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Compelled Self-Publication in the Employment Context: A Consistent Exception to the Defamation Requirement of Publication

COMPELLED SELF-PUBLICATION IN THE EMPLOYMENT CONTEXT: A CONSISTENT EXCEPTION TO THE DEFAMATION REQUIREMENT OF PUBLICATION

Courts traditionally have protected the reputational interests that employees have in the statements that the employees' former employers make about the employees' work performances.[1] Courts have held employers liable for defamation if the employers communicated defamatory statements that injured former employees' reputations to prospective employers of the former employee.[2] Under the defamation cause of action,[3] courts protect

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1. *See* Chambers v. National Battery Co., 34 F. Supp. 834, 836 (W.D. Mo. 1940) (former employer may be liable for statement that employee was careless in his work because statement tended to prejudice employee's professional reputation); Louisville Taxicab & Transfer Co. v. Ingle, 229 Ky. 578, ____, 17 S.W.2d 709, 710 (1929) (former employer may be liable for injuring employee's professional reputation by posting notice on company bulletin board which implied that employer had discharged employee for drinking on job); Heitzeberg v. Von Hoffman Press, 340 Mo. 265, ____, 100 S.W. 2d 307, 309 (1937) (former employer may be liable for maligning employee's abilities as manager in letter to prospective employer); *see also* Annotation, *Statement With Reference to Discharge from Employment as Actionable Per Se*, 66 A.L.R. 1499, 1499-1507 (1930) (discussing statements that employers make about reasons for former employees' discharges that may render employers liable for defamation).

2. *See* Jacron Sales Co. v. Sindorf, 276 Md. 580, ____, 350 A.2d 688, 700 (1976) (employer may be liable for defaming former employee by calling employee's current employer and accusing former employee of theft); Calero v. Del Chem. Corp., 68 Wis. 2d 487, ____, 228 N.W.2d 737, 744 (1975) (former employer may be liable for defaming employee if former employer made defamatory statements about employee to prospective employer).

3. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (defining defamation cause of action). A cause of action for defamation exists if a person makes a false statement that defames another person and without privilege publishes the statement to a third party. *Id.* Additionally, the plaintiff claiming defamation must prove that the person making the defamatory statement acted with some degree of fault and that the defamatory statement is either actionable per se or that the statement's publication caused special harm to the plaintiff's interest. *Id.* A defamatory communication tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. *Id.* at § 559. Considerable confusion exists as to whether proof of falsity is an element of a plaintiff's prima facie case of defamation or an affirmative defense that the defendant must prove. *Id.* § 581A comment b. At common law, a plaintiff claiming defamation had to allege in his complaint that the defamatory statement was false. *Id.* After the plaintiff filed his complaint, however, the common law generally presumed falsity and placed on the defendant the burden of proving the truth of the allegedly defamatory statement. *See id.* (discussing how common law allocated burden of establishing truth or falsity in defamation cause of action); *see also* Diapulse Corp. of Am. v. Curtis Publishing Co., 374 F.2d 442, 446 (2d Cir. 1967) (defendant has burden of proving truth of defamatory statement). Although some courts at common law required defendants to prove the truth of defamatory statements, the United States Supreme Court, in 1964, held that the first amendment of the United States Constitution prohibits courts from imposing liability on defendants who have not acted with fault. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (states may not impose liability without fault upon

an individual's interest in his reputation by holding liable the maker of false statements that damage the individual's reputation.[4] Under traditional defamation law, however, courts have determined that, for an originator of a defamatory statement to injure another individual's reputation, the originator must have communicated the defamatory statement to a third party.[5] Unless the originator of the defamatory statement communicates the statement to a third party, the originator generally will not be liable for defamation.[6] An originator of a defamatory statement is not liable for

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defamation defendants). The Supreme Court determined that plaintiffs in defamation actions must show that a defendant acted with fault regarding the truth or falsity of defamatory statements. *Gertz*, 418 U.S. at 347; *New York Times*, 376 U.S. at 279-280. By requiring plaintiffs who bring suit for statements concerning issues of public concern and "public official" plaintiffs to prove a media defendant's fault regarding the truth or falsity of defamatory statements, the Supreme Court essentially shifted the burden of proof on the issue to the plaintiff in those kind of cases. *Gertz*, 418 U.S. at 347; *New York Times*, 376 U.S. at 279-280. Subsequently, the Supreme Court expressly has determined that in defamation claims involving speech of public concern plaintiffs must prove the falsity of allegedly defamatory statements to recover from media defendants. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986) (private figure plaintiff must show falsity of defamatory statements if plaintiff seeks damages from media defendant for defendant's statements involving matters of public concern). Whether the requirement that the plaintiff prove the falsity of allegedly defamatory statements extends beyond claims involving media defendants and statements involving matters of public concern remains unclear. RESTATEMENT (SECOND) OF TORTS §§ 581A comment b, 613 comment j (1977). The United States Court of Appeals for the Sixth Circuit has ruled that the first amendment requires all defamation plaintiffs to bear the burden of proving the falsity of defamatory statements. Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 376 (6th Cir.), *cert. dismissed*, 454 U.S. 1130 (1981). *But see* RESTATEMENT (SECOND) OF TORTS §613 comment j (discussing problem that arises if law places burden of proof on party asserting the negative).

4. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (state interest underlying defamation law seeks to compensate individuals for reputational injury resulting from publication of defamatory falsehoods); Gruschus v. Curtis Publishing Co., 342 F.2d 775, 776 (10th Cir. 1965) (basis of defamation arises from harm that defamatory statements caused plaintiff's reputation); Urban v. Hartford Gas Co., 139 Conn. 301, ____, 93 A.2d 292, 295 (1952) (injury to reputation of defamed person is essential element of slander claim); Gaetano v. Sharon Herald Co., 426 Pa. 179, ____, 231 A.2d 753, 755 (1967) (defamation cause of action gives injured plaintiff public vindication of plaintiff's good name).

5. *See, e.g.*, Washington Annapolis Hotel Co. v. Riddle, 171 F.2d 732, 737 (D.C. Cir. 1948) (defendant must communicate defamatory statements to third party before plaintiff may recover for defamation); Wilcox v. Moon, 64 Vt. 450, ____, 24 A. 244, 245 (1892) (courts may not hold defendants liable for defaming plaintiffs unless defendants published defamatory statement to third persons); W. KEETON, PROSSER AND KEETON ON TORTS § 113, at 797 (1984) (communication to third party is essential to impose defamation liability on defendant); 50 AM. JUR. 2D Libel and Slander § 146, at 652-53 (1970) (defendant must publish defamatory statements to third parties before defamed person may recover for defamation).

6. *See, e.g.*, Gelhaus v. Eastern Airlines, 194 F.2d 774, 777, (5th Cir. 1952) (if only plaintiff heard defendant utter defamatory words, defendant did not "publish" words so as to create liability for defamation); Lally v. Cash, 18 Ariz. 574, ____, 164 P. 443, 446 (1917) (to recover damages for defamation, plaintiff must show that someone other than plaintiff read defamatory article); Yousling v. Dare, 122 Iowa 539, ____, 98 N.W. 371, 371 (1904) (absent proof that third person read defamatory letters, proof that defendant sent defamatory letters directly to plaintiff is not sufficient publication to support civil defamation action). The

defamation if he communicates the statement only to the subject of the statement.[7]

Some courts recently have recognized an exception to the defamation publication requirement in cases in which an employer, in making a defamatory statement about an employee, communicated the statement only to the employee.[8] These courts, recognizing the "compelled self-publication" doctrine, have determined that a plaintiff employee may satisfy the defamation publication requirement if the employee shows that the employer wrongfully dismissed the employee and that the employee, under compulsion, subsequently had to inform prospective employers of the reason for his dismissal.[9] These courts, in recognizing that an employee may recover damages for defamation after the employee publishes the employer's defamatory statements, have acknowledged that the reasons which an employer gives an employee for the employee's dismissal may affect the employee's ability to obtain subsequent employment.[10] By giving an employee a defamatory reason for the employee's dismissal, an employer can injure the employee's employment prospects if the employee has to repeat the defamatory statements regarding the reason for his dismissal to prospective employers.[11] Recognition of the compelled self-publication exception to the

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basis for a defamation claim is injury to a defamed person's reputation, which courts measure by the esteem in which others hold the defamed person. *See* Fry v. McCord Bros., 95 Tenn. 678, ____, 33 S.W. 568, 571-72 (1895) (gravamen of civil defamation action is pecuniary damage to character or credit of defamed party, and only publication that defamer makes to third persons can affect party's character or credit); *see also* RESTATEMENT (SECOND) OF TORTS § 577 comment b (1977) (defamed individual's reputation cannot suffer injury unless third person learns of defamatory communication).

7. *See supra* note 6 (discussing defendant's lack of liability for defamation if defendant does not publish defamatory statements to third party).

8. *See* McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 798, 168 Cal. Rptr. 89, 94 (1980) (recognizing exception to defamation publication requirement in situation in which employer can foresee that discharged employee must repeat employer's defamatory statements); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (same); Grist v. Upjohn Co., 16 Mich. App. 452, ____, 168 N.W.2d 389, 405-406 (Mich. Ct. App. 1969) (same); Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986) (same).

9. *See supra* note 8 (listing decisions in which courts have recognized compelled self-publication doctrine).

10. *See* McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 797-98, 168 Cal. Rptr 89, 94 (Cal. Ct. App. 1980) (employer is liable for employee's republication of defamatory reasons for employee's dismissal because of strong causal link between employer's original publication and employee's injurious republication); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 840, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (causal relation between original libel and necessary injurious republication may make employer liable for employee's republication of employer's libelous statements); Grist v. Upjohn Co., 16 Mich. App. 452, ____, 168 N.W.2d 389, 405-406 (Mich. Ct. App. 1969) (same); Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986) (doctrine of compelled self-publication holds employer who originated defamatory statements liable for any injury that employee's foreseeable republication causes).

11. *See supra* note 10 (listing court decisions that recognized causal connection between employer's stated reasons for employee's dismissal and employee's ability to find subsequent employment).

defamation publication requirement protects an employee from an injury for which his employer is responsible and that the employee is powerless to prevent.[12] If courts limit the exception to situations in which a prospective employer actually compels an employee to disclose a previous employer's defamatory statements about the employee, the compelled self-publication exception affords protection to employees without unjustifiably increasing employer liability.[13] Additionally, employers already have a strong protection against defamation liability because courts consider any communication between an employer and an employee conditionally privileged unless the employer maliciously communicates the statement.[14] Recognition of compelled self-publication enables a wrongfully discharged employee to state a prima facie case of defamation against his former employer by showing that the employer's defamatory statements caused the injuries that the employee suffered.[15]

Although some courts have recognized the validity of the self-publication doctrine, most courts, acknowledging that defamation law seeks to protect an individual's reputational interests, have required a plaintiff claiming defamation to show that a defendant published a defamatory statement to a third person.[16] Courts generally have recognized that the communication of defamatory statements only to the defamed person is not sufficient publication to support a defamation claim because, without reaching a third party, the defamatory statements cannot injure the defamed person's reputation.[17] Additionally, courts have refused to hold a defamer liable if, after he communicates defamatory statements to the subject of the defamatory remarks, the subject voluntarily discloses the defamatory statements

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12. *See infra* notes 101-109 and accompanying text (discussing former employer's responsibility for employee's inability to obtain work and employee's inability to avoid injury).

13. *See infra* notes 126-128 and accompanying text (discussing how proper limitations on compelled self-publication exception would prevent employees from bringing warrantless claims against former employers and ensure that employees would mitigate damages).

14. *See infra* notes 130-141 and accompanying text (discussing employers' conditional privilege to defame employees); *see also* 50 AM. JUR. 2D *Libel and Slander* §273, at 791 (1970).

15. *See infra* note 99 and accompanying text (discussing long-recognized exception to defamation publication requirement that allows plaintiff to establish publication if defendant communicated defamatory statements only to plaintiff and plaintiff communicated statements to third persons).

16. *See, e.g.*, Washington Annapolis Hotel Co. v. Riddle, 171 F.2d 732, 737 (D.C. Cir. 1948) (defendant must communicate defamatory statements to third party before plaintiff may recover for defamation); Wilcox v. Moon, 64 Vt. 450, ____, 24 A. 244, 245 (1892) (courts may not hold defendants liable for defaming plaintiffs unless defendants published defamatory statement to third persons); KEETON, *supra* note 5, § 113 at 797 (communication to third party is essential to impose defamation liability on defendant); 50 AM. JUR. 2D Libel and Slander § 146, at 652-53 (1970) (defendant must publish defamatory statements to third parties before defamed person may recover for defamation).

17. *See supra* notes 5-6 and accompanying text (discussing common-law requirement that defendant must communicate defamatory statements about plaintiff to third party to be liable for defamation).

to third parties.[18] For example, in *Shepard v. Lamphier*[19] the Supreme Court of the State of New York, adopting the defamation common-law publication requirement, refused to hold a defendant liable for defamation after the plaintiff had disclosed to third parties defamatory statements that the defendant had communicated only to the plaintiff.[20] In *Shepard* the defendant anonymously sent the plaintiff an allegedly defamatory letter and asked the plaintiff to keep the contents of the letter confidential.[21] The plaintiff, indignant over the letter's possible defamatory inferences, showed the letter to the postal authorities and, with the authorities' assistance, discovered the defendant's identity.[22] The *Shepard* court, in considering whether the defendant had "published" the letter for purposes of defamation liability, recognized that only the plaintiff publicly had communicated the contents of the allegedly defamatory letter.[23] The *Shepard* court explained that publication could not occur until defamatory matter had been communicated to a third person.[24] The New York court, however, further explained that if only the defamed person communicated the defamatory matter to third persons, the defamed person, not the originator of the defamatory statements, had published the defamation.[25] The *Shepard* court recognized that the requirement that the originator publish the defamatory statements to third persons exists because courts intend for the defamation cause of action to remedy the injury that a defamer, by publishing defamatory statements, causes to a defamed person's reputation.[26] The New York court reasoned that, because the defamed person could not have suffered any reputational

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18. *See* Shoemaker v. Friedberg, 80 Cal. App. 2d 911, ____, 183 P.2d 318, 322 (1947) (defendant is not liable for defamation if plaintiff disclosed to third parties contents of letter stating that plaintiff had venereal disease); Shepard v. Lamphier, 84 Misc. 498, 503, 146 N.Y.S. 745, 748 (N.Y. Sup. Ct. 1914) (plaintiff cannot recover for injuries that plaintiff created by making defamatory comments public); Sylvis v. Miller, 96 Tenn. 94, ____, 33 S.W. 921, 922 (1896) (defendant is not liable for publication of defamatory letter mailed to plaintiff because only plaintiff exhibited contents of letter to third persons).

19. 84 Misc. 498, 146 N.Y.S. 745 (N.Y. Sup. Ct. 1914).

20. Shepard v. Lamphier, 84 Misc. 498, 503, 146 N.Y.S. 745, 748 (N.Y. Sup. Ct. 1914).

21. *Id.* at 499, 146 N.Y.S. at 746. In *Shepard v. Lamphier* the defendant, in the letter that he sent to the plaintiff, offered the plaintiff five dollars and suggested that the plaintiff meet the defendant for a "good time." *Id.* The plaintiff claimed that the defendant had defamed the plaintiff by implying that the plaintiff was a woman of immoral character who would consort with the defendant for monetary gain. *Id.* at 499-500, 146 N.Y.S. at 746. The *Shepard* court, however, determined that the letter did not charge the plaintiff with past or present immoral conduct, but only offered a mere proposition for future indiscretions. *Id.* at 501-02, 146 N.Y.S. at 747-48. The *Shepard* court, therefore, concluded that the contents of the letter were not defamatory. *Id.* at 502, 146 N.Y.S. at 748. Although the *Shepard* court could have sustained the defendant's demurrer solely on the grounds that the defendant had not defamed the plaintiff, the court nonetheless chose to address the issue of whether the defendant had "published" the letter to third persons. *Id.* at 503, 146 N.Y.S. at 748.

22. *Id.* at 500, 146 N.Y.S. at 746-747.

23. *Id.* at 503, 146 N.Y.S. at 748.

24. *Id.*

25. *Id.*

26. *Id.*

injury until a third person learned of the defamatory matter, the plaintiff could have prevented any reputational injury by choosing not to disclose the contents of the allegedly defamatory letter to a third party.[27] The *Shepard* court concluded that, because only the defamed person had published the defamatory matter to third persons, the defamed person could not complain of injuries that the defamed person had created by making the defamation public.[28]

Although the common-law publication requirement generally requires that a defamer publish defamatory statements to a third party before the defamer can be liable for defamation, some courts have developed an exception to the traditional common-law publication requirement.[29] Under the exception to the defamation publication requirement, some courts have recognized that if an originator of a defamatory communication intends or has reason to suppose that third persons will learn of the contents of the communication in the ordinary course of events, the originator is responsible for the publication of the defamatory statements to the third persons.[30] These courts have based their recognition of this exception to the publication requirement on findings that the originator's defamatory statements caused the injuries that the defamed person suffered.[31] For example, in *Hedgpeth*

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27. *Id.*

28. *Id.*

29. *See, e.g.*, Rumney v. Worthley, 186 Mass. 144, ____, 71 N.E. 316, 316-17 (1904) (recognizing exception to defamation publication requirement); Hedgpeth v. Coleman, 183 N.C. 309, ____, 111 S.E. 517, 519-20 (1922) (same); Bretz v. Mayer, 1 Ohio Misc. 59, ____, 203 N.E.2d 665, 669-71 (1963) (same).

30. *See, e.g.*, Rumney v. Worthley, 186 Mass. 144, ____, 71 N.E. 316, 316-17 (1904) (because defendant knew that plaintiff's daughter often opened and read letters addressed to plaintiff, defendant reasonably could foresee that daughter would open and read defamatory letter that defendant sent to plaintiff); Hedgpeth v. Coleman, 183 N.C. 309, ____, 111 S.E. 517, 520 (1922) (defendant could have foreseen that, as natural and probable result of sending letter to fourteen-year-old plaintiff threatening plaintiff with prosecution for theft, plaintiff would show letter to his older brother to seek advice); Bretz v. Mayer, 1 Ohio Misc. 59, 203 N.E.2d 665, 670-71 (1965) (defendant reasonably could foresee that plaintiff, a minister, would show letter threatening plaintiff with legal action to others with interest in minister's church); *see also* Annotation, *Libel and Slander: Publication by Accidental Communication, or Communication Only to Plaintiff*, 92 A.L.R.2D 219, 229-31 (1963) (discussing courts' recognition of "reasonably foreseeable republication" exception to defamation publication requirement); Annotation, *Libel and Slander: Communication of Defamatory Matter Only to Person Defamed as a Publication Which Will Support a Civil Action*, 24 A.L.R. 237, 237-46 (1923) (same). If a reasonable person would recognize that a defamer's action creates an unreasonable risk that the defamatory matter will reach a third person, the defamer's action becomes a "negligent communication" that amounts to a publication. RESTATEMENT (SECOND) OF TORTS § 577 comment k (1977).

31. *See* Allen v. Wortham, 89 Ky. 485, ____, 13 S.W. 73, 74 (1890) (if defendant, in sending defamatory letter to illiterate plaintiffs, knew that someone would have to read letter to plaintiffs, defendant published defamation by proximately causing plaintiffs to show letter to third parties); Hedgpeth v. Coleman, 183 N.C. 309, ____, 111 S.E. 517, 519-20 (1922) (since defendant must have foreseen that plaintiff, because of his immaturity, would reveal contents of defamatory letter to plaintiff's elders, defendant was liable for publishing defamatory statements because defendant's sending of letter proximately caused publication).

v. Coleman[32] the Supreme Court for the State of North Carolina considered whether a plaintiff could recover for defamation if only the plaintiff had communicated the defendant's defamatory statements to third persons.[33] In *Hedgpeth* the defendant sent to a fourteen-year-old boy, the plaintiff, a letter in which the defendant accused the plaintiff of theft and threatened the plaintiff with prosecution.[34] The plaintiff, seeking advice, showed the letter to his older brother who then showed the letter to their father.[35] The defendant claimed that he could not be liable for defamation because the plaintiff voluntarily had published the letter to third persons.[36] The *Hedgpeth* court determined that the plaintiff had not voluntarily disclosed the contents of the defamatory letter to third persons because the plaintiff's circumstances had forced the plaintiff to show the letter to his brother.[37] The *Hedgpeth* court reasoned that the defendant reasonably must have foreseen that, because of the plaintiff's youth and immaturity, the plaintiff would seek advice if threatened with criminal prosecution.[38] The *Hedgpeth* court determined that, because the defendant must have foreseen that threatening a young boy with criminal prosecution would compel the boy to disclose the letter to third persons, the defendant, by sending the letter to the plaintiff, proximately caused the publication of the letter to third parties.[39]

While courts have recognized the foreseeable republication exception to the defamation publication requirement for nearly one hundred years,[40] courts traditionally have not applied the exception to situations in which a discharged employee discloses to prospective employers defamatory statements that the employee's former employer made in discharging the employee.[41] In the context of employment termination, a defamatory

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32. 183 N.C. 309, 111 S.E. 517 (1922).

33. Hedgpeth v. Coleman, 183 N.C. 309, ____, 111 S.E. 517, 519 (1922)

34. *Id.* at ____, 111 S.E. at 518.

35. *Id.*

36. *Id.* at ____, 111 S.E. at 519.

37. *Id.* at ____, 111 S.E. at 520. The *Hedgpeth* court recognized that, if a defamed person, out of necessity, disclosed defamatory matter to third persons, the originator of the defamatory matter could be liable for defamation if the originator had reason to know of the circumstances that made the plaintiff's disclosure necessary. *Id.* The North Carolina court reasoned that necessity could arise if circumstances compelled the defamed person to repeat defamatory statements to third persons. *Id.*

38. *Id.*

39. *Id.*

40. *See* Allen v. Wortham, 89 Ky. 495, ____, 13 S.W. 73, 74 (1890) (recognizing exception to general publication requirement in situations in which defamer could foresee that defamed person necessarily would disclose defamatory statements to third parties); Schmuck v. Hill 2 Neb. Unoff. 79, ____, 96 N.W. 158, 158 (1901) (recognizing exception to general publication requirement in situations in which defendant intended that third parties read defamatory statements about plaintiff).

41. *See* Sarratore v. Longview Van Corp., 666 F. Supp. 1257, 1264 (N.D. Ind. 1987) (recognizing that Indiana courts had not adopted compelled self-publication doctrine in employee discharge context); Lunz v. Neuman, 48 Wash. 2d 26, ____, 290 P.2d 697, 701-02 (1955) (failing to address foreseeable republication exception to defamation publication requirement in employee discharge context).

communication indicates a former employee's unfitness for a particular position or otherwise adversely affects his job prospects.[42] Traditionally, however, courts have held employers liable for statements that defame employees only if the employers made the statements to a third party.[43] Employers have argued that the foreseeable republication exception should not apply to employment termination situations because recognition of the exception will expose employers to increased and unwarranted defamation liability.[44] Additionally, employers have argued that the recognition of the foreseeable republication exception to the publication requirement will reduce the level of communication between employers and employees because employers will cease giving dismissed employees the reasons for the employees' dismissals.[45]

Although employers have argued against extending the foreseeable republication exception to the publication requirement to employment discharge situations, the Supreme Court for the State of Minnesota in *Lewis v. Equitable Life Assurance Society of the United States*[46] applied a form of the foreseeable republication exception to employment discharge situations by recognizing the doctrine of compelled self-publication.[47] The *Lewis*

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42. *See* M.F. Patterson Dental Supply Co. v. Wadley, 401 F.2d 167, 170 (10th Cir. 1968) (letters that injured plaintiff's ability to earn livelihood and that caused employers to refrain from hiring plaintiff were defamatory); Washer v. Bank of Am. Nat'l Trust & Sav. Ass'n, 21 Cal. 2d 822, ____, 136 P.2d 297, 300 (1943) (defamatory words may tend to injure defamed person in his profession, trade, or business); Louisville Taxicab & Transfer Co. v. Ingle, 229 Ky. 578, ____, 17 S.W.2d 709, 710 (1929) (words that impute employee's unfitness to perform employment duties or that prejudice plaintiff in plaintiff's profession or trade are defamatory per se).

43. *See* Lunz v. Neuman, 48 Wash. 2d 26, ____, 290 P.2d 697,701-02 (1955) (employer is not liable for defamation if discharged employee voluntarily discloses to prospective employers allegedly defamatory reasons that employer gave to employee for employee's discharge); *see also infra* note 116 (discussing *Lunz* decision).

44. *See New Twist to Defamation Suits*, A.B.A. J., May 1, 1987, at 17 [hereinafter *New Twist*] (discussing employers' argument that recognition of compelled self-publication doctrine exposes employers to increased defamation liability); *Fired Employees Turn the Reason For Dismissal Into a Legal Weapon*, Wall St. J., Oct. 2, 1986, at 33, col. 4 (same).

45. *See New Twist*, *supra* note 44, at 17 (discussing likelihood that, in response to compelled self-publication doctrine, employers will cease informing employees of reasons for employees' dismissals).

46. 389 N.W.2d 876 (Minn. 1986).

47. Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876 (Minn. 1986). The compelled self-publication exception to the defamation publication requirement applies to employment discharge situations if circumstances compel a discharged employee to repeat to prospective employers defamatory statements that the employee's former employer made in discharging the employee. *See id.*, 389 N.W.2d at 888 (compelled self-publication doctrine applies if circumstances compel plaintiff to repeat defamatory statements to third person and defendant can foresee compulsion). The foreseeable republication exception to the defamation publication requirement, however, may apply in situations in which no compulsion is present. *See supra* note 30 and accompanying text (explaining that foreseeable republication exception applies in any situation in which the originator of defamatory statements reasonably can foresee that plaintiff will disclose defendant's defamatory statements to third person). The compelled self-publication exception, therefore, is a subset of the traditional foreseeable

court considered whether an employer can be liable for defaming an employee if only the employee has published defamatory communications to a third party.[48] In *Lewis* the defendant employer, Equitable Life Assurance Society of the United States ("Equitable Life"), terminated the employment of four plaintiffs for "gross insubordination" after the plaintiff employees refused to alter expense reports for expenses that the employees had incurred reasonably and in good faith.[49] Although the company never communicated the reason for the plaintiffs' dismissals to anyone other than the four plaintiffs, prospective employers, in job interviews following the plaintiffs' firings, asked the plaintiffs for the reasons that the plaintiffs had left their positions at Equitable Life.[50] The plaintiffs informed prospective employers that Equitable Life had fired the plaintiffs for gross insubordination.[51] As a result, only one of the four plaintiffs was able to obtain employment after telling the truth about her dismissal from Equitable Life.[52]

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republication exception. *Compare Lewis*, 389 N.W.2d at 886-88 (illustrating compelled self-publication exception) *with* Rumney v. Worthley, 186 Mass. 144, ____, 71 N.E. 316, 316-17 (1904) (illustrating foreseeable republication exception).

48. *Id.* at 886.

49. *Id.* at 880-81. In *Lewis v. Equitable Life Assurance Society of the United States* the defendant, Equitable Life Assurance Society of the United States (Equitable Life), had hired the four plaintiffs as dental claim approvers in the company's St. Paul office. *Id.* at 880. After a short time, the company requested that the plaintiffs travel to Pittsburgh to assist the company's Pittsburgh office. *Id.* As the plaintiffs prepared to travel to Pittsburgh, a supervisor gave them incorrect and incomplete instructions concerning reimbursement for travel expenses. *Id.* at 880-81. Upon the plaintiffs' return, company management instructed the plaintiffs to fill out detailed expense reports for their trip. *Id.* at 881. After the plaintiffs submitted their reports, company management requested that the plaintiffs remove certain entries from the plaintiffs' expense reports because the entries involved expenses not recoverable under company policy. *Id.* Although the plaintiffs contended that the company supervisor had indicated before the plaintiffs' departure for Pittsburgh that these excluded expenses were recoverable, the plaintiffs complied with management's request. *Id.* After the plaintiffs had complied with the request, however, the company management again instructed the plaintiffs to change their reports and, in effect, to lower each report by two hundred dollars. *Id.* After the management had requested that the plaintiffs lower their reports by two hundred dollars, the company finally gave the plaintiffs correct written guidelines for completing expense reports. *Id.* The company made three additional requests to the plaintiffs to revise their expense reports, including a request from a manager at the company's regional office. *Id.* The plaintiffs refused to change their reports, arguing that they had incurred the reported expenses in good faith and according to the instructions they had received before the trip. *Id.* Subsequently, the regional office ordered the St. Paul office manager to fire the four plaintiffs, but not until the manager had collected money from two of the plaintiffs who had agreed to make a refund to the company. *Id.* The office manager asked the plaintiffs once more to change their reports, and, upon their refusals, fired the plaintiffs for gross insubordination. *Id.*

50. *Id.* at 882. In *Lewis* the defendant, Equitable Life, had a policy of giving to inquiring prospective employers only the dates of employment and final job title of a former employee unless the former employee, in writing, expressly had authorized Equitable Life to release additional information regarding the employee's employment with Equitable Life. *Id.*

51. *Id.*

52. *Id.* One of the plaintiffs in *Lewis*, in attempting to find a new job after Equitable Life had fired her, misrepresented to a prospective employer her reason for leaving Equitable

The plaintiffs in *Lewis* brought suit against the defendant, claiming that Equitable Life had defamed the plaintiffs by firing the plaintiffs for gross insubordination.[53] Equitable Life denied that it could be liable for defamation because Equitable Life had not published the allegedly defamatory statements about the plaintiffs to any third parties.[54] Equitable Life argued that, because only the plaintiffs had published the defendant's allegedly defamatory statements to third parties, the plaintiffs could not satisfy the common-law defamation publication requirement.[55] The plaintiffs, however, argued that, even though the defendant had not published the defamatory statements to a third party, the defendant was liable for defamation because Equitable Life knew that the plaintiffs would have to repeat the reason for their dismissals to prospective employers.[56] The *Lewis* court recognized that, generally, a defendant will not be liable for defamation unless the defendant communicates a defamatory statement to a third party.[57] The *Lewis* court, however, acknowledged that, even if the originator of a defamatory statement does not publish the statement to a third party, circumstances may compel a defamed person to reveal a defamatory statement to a third person.[58] The *Lewis* court determined that a prospective employer's request to a fired employee for the reason that the employee left his previous job could compel the employee to reveal the reason for the employee's dismissal, even if the reason was defamatory.[59] The *Lewis* court reasoned that a defendant employer, as originator of defamatory statements, could foresee that prospective employers would ask a fired employee for the reason that the employee had left his previous employment position.[60] The Minnesota court determined that, because an employer could foresee the circumstances

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Life. *Id.* A second plaintiff left blank the space on a job application that requested the plaintiff to disclose the reasons that she had left her last job. *Id.* Neither of these employees had been able to obtain employment until resorting to dishonest actions. *Id.* A third plaintiff could find only part-time work after her dismissal from Equitable Life. *Id.*

53. *Id.* at 880. In addition to claiming that the defendant, Equitable Life, had defamed them, the plaintiffs in *Lewis* claimed that Equitable Life had discharged them in breach of the plaintiffs' employment contracts. *Id.*

54. *Id.* at 886.

55. *Id.*

56. *Id.* at 880.

57. *Id.* at 886.

58. *Id.*

59. *Id.* at 888. The *Lewis* court determined that the prospective employers' requests for the reasons that the plaintiffs had left their previous employment positions compelled the plaintiff employees to reveal the defamatory reasons that the defendant employer had given them. *Id.* The Minnesota court reasoned that the plaintiffs, in interviewing for new employment positions, reasonably had to explain why they had left their previous jobs. *Id.* The *Lewis* court recognized that, when asked why the employees had left their last jobs, the employees could have answered that their employer had fired them for gross insubordination or could have lied about the reasons for their dismissals. *Id.* The *Lewis* court expressly determined that, since fabrication was not an acceptable alternative to revealing the reasons for the employees' dismissals, the prospective employers' requests for the reasons that the plaintiffs had left their last jobs compelled the plaintiffs to repeat the defamatory statements. *Id.*

60. *Id.*

that could compel a fired employee to repeat an employer's defamatory statement regarding the employee's dismissal, a defendant employer could be liable for defamation even if the employer himself had not published the defamatory statement to a prospective employer or other third party.[61] The *Lewis* court, considering the facts in *Lewis*, expressly determined that prospective employers had compelled the discharged employees to repeat Equitable Life's defamatory statements and that the employees were unable to obtain new employment because of Equitable Life's communication of the defamatory statements to the employees.[62] Accordingly, the *Lewis* court concluded that the defendant was liable for defamation even though the defendant had communicated the statements only to the defamed employees.[63]

Although the *Lewis* decision appears novel, other courts prior to the *Lewis* decision have allowed discharged employees to recover in defamation actions against former employers even though the former employers never had published defamatory statements about the employees to prospective employers.[64] For example, the Court of Appeals for the State of Georgia, in *Colonial Stores, Inc. v. Barrett*,[65] recognized that an employer who makes a defamatory statement about a discharged employee only to the employee may be liable for defamation if government regulations compel the employee to disclose the defamatory statements to prospective employers.[66] The *Colonial Stores* court considered whether a defendant employer could be liable for defamation if a plaintiff employee communicated to prospective employers defamatory statements that the defendant had made about the plaintiff.[67] In *Colonial Stores* the defendant employer, after terminating a

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61. *Id.*

62. *Id.*

63. *Id.*

64. *See, e.g.*, McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 797-98, 168 Cal. Rptr. 89, 94 (1980) (employer may be liable for defamatory statements that employer makes only to discharged employee if employee repeats defamatory statements to prospective employers); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (same); Grist v. Upjohn Co., 16 Mich. App. 452, ____, 168 N.W.2d 389, 405-406 (Mich. Ct. App. 1969) (same); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 701-02 (Tex. Civ. App. 1980) (same).

65. 73 Ga. App. 839, 38 S.E.2d 306 (Ga. Ct. App. 1946).

66. Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 308 (1946).

67. *Id.* at ____, 38 S.E.2d at 307. In *Colonial Stores, Inc. v. Barrett* the Court of Appeals for the State of Georgia recognized that War Manpower Commission regulations covered the terms of the plaintiff's employment. *Id.* at ____, 38 S.E.2d at 307. Under War Manpower Commission regulations, employers, upon discharging an employee, were to give the employee either a statement of availability or a restricted statement of availability. *Id.* If an employee received a restricted statement of availability, the employee could not apply for new employment unless he received a referral from the United States Employment Service. *Id.* Furthermore, Commission regulations forbade employers from making any comments in restricted statements of availability that would prejudice former employees' employment prospects. *Id.* at ____, 38 S.E.2d at 308. The regulations also stated that a prospective employer could not hire a job applicant unless the applicant produced for the prospective

plaintiff's employment, gave the plaintiff a certificate of separation ("the certificate"), which was a document that the government required employers to give to discharged employees.[68] In violation of governmental regulations, the defendant wrote on the certificate that the plaintiff had acted with "improper conduct toward fellow employees," knowing that the same government regulations would compel the plaintiff to present the certificate to prospective employers.[69] Although the *Colonial Stores* plaintiff attempted to find other employment, prospective employers refused to hire the plaintiff because of the employer's written statement that the employer had fired the plaintiff for improper conduct.[70]

At trial the defendant in *Colonial Stores* argued that, since the defendant never had communicated the information on the certificate to anyone except the plaintiff, the defendant had not published the allegedly defamatory statement.[71] The *Colonial Stores* court acknowledged that publication of defamatory matter is necessary for recovery in a defamation claim and that, generally, publication does not occur if a defamed person communicates defamatory matter to third persons.[72] The *Colonial Stores* court, however, recognized an exception to the general rule that publication does not occur if a defamed person communicates defamatory matter to third persons.[73] The Georgia court explained that, in situations in which a defamed person discloses defamatory statements to a third person, the causal relationship between the original defamation and the subsequent disclosure determines whether publication has occurred.[74] The *Colonial Stores* court recognized that publication may occur if a defamer intends or has reason to believe that the defamatory communication from the defamer to the defamed person will come to the attention of third persons.[75] The *Colonial Stores* court determined that this exception to the publication requirement especially applied in situations in which a defamed person must disclose another's defamatory statements.[76] After finding that the plaintiff's presentments of the certificate to prospective employers were necessary and that the defendant employer knew that government regulations would require the plaintiff

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employer a statement of availability from the applicant's prior employer or a United States Employment Service referral card. *Id.* at ____, 38 S.E.2d at 307. The defendant employer issued certificates of separation, which were the equivalents of restricted statements of availability, to its discharged employees. *Id.*

68. *Id.* at ____, 38 S.E.2d at 308.

69. *Id.*

70. *Id.* at ____, 38 S.E.2d at 307-308. The *Colonial Stores* court determined that prospective employers refrained from hiring the plaintiff solely because the defendant had written a defamatory statement on the plaintiff's certificate of separation. *Id.* at ____, 38 S.E.2d at 308.

71. *Id.* at ____, 38 S.E.2d at 307.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

to make the presentments, the *Colonial Stores* court reasoned that the presentments were publications for which the defendant was liable.[77] The *Colonial Stores* court, therefore, concluded that, if an employee, pursuant to a statutory requirement, must inform prospective employers of the false and defamatory reason that he left his previous employment, his former employer may be liable for publication of the statement if the former employer knew that the employee would have to repeat the statement to prospective employers.[78]

Although the *Colonial Stores* court determined that an employer could be liable for defamation if government regulations foreseeably compelled a defamed employee to republish the employer's defamatory statements, the Court of Appeals for the State of Michigan in *Grist v. Upjohn Co.*[79]

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77. *Id.* at ____, 38 S.E.2d at 308.

78. *Id.* Following its decision in *Colonial Stores*, the Court of Appeals for the State of Georgia in *Brantley v. Heller* significantly limited the impact of the *Colonial Stores* decision. *Compare* Brantley v. Heller, 101 Ga. App. 16, 21, 112 S.E.2d 685, 689 (Ga. Ct. App. 1960) (dictum) (unless government regulations require discharged employee to disclose to prospective employers former employer's defamatory statement, discharged employee may not recover for defamation) *with Colonial Stores*, 73 Ga. App. at 840-41, 38 S.E.2d at 307-08 (if government regulations foreseeably require discharged employee to disclose to prospective employers former employer's defamatory statement, former employer may be liable for defamation). The *Brantley* court considered whether an employer could be liable for defamation if a discharged employee exhibited an allegedly defamatory separation notice to prospective employers. *Brantley* 101 Ga. App. at 16-17, 112 S.E. at 686. In *Brantley* the defendant employer, complying with a state statute, delivered to the discharged employee a separation notice that discussed the reason for the employee's dismissal. *Id.* at 20, 112 S.E.2d at 688. The employee alleged that he was forced to show the separation notice to prospective employers because prospective employers would not hire him unless the employee revealed the reasons that the employee left his previous job. *Id.* at 16-17, 112 S.E.2d at 687. The *Brantley* court determined that the allegedly defamatory statement was absolutely privileged because the defendant made the statement in compliance with a valid public regulation. *Id.* at 20-21, 112 S.E.2d at 689.

The *Brantley* court distinguished *Colonial Stores* by stating that, while federal regulations required the plaintiff in *Colonial Stores* to present his certificate of separation to prospective employers, no regulations required the *Brantley* plaintiff to exhibit the separation notice. *Id.*; *see Colonial Stores*, 73 Ga. App. at 841, 38 S.E.2d at 307-08 (if government regulations foreseeably require discharged employee to disclose former employer's defamatory statement to prospective employers, former employer may be liable for defamation). The *Brantley* court, therefore, refused to hold a former employer liable for an employee's publications to prospective employers of the reason that the former employer discharged the employee. *Brantley*, 101 Ga. App. at 21, 112 S.E.2d at 689. By holding that the plaintiff did not have to exhibit the separation notice and, therefore, did not have to tell prospective employers the reason that his former employer had fired him, the *Brantley* court implied that, absent a federal or state regulation to the contrary, job applicants may lie to prospective employers about the reasons for leaving their previous employment. *Id.* at 21, 112 S.E.2d at 689.

While the *Brantley* court's determination concerning publication was dictum, the Georgia Court of Appeals in *Sigmon v. Womack* held that publication does not occur if a discharged employee voluntarily discloses to prospective employers that a previous employer had fired the employee from a previous job. *See* Sigmon v. Womack, 158 Ga. App. 47, 49, 279 S.E.2d 254, 257 (1981) (if government regulations did not require discharged employee to disclose former employer's defamatory statement to prospective employers, discharged employee's voluntary disclosure did not constitute publication of defamation).

79. 16 Mich. App. 452, 168 N.W.2d 389 (Mich. Ct. App. 1969).

determined that, even if no statute compelled a dismissed employee to communicate defamatory reasons for his dismissal, an employer could be liable for defamation if the employer could foresee that the dismissed employee would republish the employer's defamatory statements.[80] The *Grist* court considered whether a plaintiff successfully could recover for defamation even though the defendant had made the allegedly defamatory statements only to the plaintiff.[81] In *Grist* a plaintiff employee claimed that her former employer had given false and defamatory reasons for her dismissal.[82] In considering whether to hold the employer responsible for publication, the *Grist* court recognized the existence of an exception to the general rule that the communication of defamatory matter only to the defamed person does not constitute publication.[83] The Michigan court explained that publication may occur if the originator of defamatory statements intends or has reason to believe that, as a natural consequence of the originator's actions, the defamatory statements will come to the knowledge of some third person.[84] The *Grist* court concluded that this exception could apply in the employment discharge context if an employer, in terminating an employee's employment, communicated a defamatory statement regarding the employee's work performance only to the dismissed employee.[85] The *Grist* decision implies that employers should expect discharged employees to inform prospective employers of the reasons that employers gave for the employees' dismissals from their previous employment.[86]

Like the *Grist* court, the Court of Appeals for the State of California in *McKinney v. County of Santa Clara*[87] recognized in employment termination situations a compelled self-publication exception to the defamation

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80. Grist v. Upjohn, 16 Mich. App. 452, , 168 N.W.2d 389, 405-06 (1969).

81. *Id.* at ____, 168 N.W.2d at 405. In *Grist v. Upjohn Co.* a plaintiff originally brought suit against her former employer for slander and for wrongful interference. *Id.* at ____, 168 N.W.2d at 391. A jury returned a verdict in favor of the plaintiff for $47,000. *Id.* The trial judge granted the defendant's motion for a new trial on the ground of juror misconduct. *Id.* The trial court determined that one of the jurors had failed to disclose that a previous employer had fired the juror for cause. *Id.* The plaintiff appealed the trial court's decision to grant the defendant's motion for a new trial. *Id.* The defendant in *Grist* cross-appealed, asserting that the trial court erred in instructing the jury to find publication even if the defendant had made the slanderous statements only to the plaintiff. *Id.* at ____, 168 N.W.2d at 405. Although the Michigan Court of Appeals did not find error in the trial court's publication instruction, the court affirmed the trial court's order granting a new trial because of juror misconduct and because of an erroneous jury instruction on the degree of fault necessary to find the defendant liable for defamation. *Id.* at ____, 168 N.W.2d at 408.

82. *Id.*

83. *Id.* at ____, 168 N.W.2d at 405; *see* Annotation, *Libel and Slander: Communication of Defamatory Matter Only to Person Defamed as a Publication Which Will Support a Civil Action*, 24 A.L.R. 237, 242-244 (1923) (discussing general common-law publication rule and exception to general rule).

84. *Grist*, 16 Mich. App. at ____, 168 N.W.2d at 405.

85. *Id.* at ____, 168 N.W.2d at 405-406.

86. *Id.*

87. 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980).

publication requirement.[88] In *McKinney* the plaintiff, while seeking employment after the county had fired him, repeated to prospective employers certain defamatory statements that the defendant made in dismissing the plaintiff.[89] The *McKinney* plaintiff asserted that the defendant, as the originator of defamatory statements, should be liable for any foreseeable repetitions of the statements.[90] The defendant, however, argued that the court should not allow the plaintiff to recover for injuries that the plaintiff caused himself by making public the defamatory statements.[91] The *McKinney* court agreed with the plaintiff that a job applicant is under a strong compulsion to repeat the defamatory reasons for his dismissal to prospective employers.[92] The California court further explained that an employer should know that a discharged employee might be compelled to repeat to third parties the defamatory statements that the employer makes in discharging the employee.[93] The *McKinney* court determined that an employer should be liable for defamation if the employer could foresee that circumstances would compel a former employee to disclose to third parties the defamatory statements that the employer made about the employee.[94] The *McKinney* court based the employer's liability on the strong causal link between the employer's defamatory statements and the injury to the employee that the employee's republication of those statements causes.[95] The *McKinney* court determined that the defamed person's communication of the defamatory statement to prospective employers does not weaken the causal link between the employer's defamatory statement and the employee's injury.[96]

Although the courts that have applied the compelled self-publication doctrine to employee discharge situations have used different terms to describe this exception to the publication requirement, the differences between the decisions appear minor.[97] Each court recognized the general defamation requirement that publication does not occur if the originator of defamatory statements communicates the statements only to the person that

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88. McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 796-98, 168 Cal. Rptr. 89, 93-95 (Cal. Ct. App. 1980).

89. *Id.* at 792, 168 Cal. Rptr. at 91. In *McKinney v. County of Santa Clara* the defendant had fired the plaintiff from the plaintiff's position as a probationary deputy sheriff for unreported reasons. *Id.* The defendant's supervisors made allegedly defamatory statements in reviewing the plaintiff's performance and announcing his dismissal. *Id.* Subsequently, the plaintiff applied for work as a police officer at various police departments. *Id.*

90. *Id.* at 795, 168 Cal. Rptr. at 93.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 797-98, 168 Cal. Rptr. at 94.

95. *Id.*

96. *See id.* (causal link between employer's defamatory statement and employee's injury is not weakened by fact that employee communicated statement to third party because employee compelled to communicate statement).

97. *See infra* notes 98-100 and accompanying text (discussing how courts that have recognized compelled self-publication have reasoned similarly).

the originator defames.[98] Additionally, each court recognized a long-standing exception to the publication requirement.[99] According to these courts, if an originator of defamatory statements reasonably could have foreseen that circumstances would compel the defamed person to repeat the defamatory statements to a third party, the originator is liable for publication after the defamed person, under compulsion, actually communicates the statements to a third party.[100]

Because the compelled self-publication exception applies if a defamed person is compelled to communicate statements to a third party, the courts, like *Lewis*, reasoned that the exception applies to situations in which an

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98. *See McKinney*, 110 Cal. App. 3d at 796, 168 Cal. Rptr at 93 (originator of defamatory statements generally is not liable for injury that results from defamatory statements if defamed individual discloses contents of statement to third persons); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 839, 38 S.E.2d 306, 307 (1946) (same); Grist v. Upjohn Co., 16 Mich. App. 452, , 168 N.W.2d 389, 405 (1969) (same); Lewis v. Equitable Life Assurance Soc'y of United States, 389 N.W.2d 876, 886 (Minn. 1986) (same).

99. *See* McKinney v. County of Santa Clara, 110 Cal. App. 787, 796, 168 Cal. Rptr. 89, 93 (Cal. Ct. App. 1980) (recognizing that courts have developed exception to general rule that originator is not liable for defamed person's republication of defamatory matter to third persons); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 840, 38 S.E.2d 306, 307 (1946) (same); Grist v. Upjohn Co., 16 Mich. App. 452, ____, 168 N.W.2d 389, 405 (1969) (same); Lewis v. Equitable Life Assurance Soc'y of United States, 389 N.W.2d 876, 886 (Minn. 1986) (same). Decisions recognizing compelled self-publication in an employee discharge context offer two slightly different definitions of the "foreseeable republication" exception. For example, the *Colonial Stores* and *Grist* courts recognized that the exception to the publication requirement makes the originator of defamatory statements liable if the originator intended or had reason to believe that, in the ordinary course of events, a third person would learn of the defamatory statements. *Colonial Stores*, 73 Ga. App. at 840, 38 S.E.2d at 307-08; *Grist*, 16 Mich. App. at ____, 168 N.W.2d at 405-06; *see also supra* notes 65-86 and accompanying text (discussing *Colonial Stores* and *Grist* decisions). The *McKinney* and *Lewis* courts, however, recognized that the compelled self-publication exception to the publication requirement applied if the originator of defamatory statements could foresee that circumstances would compel the defamed person to repeat the defamatory statements to third persons. *McKinney*, 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 93-94; *Lewis*, 389 N.W.2d at 886-88; *see supra* notes 46-63, 87-96 and accompanying text (discussing *Lewis* and *McKinney* decisions). Although the *Lewis* and *McKinney* decisions appear to impose a tougher foreseeability standard on plaintiff employees than the *Colonial Stores* and *Grist* decisions impose, both standards led to identical results when applied to an employment termination situation. *See McKinney*, 110 Cal. App. at 797-798, 168 Cal. Rptr at 94-95 (former employer may be liable for defamation if employer can foresee that prospective employers will require defamed employee to disclose former employer's defamatory statements about reason for employee's discharge); *Colonial Stores*, 73 Ga. App. at 840-41, 38 S.E.2d at 308 (same); *Grist*, 16 Mich. App. at ____, 168 N.W.2d at 405 (same); *Lewis*, 389 N.W.2d at 886 (same). Since nearly every employer requires job applicants to specify the reasons that the applicants left their previous employments, every discharging employer should be able to foresee that prospective employers will compel a discharged employee to reveal the reason that the employee left his employment with the discharging employer. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting) (complaining that foreseeable compulsion to republish reason for employee's dismissal occurs in almost every case of employee discharge).

100. *McKinney*, 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 93-94; *Colonial Stores*, 73 Ga. App. at 840, 38 S.E.2d at 307; *Grist*, 16 Mich. App. at ____, 168 N.W.2d at 405; *Lewis*, 389 N.W.2d at 886.

employer gives an employee a false and defamatory reason for the employee's discharge.[101] Because most prospective employers ask job applicants the reasons why the applicants left their previous jobs,[102] an applicant who was dismissed from his job most likely will have to inform a prospective employer of the reason for his dismissal.[103] The applicant's only options if asked why he left his previous employment are to inform the prospective employer of the stated reason for his dismissal or to lie to the prospective employer.[104] In determining that a prospective employer's request for the reason that an applicant left his previous job does not compel the applicant to repeat to prospective employers the reason that the applicant left his job, a court implies that an applicant may lie to the prospective employers.[105] Public policy, however, demands that courts not encourage job applicants to lie to prospective employers.[106] Courts have determined that an employer who discharges an employee should be able to foresee that prospective employers will compel the employee to repeat the reasons that the employee left his job.[107] A discharging employer knows that other employers, as a routine matter, will ask job applicants for the reasons the applicants left their previous employment positions.[108] Recognizing that employers reasonably can foresee that dismissed employees will repeat the statements the employers made in dismissing the employees, these courts have held employers liable

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101. *See McKinney*, 110 Cal. App. at 798, 168 Cal. Rptr. at 94-95 (employer may be liable for defamation if employer can foresee that circumstances will compel discharged employee to disclose defamatory statements that employer made to employee to prospective employers); *Colonial Stores*, 73 Ga. App. at 840-41, 38 S.E.2d at 308 (same); *Grist*, 16 Mich. App. at ____, 168 N.W.2d at 406 (same); *Lewis*, 389 N.W.2d at 888 (same).

102. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 896 (Minn. 1986) (Kelley, J., dissenting) (employers invariably ask job applicants for the reasons why the applicants left their previous employment positions); Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting) (same), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986).

103. Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986).

104. *Id.*

105. *Id.* The *Lewis* court rejected the argument that employees have the option to lie if prospective employers ask for the reasons for the employees' departures from the employees' previous jobs. *Id.* The *Lewis* court expressly stated that, if prospective employers ask for the reasons that employees left their previous jobs, the employees have no choice but to repeat the defamatory reasons that the employees' former employers gave to the employees. *Id.* By holding that circumstances compelled the employees to repeat the former employer's defamatory statements because the employees could not lie about the reasons that the employees had left their previous employment positions, the *Lewis* court implied that any court which holds that similar circumstances do not compel employees to repeat the defamatory statements must base its holding on a belief that the employees had the option to lie to prospective employers. *Id.*

106. *Id.*

107. *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 798, 168 Cal. Rptr. 89, 94-95; *Colonial Stores, Inc. v. Barrett*, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 308; *Grist v. Upjohn Co.*, 16 Mich. App. 452, ____, 168 N.W.2d 389, 405-06; *Lewis*, 389 N.W.2d at 888.

108. Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986).

for defamation if the employers' statements are false and defamatory.[109]

Although some courts have allowed plaintiff employees to recover for defamation if defendant employers could foresee that the employees would disclose the defendant employers' defamatory statements to prospective employers, not all courts have extended the foreseeable republication exception to the defamation publication requirement to the employment context.[110] For example, in *Churchey v. Adolph Coors Co.*,[111] the Court of Appeals for the State of Colorado rejected a fired employee's argument that, because her employer reasonably could have foreseen that the discharged employee would repeat to prospective employers allegedly defamatory statements the employer made in discharging the employee, the employer should be liable for defamation.[112] In *Churchey* a defendant employer told the plaintiff that the defendant was firing the plaintiff for dishonesty.[113] The plaintiff asserted

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109. *See McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787,798, 168 Cal. Rptr. 89, 94-95 (employer may be liable for allegedly defamatory statements that employer communicates to discharged employee if employer reasonably can foresee that circumstances will compel employee to repeat employer's statements to prospective employers); *Colonial Stores*, 73 Ga. App. 839, 840-41, 38 S.E.2d 306, 307-308 (same); *Grist*, 16 Mich. App. 452, ——, 168 N.W.2d 389, 405-406 (same); Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986) (same). If a discharged employee communicates to prospective employers the allegedly defamatory reason that a former employer gave the employee for the employee's dismissal, the former employer's original communication to the employee is a negligent communication. *See supra* note 30 (discussing definition of negligent communication). A negligent communication occurs if a defamer's conduct creates an unreasonable risk that the defamatory matter will come to the attention of a third person. RESTATEMENT (SECOND) OF TORTS § 577 comment k (1977). A negligent communication satisfies the defamation publication requirement as effectively as an intentional communication. *Id.* Since employers know that prospective employers will ask job applicants for the reasons that the applicants left their previous employments, a discharging employer who makes a defamatory statement to an employee creates an unreasonable risk that the discharged employee will communicate the statement to prospective employers. *See Lewis*, 389 N.W.2d at 888 (discharging employer could foresee that discharged employees would disclose employer's defamatory statements about employees to prospective employers). Employers who give discharged employees defamatory reasons for the employees' dismissals, therefore, may be liable for defamation if the employees repeat the defamatory reasons to prospective employers because the employers "negligently communicated" the reasons to the employees. *See* RESTATEMENT (SECOND) OF TORTS § 577 comment k (1977) (negligent communication satisfies defamation publication requirement).

110. *See* Churchey v. Adolph Coors Co., 725 P.2d 38, 41 (Colo. Ct. App. 1986) (finding no reason to adopt exception to general requirement that defamer must publish defamatory statements to third party in employment termination context); Lunz v. Neuman, 48 Wash. 2d 26, ——, 290 P.2d 697, 701-702 (1955) (publication cannot occur if defendant communicates defamatory material solely to plaintiff and plaintiff subsequently communicates material to third persons). *See generally infra* notes 111-19 and accompanying text (discussing decisions in which courts have refused to hold former employers liable for defamation after discharged employees disclosed to prospective employers defamatory statements that former employers made to employees).

111. 725 P.2d 38 (Colo. Ct. App. 1986).

112. Churchey v. Adolph Coors Co., 725 P.2d 38, 39 (Colo. Ct. App. 1986).

113. *Id.* In *Churchey v. Adolph Coors Co.* after the defendant fired the plaintiff, the plaintiff appealed her dismissal to a five-member appeals board pursuant to company policy.

that, after losing her job, no prospective employer would hire her after requiring her to disclose that her former employer had discharged her for dishonesty.[114] Like other courts, the *Churchey* court recognized that the originator of defamatory statements generally is not liable for defamation if the originator communicates the statements only to the defamed person because the originator has not published the statements.[115] The Colorado court noted that other jurisdictions had adopted a compelled self-publication exception to the defamation publication requirement.[116] The *Churchey* court, however, refused to hold former employers liable for a discharged employee's disclosure to prospective employers of the former employer's defamatory statements.[117] The Colorado court perceived no reason for recognizing a compelled self-publication exception to the publication requirement in employment termination situations.[118] The *Churchey* court, however, offered

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Id. Company policy entitled the plaintiff to select two of the members of the appeals board. *Id.* The appeal board, however, unanimously upheld the plaintiff's termination of her employment for dishonesty. *Id.*

114. *Id.* In *Churchey* the plaintiff claimed that, because each prospective employer's application form contained a request for the reason that plaintiff had left her previous employment, prospective employers compelled the plaintiff to disclose that a former employer had discharged the plaintiff and to disclose the reason the former employer stated for the discharge. *Id.*

115. *Id.* at 40.

116. *Id.*

117. *Id.* at 41. Like the *Churchey* court, the Supreme Court for the State of Washington, in *Lunz v. Neuman*, refused to hold an employer liable for defamation after a discharged employee stated in applications for employment that his former employer had fired the employee for theft. Lunz v. Neuman, 48 Wash. 2d 26, ____, 290 P.2d 697, 701-02 (1955). In *Lunz* a defendant employer fired the plaintiff after the defendant confronted the plaintiff about allegations that witnesses had seen the plaintiff removing groceries from the defendant's store without paying for them. *Id.* at ____, 290 P.2d at 699-701. The plaintiff testified that prospective employers required the plaintiff to disclose the reason that the plaintiff had left his previous employment. *Id.* at ____, 290 P.2d at 701. The defendant argued that, because the defendant never had published the allegedly defamatory statement to a third party, the plaintiff could receive no damages for injuries that resulted from the plaintiff's publication of the defendant's allegedly defamatory reason for firing the plaintiff. *Id.* The *Lunz* court determined that the well-settled rule, that a defendant does not publish defamatory material if the defendant communicates only to the defamed person, precluded an award of damages to the plaintiff. *Id.* at ____, 290 P.2d at 701-02. The Washington court, however, never rejected the foreseeable republication exception to the general rule because the plaintiff never presented the exception to the court for consideration. *Id.*

Although the *Lunz* court never considered any exception to the publication requirement, the United States District Court for the Northern District of Indiana, in *Sarratore v. Longview Van Corp.*, expressly considered whether to adopt the compelled self-publication doctrine. Sarratore v. Longview Van Corp., 666 F. Supp. 1257, 1263-64 (N.D. Ind. 1987). Like the *Churchey* court, the *Sarratore* court refused to apply the *Lewis* doctrine of compelled self-publication to employment termination situations. *Sarratore*, 666 F. Supp. at 1264. The *Sarratore* court, however, expressly decided not to reject the reasoning behind the doctrine. *Id.* Instead, the *Sarratore* court refused to recognize the exception under Indiana law because, absent clear evidence that the Indiana courts would recognize the compelled self-publication exception to the defamation publication requirement, the district court was unwilling to usurp the role of the Indiana courts in determining Indiana law. *Id.*

118. *Churchey*, 725 P.2d at 41.

no basis for distinguishing employment termination situations from those situations in which courts have held an originator of defamatory statements liable for a defamed person's foreseeably compelled republications.[119]

Although the *Churchey* court failed to offer any reasons for rejecting the compelled self-publication doctrine, critics of the doctrine argue that the self-publication doctrine discourages discharged employees from mitigating the damages that occur if employees repeat their former employers' defamatory statements about the employees' work performances.[120] These critics have argued that, because a discharged employee can attempt to contradict a former employer's defamatory statements by offering to prospective employers a true account of the events surrounding his dismissal, a discharged employee is in the best position to limit any injury his former employer's defamatory statements may cause the employee.[121] These critics have argued that the availability of a compelled self-publication claim removes the discharged employee's incentive to attempt to explain the true story of his dismissal.[122] Further, according to these critics, recognizing the self-publication doctrine in employee discharge situations unjustifiably will increase employer liability for defamation.[123] Defamation suits brought by discharged employees against their former employers presently account for approximately one-third of all defamation actions.[124] Critics claim that courts will increase the number of warrantless defamation claims by allowing discharged employees to recover damages for statements that an employer makes solely to a discharged employee.[125]

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119. *Id.*

120. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 896 (Minn. 1986) (Kelley, J., dissenting) (recognition of compelled self-publication doctrine in employment termination cases discourages plaintiffs from mitigating damages); Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting) (doctrine of self-publication inherently undermines mitigation principle), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986).

121. Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986).

122. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 896 (Kelley, J., dissenting) (any attempt to limit plaintiff's injury would work against plaintiff's self-interest by lowering plaintiff's potential recovery); *Lewis*, 361 N.W.2d at 884 (Forsberg, J., dissenting) (recognition of self-publication doctrine removes employee's incentive to contradict defamatory statements).

123. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 896 (Kelley, J., dissenting) (reasoning that majority's holding ensures employers' liability in all cases in which employers fired employees for any reason suggesting immorality, ineptness, or improbity); *Lewis*, 361 N.W.2d at 884 (Forsberg, J., dissenting) (any termination based on employee conduct or performance may give rise to defamation liability), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986); *see also* National L. J., May 4, 1987, at 30, col. 1 (discussing comment that employers must view every wrongful discharge as potential defamation case); *Fired Employees*, *supra* note 44 at 33, col. 4 (discussing argument that employers no longer can fire employees without risking liability for defamation).

124. *Fired Employees*, *supra* note 43, at 33, col. 4.

125. *See New Twist*, *supra* note 43, at 17 (discussing argument that, in states that do not recognize cause of action for wrongful discharge, discharged employees now will bring defamation suits to circumvent judicial proscription against wrongful discharge claims).

Although critics argue that courts unjustifiably will increase employer liability by recognizing the compelled self-publication exception in employee discharge situations, the *Lewis* court expressly determined that, if courts properly limit the self-publication cause of action, employers will not have to worry that employees would not mitigate damages or that employers' liability unjustifiably would increase.[126] The *Lewis* court reasoned that courts reasonably could ensure that plaintiffs would attempt to mitigate their damages by requiring plaintiffs to make reasonable attempts to explain the falsity of defamatory statements.[127] Addressing the issue of increased employer liability, the *Lewis* court asserted that plaintiffs could not manufacture unwarranted causes of action if courts imposed liability on defendants for plaintiffs' self-publication only when circumstances actually compelled plaintiffs to repeat the defendants' defamatory remarks.[128] Recognition of the compelled self-publication doctrine merely holds a defamer liable for the injury his defamatory statement causes a defamed person.[129]

In addition to the protections that proper limitation of the self-publication claim offers employers, employers possess a conditional privilege that protects employers against defamation liability for statements the employers make in discharging an employee.[130] A conditional privilege protects a privileged party from defamation liability unless the privileged party abuses the privilege.[131] In granting conditional privileges, courts have recognized that the law must protect the free flow of information in certain situations, even if the protection risks defamatory injury.[132] To protect the necessary free flow of information between employers, courts have protected employ-

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126. Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 888 (Minn. 1986).

127. *See id.* at 888 (plaintiffs, to mitigate their damages, only could attempt to explain to prospective employers true facts of plaintiffs' dismissals).

128. *Id. But see* Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 884 (Minn. Ct. App. 1985) (Forsberg, J., dissenting) (recognition of compelled self-publication in employment discharge situations will result in litigation in almost every case of employee discharge), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986).

129. *Id.*

130. *Lewis*, 389 N.W.2d at 890.

131. *See infra* notes 134-138 and accompanying text (discussing ways in which employers may lose their conditional privileges to defame employees).

132. *See* Iverson v. Frandsen, 237 F.2d 898, 899 (10th Cir. 1956) (public policy exempts certain communications from defamation liability as conditionally privileged); Coleman v. Newark Morning Ledger Co., 29 N.J. 357, ____, 149 A.2d 193, 203 (1959) (societal interest in ensuring freedom of disclosure of individuals communicating information in protection of self-interest or common interest mandates that courts grant conditional privileges to those individuals' communications); Lathan v. Journal Co., 30 Wis. 2d 146, 152, 140 N.W.2d 417, 420 (1966) (by granting conditional privileges against defamation liability to certain communications, courts recognize social utility of encouraging free flow of information in those communications). Generally, courts have granted a conditional privilege to communications in which the speaker makes a statement in good faith and in discharge of a public or private duty, or in matters in which the speaker has an interest. W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 115, at 825 (1984); RESTATEMENT (SECOND) OF TORTS §§ 594-98 (1977); 50 AM. JUR. 2D § 195, at 698-99 (1970).

ers from defamation liability for communications that the employers make about former employees to prospective employers.[133] Courts have protected employers from liability for statements that the employers make about former employees to ensure that the employers will provide accurate information about the employees' qualifications.[134] If courts grant conditional privileges to employers concerning communications to prospective employers of the reasons for employees' dismissals, to maintain consistency, courts also should protect employers from defamation liability for communications that employers make directly to discharged employees.[135] By granting a conditional privilege to employers for their statements to employees of the reasons for the employees' dismissals, courts will protect employers from unwarranted defamation liability.[136]

While employers possess a conditional privilege against defamation liability concerning statements that employers make in employment references, courts have ruled that employers may lose this conditional privilege if the employers abuse the privilege[137] or if the employers act with malice.[138] An employer may abuse his conditional privilege by irrelevant, unreasonable or excessive publication.[139] An employer acts with malice if he publishes an

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133. *See* Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980) (former employers' communications to prospective employers concerning employees deserve conditional privileges to encourage former employers accurately to assess employees' qualifications); Calero v. Del Chem. Corp., 68 Wis.2d 487, , 228 N.W.2d 737, 744 (1975) (former employers' communications about employees to prospective employers entitled to conditional privilege).

134. *See* Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980) (former employers' communications to prospective employers concerning employees deserve conditional privileges to encourage former employers accurately to assess employees' qualifications).

135. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 889-90 (Minn. 1986) (courts cannot consistently grant privilege to former employer's direct statement to third parties while denying privilege to employer's statement to employee). The sole distinction between an employer's direct statement to a prospective employer and a statement to an employee that the employee subsequently repeats to the prospective employer is the amount of control that the former employer exercises over the statements. *See id.* (sole difference between two situations is mode of publication).

136. *Id.*

137. *See* Galvin v. New York, N.H. & H.R.R., 341 Mass. 293, ____, 168 N.E.2d 262, 266 (1960) (employers lose their conditional privilege against defamation liability for statements concerning employees if employers abuse privilege); Murphy v. Johns-Manville Prod. Corp., 45 N.J. Super. 478, ____, 133 A.2d 34, 41 (1957) (same); Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification*, 24 A.L.R.4TH § 3, at 153 (1983) (same).

138. *See* Andrews v. Mohawk Rubber Co., 474 F. Supp. 1276, 1282 (E.D. Ark. 1979) (employer loses conditional privilege against defamation liability if malice motivates employer's defamatory statements about employee); Calero v. Del Chemical Corp., 68 Wis. 2d 487, ____, 228 N.W.2d 737, 744 (same); Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification*, 24 A.L.R.4TH § 4, at 156 (same).

139. *See* Galvin v. New York, N.H. & H.R.R., 341 Mass. 293, ____, 168 N.E.2d 262, 266 (1960) (employer abuses his conditional privilege against defamation liability for defamatory statement about employee if employer publishes statement unnecessarily, unreasonably, or excessively); Murphy v. Johns-Manville Prod. Corp., 45 N.J. Super. 478, ____, 133 A.2d 34, 41 (1957) (employee may prove that employer abused his conditional privilege against defamation liability by showing that employer excessively published defamatory statements).

employee reference in bad faith, with ill will, or for an improper motive.[140] In the self-publication context, therefore, only employers who maliciously make false statements in discharging employees should worry about losing their privilege against defamation liability.[141]

Although a conditional privilege provides employers with a strong shield against defamation liability, at least one commentator has argued that employers are worried about more than simply prevailing at trial.[142] The protections that a proper limitation of the compelled self-publication exception and a conditional privilege offer to employers do not shield employers from the costs of mounting expensive defenses to warrantless suits or settling claims of unworthy plaintiffs.[143] Many employers already have ceased to exchange reference information about former employees because of the potential threat of and expense in defending against employee defamation lawsuits.[144] Because of decisions like *Lewis*, many employers now refuse to communicate to anyone, even a discharged employee, the reasons for the employee's discharge.[145] Employers complain that the limited exchange of information about employees weakens the ability of prospective employers to make informed hiring decisions.[146]

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140. *See* Andrews v. Mohawk Rubber Co., 474 F. Supp. 1276, 1282 (E.D. Ark. 1979) (employer acts with malice if, in defaming employee, employer acts with hate, vindictiveness, spite, or reckless disregard of employee's rights); Calero v. Del Chem. Corp., 68 Wis. 2d 487, ____, 228 N.W.2d 737, 744 (1975) (employer loses conditional privilege if employer makes defamatory statements about employee motivated by ill will, spite, revenge, or other bad motive).

141. *See* Lewis v. Equitable Life Assurance Soc'y of the United States, 361 N.W.2d 875, 881 (Minn. Ct. App. 1985) (recognition of self-publication threatens only those employers whose communications to discharged employees are dishonest and malicious), *aff'd in part*, 389 N.W.2d 876 (Minn. 1986).

142. *See* Comment, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation:* Lewis v. Equitable Life Assurance Soc'y of the United States, 71 MINN. L. REV. 1092, 1105 n.67 (1987) (arguing that *Lewis* court, in holding that careful limiting of self-publication cause of action would limit extension of employer liability and not deter employer communication, failed to understand how its decision would affect pretrial stages of litigation).

143. *See id.* (unwarranted ancillary claim of self-publication defamation could force higher settlement amount between employer and employee).

144. *See Fired Employees*, *supra* note 43, at 33, col. 4 (many companies are sharply restricting information that companies provide about former employees because companies desire to avoid costs and aggravation of defamation suits); National L. J., May 4, 1987, at 30, col. 1 (threat of defamation lawsuits has chilled traditional exchange of information between employers). Because of increased employer liability for defamation, prospective employers do not check the references of approximately seventy-five percent of their job applicants. National L. J., May 4, 1987, at 30, col. 1.

145. National L. J., May 4, 1987, at 30, col. 1.

146. *See Fired Employees*, *supra* note 43, at 33, col. 4 (reduction of available information concerning job applicants prevents prospective employers from screening out incompetent and dishonest applicants). One commentator claims that the lack of adequate reference information causes financial institutions unwittingly to hire unqualified applicants and causes a high turnover of employees. *See id.* (discussing ramifications of reduction in reference information in labor marketplace). Additionally, a defense contractor has reported to a senate subcommittee that employers' fear of defamation suits has allowed workers to conceal past employment problems

Although a limited exchange of information about employees adversely affects hiring decisions, recognition of the self-publication exception to the publication requirement should not affect the flow of information between employers because the compelled self-publication exception applies solely to situations in which an employer communicates a defamatory statement to a discharged employee, not to a prospective employer.[147] Furthermore, courts grant employers a conditional privilege against defamation liability expressly to protect the flow of information between employers and to protect employers from warrantless claims.[148] Employers' arguments that compelled self-publication claims inhibit communication are really complaints that the employers' conditional privilege insufficiently protects the flow of information between employers.

In response to the threat of defamation liability from recognition of the compelled self-publication doctrine, many employers may cease giving employees the reason for the employees' dismissals.[149] Neither employers nor discharged employees will benefit if employers silently discharge employees.[150] Seemingly arbitrary dismissals will frustrate employees and lower worker morale in general.[151] Because lower morale results in lower productivity and efficiency, employers also will suffer from a non-explanatory approach to employee dismissals.[152] Some attorneys and consultants have advised their corporate clients to avoid defamation litigation by helping discharged employees find subsequent employment through "outplacement counseling."[153] Not only does placement limit the damages that the discharged employee may suffer, but discharged employees who find subsequent employment are less likely to sue former employers than discharged employees who do not find work.[154] Although the outplacement approach might help to prevent some self-publication claims, discharged employees

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and obtain jobs in the defense industry that the workers could not have obtained had prospective employers known about the past problems. *See id.* (discussing effect of employee defamation suits on hiring in defense industry).

147. *See supra* notes 101-09 and accompanying text (describing situations in which self-publication defamation occurs in employment discharge context).

148. *See supra* notes 130-41 and accompanying text (discussing employers' conditional privilege against defamation liability for statements that employers make about employees).

149. *See Fired Employees*, *supra* note 44, at 33, col. 4 (employers may respond to the self-publication cause of action by refusing to tell employees the reasons for employees' dismissals).

150. *See* Comment, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation:* Lewis v. Equitable Life Assurance Soc'y of the United States, 71 MINN. L. REV., 1092, 1113 (both employers and employees will suffer if employers cease to inform employees of reasons for employees' dismissals).

151. *Id.* If an employer discharges an employee, without informing him of the reason for the dismissal, the employee may become suspicious and insecure, believing that any subsequent employer also may fire him for some unknown reason. *Id.*

152. *Id.*

153. National L. J., May 4, 1987, at 30, col. 4.

154. *See Fired Employees*, *supra* note 43, at 33, col. 4 (discharged employees who find new jobs are unlikely to sue former employers).

will continue to receive questions from prospective employers about the employees' reasons for leaving past employment. As a result of the limitations of the "silent discharge" and "outplacement counseling" approaches, a better alternative for employers might be for employers to adopt disciplinary systems that carefully document any negative charges that employers obtain concerning employees, corroborate any action the employers take against employees, and ensure honesty in employer communications to discharged employees.[155] An employer is not liable for defamation if the employer makes only true statements about the a discharged employee, even if the true statements are injurious to the employee's reputation.[156] Furthermore, if an employer can show that he attempted to verify his reason for firing an employee, the employer is unlikely to be guilty of malice because the employer neither was indifferent to the truth nor acted with a bad motive.[157] If an employer does not abuse his conditional privilege against defamation liability, the employer retains his privilege and will not be liable for statements the employer made to or about the employee.[158]

Although the doctrine of self-publication initially appears radically to extend employers' liability, the doctrine, in actual practice, merely applies to employment termination situations a long-recognized exception to the defamation publication requirement.[159] By recognizing the compelled self-publication doctrine, courts allow discharged employees to hold their former employers responsible for injuries that the employers have caused by maliciously making false and defamatory statements to employees.[160] If courts properly limit the compelled self-publication cause of action, the cause of action should not subject employers to unwarranted liability.[161] Employer response to the self-publication doctrine will be crucial in determining whether the self-publication doctrine will impact positively on relations between employers and employees. If employers respond to the self-publication doctrine by refusing to communicate to employees the reasons for the employees' dismissals, both employers and employees will suffer from

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155. *See* Martin & Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE RELATIONS L. J. 43, 59 (1987) (identifying eight steps that employer can take to reduce risk of liability when employer discharges employee).

156. *See supra* note 3 (plaintiff has defamation cause of action if defendant makes defamatory statements that are false).

157. *See supra* notes 137-40 and accompanying text (discussing ways employer can abuse conditional privilege).

158. *Id.*

159. *See supra* notes 47, 101-09 and accompanying text (discussing manner in which compelled self-publication cause of action fits within recognized exception to publication requirement).

160. *See supra* notes 126-29, 141 and accompanying text (discussing how employers who act in good faith need not worry about compelled self-publication liability).

161. *See supra* notes 126-129 and accompanying text (proper limits on self-publication doctrine will prevent employees from using doctrine to recover for warrantless defamation claims against former employers).

the lack of communication.[162] Because the self-publication doctrine, however, threatens only employers who maliciously make false and defamatory statements to discharged employees, recognition of the doctrine only should cause employers to take reasonable steps to ensure the accuracy of statements that the employers make to and about employees.[163] The potential problems that the doctrine of compelled self-publication may cause do not justify denying injured employees what may be their only means of redress against employers who have wronged them.

CHARLES S. MURRAY, JR.

ADDENDUM

On August 8, 1988, the Colorado Supreme Court reversed the decision of the Colorado Court of Appeals on the issue of compelled self-publication in *Churchey v. Adolph Coors Co.*, No. 86SC183 (Colo. Aug. 8, 1988) (WESTLAW, CO-CS Database). In *Churchey* the Colorado Supreme Court held that a defamation plaintiff may establish the element of publication with self-publication if the plaintiff proves that the defendant could have foreseen that the plaintiff would have been under a strong compulsion to publish the defamatory statement. *Id.* The Colorado Court also stated that a conditional privilege protects an employer for statements that the employer makes to an employee when discharging the employee. *Id.* The *Churchey* court held, however, that a plaintiff employee can overcome this privilege by proving that the employer knew the statement was false or acted in reckless disregard of the statement's veracity. *Id.* As a result of the *Churchey* decision, every court that expressly has considered the self-publication cause of action in the context of employee discharges has recognized the cause of action.

162. *See supra* notes 150-52 and accompanying text (if employers cease to inform employees of reasons for employees' dismissals, both employers and employees will suffer).

163. *See supra* note 141 and accompanying text (recognition of compelled self-publication doctrine threatens only those employers who make false and malicious statements to discharged employees).