective employer in an appropriate manner — i.e., the employer discloses only relevant information in response to requests by prospective employers — the fact that the employer bears the employee some ill will should not preclude the employer from disclosing it.[343]

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is necessary").

339. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (stating that "actual malice" exists with respect to statement if it is made "with knowledge that it was false or with reckless disregard of whether it was false or not").

340. *See* John J. Watkins & Charles W. Schwartz, Gertz *and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 871 (noting that some courts "hold that a showing of ill will or spite is sufficient to overcome a conditional privilege, while others require that the plaintiff demonstrate 'constitutional' malice, that is, knowing falsity or reckless disregard for the truth as used in *New York Times*").

341. OKLA. STAT. ANN, tit. 40, § 61 (West 1986 & Supp. 1996).

342. *Prosser and Keeton* would abolish the term in the context of qualified privilege. *See* KEETON ET AL., *supra* note 63, § 115, at 833-34 (calling for "discarding" of malice "as a meaningless and quite unsatisfactory term"); *see also supra* notes 137-50 and accompanying text.

343. On this point, we find ourselves convinced by Professor Saxton's arguments that ill will should not necessarily defeat a qualified privilege claim. Saxton argues that because employers will often feel resentment or anger at the past misbehavior of employees, the employers will always be vulnerable to the charge that they acted with improper motives. According to Saxton:

> The result is to greatly encourage litigation over reference disputes, with the plaintiff and the defendant respectively striving to convince the factfinder that the defendant's motives were primarily "malicious" or primarily "proper." This tendency of the "malice" and "improper purpose" tests to encourage litigation over reference disputes is a compelling reason why these standards should be discarded, at least if other more clearly-defined standards adequately serve the interests served by the "malice" and "improper purpose" standards.

Saxton, *supra* note 2, at 82.

4. *Critical Elements in Crafting an Appropriate Qualified Privilege*

At the outset, we note that although we have discussed qualified privilege in the context of defamation, we intend our reform proposals to extend to other causes of action that could be brought against an employer by a former or current employee with respect to a job reference.[344] At a minimum, we would include causes of action such as blacklisting, tortious interference with prospective economic advantage, negligence, violating service-letter statutes, and misrepresentation. For a variety of reasons, we would not interfere with current laws relating to racial or sexual discrimination.[345] Before proposing a substantive standard, we shall address four preliminary issues.

The first issue presents a particular challenge to those seeking an appropriate standard for qualified privilege in employee references — distinguishing fact from opinion. In the typical employment-reference inquiry, the prospective employer seeks the former employer's overall assessment of an employee rather than the details of any specific aspect of the employee's job performance.[346] Although courts generally indicate that expressions of pure opinion are not actionable,[347] such expressions become so when undisclosed defamatory facts form the basis of the opinion.[348] The

344. We note in passing that Professor Saxton extends his proposal for reforming qualified privilege to tort theories of "defamation, tortious interference with prospective contractual relation, and tortious interference with prospective economic advantage." *Id.* at 109.

345. Besides, our statutory recommendations were enacted at a state level, federal laws such as Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994), that govern racial and sexual discrimination would preempt any state law that purported to modify existing federal standards. If our recommendations were enacted at the federal level, we would still not seek to change existing federal antidiscrimination legislation because (1) we favor strong, comprehensive antidiscrimination laws and (2) political opposition to any weakening of the civil rights laws undoubtedly would spell the death of the proposal.

346. *See* Posey, *supra* note 2, at 479 (noting that in "employment context, the prospective employer solicits an opinion — an overall perception of an individual as a person and an employee"); *see also supra* notes 75-85 and accompanying text.

347. *See* RESTATEMENT (SECOND) OF TORTS § 566 (1977); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of their ideas."); Gross v. New York Times Co., 180 A.D.2d 308, 311 (N.Y. App. Div. 1992) (finding that statement of pure opinion neither based nor impliedly based on undisclosed facts nonactionable). *But see* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) (stating that even opinions can be defamatory if they reasonably imply false assertion of fact); *see also supra* notes 76-85 and accompanying text.

348. *Id.* Conversely, when an opinion derives from truthful facts or from facts not contested, it will not be actionable. *See* KEETON ET AL., *supra* note 63, § 113A, at 814.

problem for employers arises when they give broad characterizations such as "uncooperative," "bad attitude," "unreliable," "lazy," "immature," "hot-headed," or the like. Because a broad characterization typically derives from a number of observations — some easily remembered and others perhaps not — they present substantial problems of proof if considered to be fact rather than opinion.[349] In all likelihood, such characterizations would be treated as fact by the courts.[350] Therefore, notwithstanding their extreme usefulness to prospective employers, broad characterizations are likely to be avoided by employers in job references unless employers are given substantive legal protection.[351] We would protect broad characterizations by treating them as nonactionable opinion to the extent that they do not include specific factual references. If such characterizations include factual predicates, we would permit an aggrieved employee to challenge the underlying allegations and to seek to prove the corresponding inaccuracy of the broad characterization.[352]

The second issue relates to the burden of proof that should apply to actions involving a qualified privilege — that is, should the law require that a plaintiff meet a higher standard than preponderance of the evidence in order to prevail in a challenge to a negative job reference? Although recent state reform efforts appear inconsistent on this point,[353] some legislatures have required that a plaintiff prove a claim through clear and convincing evidence rather than through the more traditional preponderance of the

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349. That is, rather than having to produce evidence of a single incident, the employer would have to muster evidence of a number of incidents. In many cases, an employer might not even remember all of the incidents that gave rise to a judgment about an employee, but would be quite clear that, in sum, they gave rise to a quite accurate assessment of the employee.

350. Because the terms all have some arguable verifiability by objective proof, they likely would be considered fact. *See* Posey, *supra* note 2, at 478 n.57 (indicating assessment that courts have adopted per se rule that employers' statements are fact).

351. *See, e.g.*, Perry, *supra* note 250, at 34-35 (advising employers that give job references to discuss only verifiable facts, not opinion).

352. If, for example, a former employer gave a reference in which it stated that "Tom is a lazy worker," we would treat that statement as nonactionable opinion. If, on the other hand, the employer stated, "Tom is a lazy worker because he missed work twice last year to go fishing," we would permit Tom to try to prove that he did not miss work to go fishing.

353. For example, the following states permit the presumption of good faith in providing employee references to be rebutted by a preponderance of the evidence: Alaska, Colorado, Georgia, Indiana, Louisiana, Oklahoma, and Tennessee. *See supra* note 209 and accompanying text. The following states require clear and convincing evidence to overcome the presumption of good faith: Florida, Maine, and Utah. *See supra* note 210 and accompanying text.

evidence test.[354] The impetus for invoking this higher standard likely stems from Supreme Court holdings in cases such as *New York Times Co. v. Sullivan*[355] and *Bose Corp. v. Consumers Union of United States*[356] that impose higher burdens of proof on plaintiffs when constitutional privileges apply. Legislation known as the "Uniform Defamation Act"[357] recently proposed by the National Conference of Commissioners on Uniform State Laws to address defamation law reform also calls for a higher burden of proof in defamation actions.[358] Although nothing in current defamation law requires a clear and convincing evidence standard,[359] we recommend this higher standard to signal society's view that liability ought to attach in employment-reference cases only in compelling circumstances.[360]

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354. Defining the boundaries that separate the various burdens of proof is a particularly challenging endeavor. Daniloff distinguishes between the clear and convincing evidence and preponderance of the evidence tests in the context of employment references as follows:

> [The c]lear and convincing evidence test would increase the plaintiff's burden of proof beyond the current preponderance of the evidence requirement. Clear and convincing evidence is defined as "clear, explicit and unequivocal" or as "sufficiently strong to command the unhesitating assent of every reasonable mind." The distinction between the two standards has been summarized as follows: "preponderance calls for probability, while clear and convincing proof demands *high probability*." Thus, evidence that the employer acted unreasonably would be necessary to establish liability.

See Daniloff, *supra* note 2, at 705-06 (citation omitted). Our own unscientific rule of thumb is that if preponderance of the evidence calls for at least 51% of the credible evidence and if beyond a reasonable doubt demands over 95%, then clear and convincing evidence falls somewhere in between. To say the least, determining that a burden of proof has been met is not rocket science.

355. 376 U.S. 254, 285-86 (1964) (stating that actual malice must be shown with "convincing clarity").

356. 466 U.S. 485, 511 (1984) (noting that issues of constitutional fact, such as actual malice, must be proved by clear and convincing evidence).

357. *See generally* Ackerman, *supra* note 226 (discussing proposed Uniform Defamation Act and its successor, Uniform Correction or Clarification of Defamation Act).

358. *See id.* at 304-05. The Uniform Defamation Act called for clear and convincing evidence with respect to matters pertaining to constitutional privilege and preponderance of the evidence with respect to other questions of fact. This has drawn criticism for being difficult for juries to understand and apply. *Id.*

359. Because employment references typically involve private litigants who are not public figures, it is highly unlikely that the constitutional privilege will apply. Accordingly, nothing in the various Supreme Court rulings demands a burden of proof higher than preponderance of the evidence.

360. We could easily live with a preponderance of the evidence test. Our main concern is that a *uniform* approach be adopted, which is why we call for federal legislation. Moreover, in a declaratory judgment setting in which damages are not at issue, we see no

The third issue relating to qualified privilege arises with respect to who *initiates* the communication regarding a job reference. If an employer gives job-reference information regarding a past or current employee only to those who request it and never acts as a volunteer, the employer substantially reduces the likelihood that it will be accused of excessive publication of defamatory materials.[361]

Offering a bright line rule that extends the qualified privilege only to those that provide employee references in response to inquiries from prospective employers is a debatable proposition because one can posit instances in which volunteering information to a prospective employer that has not requested a job reference would seem to be appropriate. For example, Professor Saxton challenges the usefulness of a bright line test in this context by suggesting a hypothetical in which an employer that runs a daycare center terminates an employee on the ground that the employee exercised poor judgment in supervising children such that several sustained injuries. In Saxton's hypothetical, the employer, although certain that the employee did a poor job, realizes that a reasonable factfinder might disagree with its assessment of the employee. Subsequently, the employer learns that another daycare center is about to hire the employee. In this circumstance — not surprisingly given his expansive notion of duty — Saxton would statutorily provide the former employer a qualified privilege to notify the prospective employer about its views on the former employee.[362] Although we are sympathetic to Saxton's argument, we would not extend the *statutory* qualified privilege that we propose to cover this situation. Our proposal seeks to establish a safe harbor for those that fit within our guidelines, and we prefer to keep them as simple and clear as possible. Nothing in our proposal, however, would invalidate any state's *common-law* privilege — which would likely protect the employer in this case. Our hesitation in adopting as expansive an approach as Saxton's stems from our concern that providing a qualified privilege to everyone who "volunteers" job references would protect too many unfair negative job

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reason to impose a clear and convincing evidence test.

361. According to the *Restatement (Second) of Torts*, an important factor in determining whether a qualified privilege should apply to a situation is whether the "publication is made in response to a request rather than volunteered." RESTATEMENT (SECOND) OF TORTS § 595(2)(a) (1977). On the other hand, employers that volunteer negative information about former employees place themselves in a position to lose their qualified privilege. *See, e.g.*, Davis v. Ross, 754 F.2d 80, 86 (2d Cir. 1985) (finding that singer Diana Ross did not enjoy qualified privilege to distribute unsolicited letter impugning integrity of former employee).

362. *See* Saxton, *supra* note 2, at 87-88.

references. Accordingly, on balance, we think that a simple and clear bright line approach is preferable to a more open-ended, complex test. Any gains in protecting reference-volunteering employers would be more than offset by confusion arising from added complexity.

Finally, we turn to what the substantive standard should be to protect employers that give job references. Because we prefer simplicity whenever possible, we reject the approach that many states have adopted of providing a presumption of good faith or reasonable belief that the plaintiff must overcome in order to establish liability. Presumptions such as these strike us as unnecessary and distracting so long as the actual substantive standard and burden of proof are set forth directly. In recommending a standard, we wish to state our assumption about the result we hope the standard will produce. In the case of employment references, our goal is to expand the protection available to employers when they give job references about past or current employees. As noted above,[363] we are acutely aware that doing so may create opportunities for vindictive, dishonest employers to escape liability when providing employee references.[364] However, we believe that our proposals minimize the harm to employees to the greatest extent possible and add protections for workers not previously available.[365]

5. *Qualified Privilege: A Recommended Approach*

We propose that courts adopt the "actual malice" definition in *New York Times*.[366] Set forth as a substantive rule, our proposal is as follows:

> An employer that discloses information about the job performance of an employee or former employee at the request of a prospective employer (or at the request of the employee or former employee) shall not be civilly liable for any harm caused by such disclosure unless the employee or former employee demonstrates by clear and convincing evidence that:

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363. *See supra* notes 254-58 and accompanying text.

364. We note in passing that every other proposal that we have seen that adds protections for employers when they provide job references also creates the opportunity for expanded mischief on the part of "bad" employers. Regrettably, few reforms are cost free.

365. We believe that our proposal to create an administrative declaratory judgment process adds a quick, affordable method of vindicating employee rights. *See infra* notes 398-411 and accompanying text.

366. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); *see also supra* notes 113-51 and accompanying text. We see no reason, however, to include the words "actual malice" in our proposal. We suspect that they carry the likelihood of confusion in the context of our proposal since most ordinary citizens may not equate a "reckless disregard of the truth" with malice.

> (1) the information disclosed was false and defamatory,
> (2) the information disclosed was acted upon by the prospective employer in a manner that caused harm to the employee or former employee, and
> (3) the employer knew the information was false or acted with reckless disregard of the information's truth or falsity.

We propose adoption of this approach because we believe that courts are knowledgeable about and supportive of the *New York Times* standard, and because we think juries will have little difficulty with the concepts contained in the rule. We grant that much of the litigation surrounding this test focuses not on truth or falsity,[367] but on what the defendant knew at the time of giving the reference. Moreover, this test contemplates that mistakes and falsehoods will be committed and protects all but the most egregious. In short, this test is a tough and often insurmountable obstacle for plaintiffs. The tradeoff, we believe, will be an increased flow of critical information producing a safer, more efficient workplace.[368]

C. *Contractual Waivers of Liability: Express and Implied*

Whether or not qualified privilege law is reformed as we suggest, employers might also consider whether they wish to enter into contractual agreements with their employees regarding tort liability for employment references.[369] Although it is theoretically possible for employees to seek agreements in which employers reduce their rights to give references,[370] we suspect that the vast majority of contractual arrangements in this context will be those sought by employers concerned about being sued. Employers can seek waiver-of-liability agreements in at least three circumstances: (1) when they hire an employee; (2) when a former or current employee requests a job reference; or (3) when a prospective employer insists that an

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367. *See supra* notes 319-24 and accompanying text.

368. Although litigation through courts becomes more difficult for plaintiffs, we provide an alternative approach through administrative alternative dispute resolution procedures that, we believe, more than compensates for this. *See infra* notes 398-411 and accompanying text.

369. For a discussion of the law on contractual waivers of liability for employment references, see, for example, Acoff, *supra* note 2, at 759-60; Saxton, *supra* note 2, at 62-63; *see also supra* notes 106-08 (discussing consent as defamation defense). *See generally* Horkan, *supra* note 2.

370. *See* Horkan, *supra* note 2, at 526 (noting that "if employees place a particularly high value on reputation, they may be willing to pay for more protection than their state's law provides"). We presume that the most likely approach adopted by employees would be to ask for a waiver of the employer's qualified or constitutional privilege.

employee waive tort claims against his or her former employer as a condition of being considered for employment (and as an inducement for the former employer to give a candid assessment of the employee).

Absent express agreement, employers can sometimes argue that former or current employees have given implicit waivers of liability when the employees ask for references knowing that the references are likely to be negative.[371] In such a case, if employers give a negative reference, courts have ruled that the employee should not be able to sue — the employee should not have requested the reference in the first place.[372] Arguing that a former employee has implicitly consented to be defamed, however, is a high risk approach for employers to take and has been strongly criticized.[373]

Employers must approach contractual waivers cautiously. Although some courts uphold such clauses on the theory that employees can freely enter into such agreements,[374] other courts reject them on the theory that an employer cannot absolve itself of liability for intentional torts.[375] Courts and commentators have expressed misgivings about their enforceability,[376] thereby giving rise to substantial hesitation on the part of employers to enter into such agreements.[377]

We can see that employers in states with strong employee protections and limited qualified privileges might turn to contractual waivers in the absence of any other immediate approach that would insulate them from liability, but we generally do not favor such waivers. Not only are such waivers uncertain in guaranteeing protection, but they also create an appearance of employer overreaching — at least to the extent that an employer

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371. *See id.* at 528-30 and cases cited therein. Some courts have invoked the RESTATEMENT (SECOND) OF TORTS § 583 cmt. d, illus. 2 (1977), which states that when the plaintiff has reason to know that a publication will likely be defamatory, consent to such a publication is a complete defense to any resulting claim.

372. *See* Horkan, *supra* note 2, at 528-30.

373. *See id.* at 528. Horkan argues that employees do not truly consent when their only choice is to agree to a negative job reference or to lose any opportunity for consideration for the job. *Id.* In response, one might argue that employees can consent to such an agreement even though they might not like the unpalatable choices presented to them.

374. *See, e.g.*, Smith v. Holley, 827 S.W.2d 433, 436 (Tex. App. 1992).

375. *See, e.g.*, Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816, 817 (Fla. Dist. Ct. App. 1985).

376. *See* Horkan, *supra* note 2, at 535 ("[D]isagreement among courts and commentators creates a great deal of uncertainty about the enforceability of contractual modifications of the qualified privilege. Consequently, parties to an employment contract may be hesitant to include such a clause, because its enforcement is doubtful.").

377. *See id.*

seeks exoneration even for blatant or malicious lies.[378] To the extent that employers seek a qualified privilege that limits liability to instances of actual malice, we vastly prefer a statutory approach that provides protection for *all* employers, not just those wealthy enough to afford counsel to draft exculpatory clauses. We also prefer a statutory approach because we believe this more public route offers a greater opportunity for employee rights to be protected.

D. *Attorney Fees: A Limited Proposal to Make the Loser Pay*

Under the legal system in the United States litigants typically must pay for the legal fees they incur irrespective of the outcome of the lawsuit. This so-called American Rule dates back to colonial times and often is seen as a fundamental approach of our jurisprudence.[379] In contrast, most of the rest of the world's common-law systems follow the so-called English Rule, in which the losing party must pay for the winner's attorney fees.[380] The trade-offs between the two systems are stark. Under the English Rule, litigants who win a lawsuit are made substantially whole, that is, they recover the substantial attorney fees that must be paid in pursuing or defending a lawsuit. On the other hand, the knowledge that such fees must be paid surely discourages all but the most wealthy or risk-taking of parties and creates almost irresistible pressures on the parties to settle.[381] In contrast, under the American Rule, even impoverished litigants, especially those with attorneys who take cases on a contingent fee basis,[382] find ready access to the courts even on novel and untested legal theories. However, this easier access to the court system means that court dockets will include numerous frivolous lawsuits that consume enormous amounts of time and waste many precious dollars of innocent defendants. This is particularly pertinent in employment-reference cases involving allegations of defamation because most employers

378. We note that the *Restatement (Second) of Contracts* bars a party from providing immunity for intentional or reckless torts. *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1979).

379. *See, e.g.*, Stewart v. Sonneborn, 98 U.S. 187, 197 (1879); Oelrichs v. Spain, 82 U.S. 211, 231 (1872); Day v. Woodworth, 54 U.S. (13 How.) 363, 372 (1851); Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796). For an extensive discussion of the American Rule, see generally John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

380. Vargo, *supra* note 379, at 1597.

381. In England, 99% of cases are settled before they go to trial; no doubt a reflection of the fear of paying attorney fees. *Id.* at 1612.

382. That is, the attorney receives payment only if the plaintiff wins the lawsuit. In such a case, the attorney typically recovers a percentage of the damages.

eventually prevail, albeit often at great expense.[383]

Despite its time-honored tradition, the American Rule has not gone unchallenged.[384] In recent years, it has come under attack in the employment-reference context.[385] Professor Saxton offers a thoughtful proposal. Briefly summarized, Saxton would permit a prevailing plaintiff to recover attorney fees and expenses in cases in which the factfinder determined that the defendant disseminated false and derogatory reference information about the plaintiff and that, in disseminating the false information, the defendant forfeited the qualified privilege that would normally apply.[386] Conversely, Saxton would authorize a prevailing defendant to recover attorney fees and expenses when the factfinder determined that the employment reference which gave rise to the plaintiff's complaint was substantially true and not false in any material respect.[387] Although we favor Saxton's proposal insofar as it offers defendant employers a carefully and narrowly drawn opportunity for recovering attorney fees, we remain unconvinced that offering prevailing plaintiffs attorney fees, except in the narrowest of circumstances,[388] improves the current situation significantly. We realize that an asymmetrical approach in which one side of the litigation has a

383. *See supra* note 320 and accompanying text.

384. By one count, over 200 federal statutes and roughly 2000 state statutes permit fee-shifting in particular types of litigation. *See* Saxton, *supra* note 2, at 102 (identifying several commentators and studies of fee-shifting in United States). Among the federal statutes in which fee-shifting is authorized are the Sherman Act, 15 U.S.C. § 15(a) (1994); the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1994); and the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11113 (1994).

385. *See, e.g.*, Ackerman, *supra* note 226, at 336 (endorsing limited fee-shifting in instances when plaintiff could demonstrate actual malice on part of defendant); Barrett, *supra* note 317, at 850-51 (arguing that declaratory judgment proposals in libel actions should include fee-shifting because it "provides the dual benefits of making deserving plaintiffs whole and discouraging frivolous suits"); Saxton, *supra* note 2, at 99-107 (proposing rule "that would allow litigants, in particular circumstances, to recover their reasonable attorney fees and expenses if they prevail in litigation over an employment reference").

386. *See* Saxton, *supra* note 2, at 100. The qualified privilege would most likely be lost as a result of excessive publication.

387. *Id.* Saxton would not support awarding attorney fees in cases in which the defendant prevailed because of the qualified privilege: "In other words, the defendant could *not* recover attorneys' fees and expenses from the plaintiff if the factfinder determined that the reference that gave rise to the litigation was false and defamatory, but the factfinder also found that the defendant employer did not abuse and forfeit the qualified privilege." *Id.*

388. We would make an exception in the event that a plaintiff offered to resolve a case through an administrative ADR proceeding and the defendant refused. *See infra* note 410 and accompanying text.

disproportionate opportunity for attorney fees appears unfair, but we feel confident that it is not. First, we are reluctant to create additional incentives for plaintiffs to file tort suits, particularly when we hope to encourage aggrieved parties to seek an administrative remedy as an alternative to litigation.[389] Second, we think that most potential plaintiffs with meritorious cases have little trouble finding attorneys to bring cases for them on a contingency basis.[390] Third, we suspect that many plaintiffs already unofficially receive attorney fees from juries through the imposition of either large compensatory damage awards or punitive damages. Permitting the recovery of attorney fees on a separate basis might produce double recoveries for plaintiffs. Accordingly, to the extent that we support fee-shifting in employment-reference cases, we do so only in the limited instance in which a defendant has demonstrated the truth and appropriate disclosure of the information he or she shared with a prospective employer.[391] Moreover, to protect unsuccessful plaintiffs, we would provide substantial discretion to a judge to refuse attorney fees when the fees would produce substantial injustice to the plaintiff.

E. Administrative Declaratory Judgments: No Privileges, Limited Damages

Our final major recommendation is to establish an ADR system in which disputes are resolved in administrative "trials" wherein defendants cannot raise constitutional or qualified privileges as defenses and plaintiffs can receive only limited damages. Several features of employment-reference cases make this context unique and appropriate for our recommendation.

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389. *See infra* notes 394-97 and accompanying text.

390. According to Gaffney, the current system operates like a giant lottery in which payoffs, although rare, are attractive enough to encourage excessive litigation:

> There remains a strong incentive . . . to sue despite . . . high costs and the high burden imposed by the fault standard. Although plaintiffs rarely win, those who do win big. According to one study ending in 1984, the average jury award to victorious plaintiffs is roughly $80,000 . . . . [T]hese big payoffs no doubt encourage others who feel defamed to hire an attorney on contingent fee to file a big-money lawsuit.

Gaffney, *supra* note 317, at 606 (citation omitted).

391. We would analogize our proposal to a provision of the Federal Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11113 (1994), in which the prevailing defendant, but not the plaintiff, in challenges to physician peer review actions, can recover attorney fees.

First, unlike many cases involving defamation charges against the media, employment-reference claims rarely involve public officials, public figures, or matters of public interest of the sort that would trigger constitutional concerns.[392] This approach offers a greater opportunity to fashion appropriate alternatives to the current litigation system.

Second, except in instances involving widespread publication of a negative job reference,[393] most employment-reference claims arise in a limited and relatively private manner. That is, the only parties that play a role typically are the employee, the former or current employer, and the prospective employer. Thus, the need for widespread dissemination of a retraction or correction is greatly reduced.

Third, the damages from a false and defamatory job reference will typically be of a concrete nature, less prone to speculation than those that arise in settings that are more public. Arguably, this could produce easier-to-calculate remedies.

Fourth, time may particularly be of the essence to an employee who is receiving negative job references that prevent his or her finding new employment. Accordingly, the employee may be quite amenable to an inexpensive procedure that quickly resolves his or her challenge to a negative reference.

None of these points guarantees that an administrative alternative to court litigation will prove successful, but they provide fertile conditions for developing such an alternative.

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392. Professor Ackerman summarizes the constitutional requirements currently applicable to defamation law as follows:

> (1) Neither a public official nor a public figure may recover damages for a statement regarding his or her official or public conduct without proving, with clear and convincing clarity, that the statement was made with known falsity or with reckless disregard for truth or falsity (actual malice). (2) No damages may be recovered by a plaintiff in a defamation action without proof of fault, and presumed or punitive damages may not be recovered in the absence of actual malice, unless the defamatory statement is not a matter of public concern. (3) In an action against a media defendant involving a statement that is a matter of public concern, the plaintiff has the burden of proving, by a preponderance of the evidence, that the statement was false.

Ackerman, *supra* note 226, at 328. The restriction that appears to come the closest to affecting our recommendation is the restriction on providing for damages in the absence of a finding of fault. Nonetheless, this rule, which was announced in the cases of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), would appear to be generally inapplicable because employment-reference cases typically do not involve matters of public concern.

393. Volunteering a negative employment reference in a widespread fashion is, of course, the very action most designed to provoke a lawsuit and least defensible when challenged. *See* Davis v. Ross, 754 F.2d 80, 81 (2d Cir. 1985).

1. *The Advantages of an ADR Administrative Remedy*

We propose an ADR mechanism for resolving employment-reference claims by employees against their former or current employers. ADR is an expanding field of procedures and practices that grew out of current dissatisfaction with the judicial system.[394] Among the many advantages of the ADR approach is its ease, simplicity, inexpensiveness, and efficiency.[395] In recent years, new legislation has encouraged ADR programs, especially at the federal level,[396] and new programs have sprung up throughout the states.[397] Accordingly, we recommend an ADR approach to ease the problems currently attendant to employment-reference issues.

2. *A Recommended Approach*

We envision an ADR "declaratory judgment" system that would operate as follows:

First, the ADR system would offer expedited administrative hearings with nontechnical evidentiary rules, employing arbitrators as the hearing officers. Under an ADR approach, the principal issue to be decided would be whether the employment reference was false and defamatory. This would be a strict liability determination under a preponderance of the evidence standard. That is, the factfinder would rule only on the accuracy of the reference, not on how or why the inaccuracy occurred.[398] The factfinder would not investigate or rule on whether the employer acted in good faith, reasonably, mistakenly, or maliciously.

394. For an excellent overview of current ADR practice and theory, see ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES (Martha A. Matthews ed., BNA Special Report No. 149, 1990) [hereinafter BNA ADR REPORT].

395. *See generally id.*

396. At the federal level, Congress has enacted legislation encouraging federal agencies to use ADR, the Administrative Dispute Resolution Act, P.L. 101-552, 104 Stat. 2736 (1990), and the Negotiated Rulemaking Act, P.L. 101-648, 104 Stat. 4969 (1990), as well as encouraging federal courts to establish ADR programs, the Judicial Improvement Act, P.L. 101-650, 104 Stat. 5089 (1990).

397. The National Center for State Courts estimated in 1988 that about 700 ADR programs of one kind or another operated in connection with court operations. *See* BNA ADR REPORT, *supra* note 394, at iii.

398. The reason for this is simple. Employees want to have the record corrected as soon as possible so that they can seek employment without a negative reference hanging over their heads. Moreover, proving how and why the employer arrived at the mistaken reference will not increase the employee's damages at all.

Second, hearing officers would be authorized to make findings that the job references for the employee were "true,"[399] "false," or "truth or falsity not determinable."[400]

Third, employer-defendants would be barred from raising as a defense any argument based on legal privileges — constitutional or qualified.

Fourth, employee-plaintiffs would be entitled to recover damages for specifically identifiable economic losses they could document,[401] but would be barred from recovering any "general,"[402] "mental anguish,"[403] or "punitive"[404] damages. In order to document a claim for damages, the employee-plaintiff would have to show not only that he or she was unsuccessful in applying for a job for which a negative reference was supplied, but also that the failure to gain the offer proximately resulted from the negative reference.[405]

Fifth, discovery would be severely restricted.[406] It could not occur

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399. This would include a finding that the reference was "substantially true." In other words, a minor point of inaccuracy that would have had little effect in how an employee was described would not be permitted to affect the tribunal's ruling. For example, an employee who shows that an employer's accusation that the employee embezzled $150 when, in fact, the employee had taken only $100 should not be entitled to demand a ruling that the employer had falsely accused him or her.

400. We mean for the "not determinable" finding to apply mainly to situations in which an employer has given a broad characterization lacking significant verifiable allegations. To the extent that the broad characterizations rest upon specific, underlying facts, the tribunal should seek to determine the accuracy of such facts.

401. Typically, this would be the employee's lost wages.

402. "General" damages, as defined in defamation law, refers to losses sustained that are normal and usual and that are to be anticipated when a person's reputation is impaired. RESTATEMENT (SECOND) OF TORTS § 904 (1977). They need not be specifically proved. *See* KEETON ET AL., *supra* note 63, § 116A, at 843 (noting that general damages are of "peace-of-mind and dignitary nature rather than economic in character . . . [and] are not readily measurable in monetary terms"). Our approach requires damages to be proved with specificity.

403. Courts occasionally award "mental anguish" damages. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 460 (1976). *Prosser and Keeton* dislikes such damages, *see* KEETON ET AL., *supra* note 63, § 116A, at 844-45, and we would bar them.

404. The courts increasingly look askance at punitive damage awards, especially in the case of media defendants. *See* KEETON ET AL., *supra* note 63, § 116A, at 845.

405. Without such a requirement, an employee who stood no chance of obtaining employment at a specific job would be able to seek damages based on this lost opportunity.

406. There is no doubt that discovery is one of the chief causes of delay and expense in the legal system. *See, e.g.*, *Illinois Judge Calls for Menu of Alternatives to Help Courts Fulfill Their Traditional Role*, *in* BNA ADR REPORT, *supra* note 394, at 59, 60 (noting that judges at both federal and state levels believe that "abuse of the discovery process is the most important cause of delay in litigation and of excessive costs").

without the consent of the hearing officer, who would be directed to discourage discovery to the greatest extent possible.[407]

Sixth, expeditiousness would be stressed throughout the process. Hearing officers would be assigned quickly upon the docketing of a case in the administrative tribunal. Decisions would be mandatory within a certain deadline, perhaps within nine months of the commencement of the action.[408]

Seventh, either party could request an expedited ADR hearing in lieu of a trial in court. In the event that the plaintiff offered to resolve the dispute in an ADR administrative proceeding and the defendant refused, the plaintiff, if successful at trial, would be entitled to recover reasonable attorney fees from the defendant.[409] If the defendant offered to resolve the dispute in an ADR administrative proceeding and the plaintiff refused, the defendant, if successful at trial, would be entitled to recover reasonable attorney fees from the plaintiff.[410]

Eighth, in the event that neither party sought an ADR administrative proceeding, the case would proceed to litigation with the qualified privilege we have proposed applying to the lawsuit.[411]

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407. We borrow this portion of our proposal from the approach currently administered in the Court Annexed Arbitration Program (CAAP) in the state of Hawaii. *See Hawaii's Court-Annexed Arbitration Evaluation Is First to Show Cost Reduction to Litigants, in* BNA ADR REPORT, *supra* note 394, at 73.

408. Hawaii's CAAP requires a determination within nine months. *Id.* at 75. Approximately three-quarters of the CAAP cases meet this deadline. *Id.*

409. This is the one limited instance in which we would support the right of a plaintiff to seek attorney fees from the defendant. We do so to provide a strong incentive to defendants to use the ADR administrative approach rather than to litigate in court.

410. In this instance, we would provide for reasonable attorney fees not just in the event that the defendant prevailed upon the truth or falsity of the job reference, but on any ground, including privilege. This approach contrasts with our views relating to the reform of qualified privilege. *See supra* notes 379-91 and accompanying text. We do so both because we wish to encourage the parties to use the ADR administrative procedures, and also because the plaintiff will have been given an opportunity in an ADR setting to establish the truth or falsity of the job reference and will have been rebuffed.

411. We note that, if a court wished, it could adopt the "Sofaer" test used by Judge Abraham Sofaer in the Ariel Sharon libel trial against *Time* magazine. *See* Wissler, *supra* note 227, at 474. In the Sharon trial, the judge instructed the jury to reach separate verdicts on whether the challenged statement was defamatory, whether the statement was false, and, finally, on whether the statement was published with actual malice. The advantage of such an approach is that the plaintiff could get a determination on truth or falsity even if he or she is denied damages because no actual malice could be demonstrated. The disadvantage is that trials conducted under such an approach would be very expensive and time-consuming because summary judgment on qualified or constitutional privilege would not be available and full discovery rights would apply.

F. *Summary of Recommendations*

In summary, having explored a number of issues that revolve around the difficulties employers have in providing employment references, we take the following positions with respect to reforming the law.

1. We do not recommend imposing a common-law or statutory duty on employers to provide employment references when queried by prospective employers. At most, we support an extremely limited duty in instances in which an employer has acquired confidential information that a former employee imminently plans to assault a readily identifiable victim or class of victims.

2. We recommend adoption of federal legislation to establish a qualified privilege for employers to provide employment references as follows:

> An employer that discloses information about the job performance of an employee or former employee at the request of a prospective employer (or at the request of the employee or former employee) shall not be civilly liable for any harm caused by such disclosure unless the employee or former employee demonstrates by clear and convincing evidence that:
>
> (1) the information disclosed was false and defamatory,
>
> (2) the information disclosed was acted upon by the prospective employer in a manner that caused harm to the employee or former employee, and
>
> (3) the employer knew the information was false or acted with reckless disregard of the information's truth or falsity.

3. We do not recommend expanding employer rights to enter into contractual waivers of liability with employees.

4. We recommend a modest expansion of the right to attorney fees for prevailing parties in employment-reference cases: (a) for parties that prevail in court after having offered to resolve cases in an administrative ADR proceeding and having been rebuffed by the other side and (b) for employers that prevail in court when neither side offers to resolve an employment-reference dispute in court.

5. We recommend the establishment of an ADR mechanism for resolving employment-reference claims. The ADR system would operate informally, without significant discovery rights, without qualified (or other) privileges, and with limited damages. In return, it would offer expeditious and cost-efficient decisions declaring whether an employer's references were accurate.

IX. Conclusion

The issues relating to employment references are many and multi-faceted. Because they involve the delicate balance among employers, employees, prospective employers, co-workers, and members of the public generally, easy solutions seem unattainable. Moreover, because reform requires readjustments of the parties' rights and expectations, change is likely to come only after extensive debate and reflection. Because of this, we hold no high hopes that our proposals will prevail in any short-run time frame. On the other hand, we urge all concerned, including those with conflicting interests, to assess whether the current situation is tolerable for anyone. We particularly question whether the recent state initiatives, upon close inspection, do much to alleviate the current problem.[412] We think they do not, and we reiterate our sense that action at the federal level to address the problem is vastly to be preferred.

412. *See supra* notes 331-43 and accompanying text.

NOTES