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OPENING THE CHANNELS OF COMMUNICATION AMONG EMPLOYERS: CAN EMPLOYERS DISCARD THEIR "NO COMMENT" AND NEUTRAL JOB REFERENCE POLICIES?

I. INTRODUCTION

While working at Stereo, Inc., Tom received twenty-four disciplinary warnings for outrageous acts that ranged from violence in the workplace to alcohol and drug abuse on the job before his employer discharged him.¹ When searching for other employment, Tom listed the name of his former employer, Stereo, Inc., on his application. A prospective employer inquired about Tom's past job performance with Stereo, Inc. However, Stereo, Inc. provided limited information, which merely consisted of confirming Tom's title and dates of employment.² The prospective employer, who had no knowledge of Tom's violent past, hired him. While working at his new job, Tom savagely beat and murdered his co-worker, Lisa.

This opening illustration represents the established trend³ of companies adopting "no comment" policies⁴ or neutral job reference policies⁵ in order to avoid defamation liability⁶ or Title VII retaliatory

¹ This illustration was based on an actual case, *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990). The *Moore* court held that the former employer did not owe a duty to an unknown third party who was murdered by the dangerous former employee because no special relationship existed between the former employer and the third-party victim. *Id.* at 102, 103. Therefore, the *Moore* court determined that the former employer was not liable for failing to disclose to a prospective employer that its former employee had previously shown violent behavior in the workplace. *Id.*

² In the actual case of *Moore v. St. Joseph Nursing Home, Inc.*, Tom's new employer did not contact his former employer; however, the latter admits that if it had been contacted to give a reference, it would have given the prospective employer only limited employment information, such as dates of employment. *Id.* at 102, 103.

³ See *infra* part II.A. This part addresses why employers adopted "no comment" and neutral job reference policies.

⁴ See *infra* note 9. Employers have "no comment" reference policies or "non-disclosure" policies when they provide no information for a prospective employer regarding a former employee's character or job performance. *Id.*

⁵ See *infra* note 10. Under a neutral job reference scheme, employers provide limited information such as a former employee's name, title of position, dates of employment, and salary, for a prospective employer. *Id.*

⁶ See *infra* notes 53 to 126 and accompanying text. See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 773 (5th ed. 1984). "Defamation...tends to injure 'reputation,' in the popular sense; to diminish the esteem, respect, goodwill or confidence

claims brought by former or departing employees.⁷ A 1995 survey conducted by the Society for Human Resource Management found that sixty-three percent of personnel managers refused to provide information about former employees for fear of landing in court.⁸ Under "no comment" reference policies, employers provide no information regarding a former employee or a departing employee, and as a result, prospective employers are unable to obtain reliable and accurate information about a job applicant.⁹ Moreover, under a neutral job reference scheme, employers provide only limited information such as a former employee's name, position title, dates of employment, and salary for prospective employers.¹⁰

The principal reason why employers have adopted "no comment" reference policies originates from a perceived dilemma between choosing to disclose or to omit negative information in a reference, such as a former employee's previous violent behavior or poor work performance.¹¹ Specifically, when employers provide a complete

in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." *Id.*

⁷ See *infra* part II.C. This part presents the case of *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843 (1997). A unanimous Supreme Court, per Justice Clarence Thomas, held that a former employee may bring a retaliation cause of action under Title VII section 704(a) against his former employer for giving a negative reference in response for his having filed a race discrimination suit against the employer. *Id.* at 844-49. The Supreme Court reasoned that the retaliatory provision, section 704(a), applied to both current employees and former employees. *Id.*

⁸ Frances A. McMorris, *Ex-Bosses Face Less Peril Giving Honest Job References*, WALL ST. J., July 8, 1996, at B1 [hereinafter McMorris].

⁹ Jack Kenny, *Beware Giving References for Ex-Employees*, N.H. BUS. REV. Feb. 14, 1997, at 1 [hereinafter Kenny] (stating that "non-disclosure" policies adopted by many companies means that prospective employers are unable to obtain reliable and accurate job histories of applicants). See also Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45 (1995) [hereinafter Saxton, *Flaws in the Laws*]. Many companies have adopted policies, referred to as "no comment" policies in which employers refuse to provide job references for former employees or departing employees when the employee or prospective employer request such information. *Id.*

¹⁰ William D. Frumkin & Louis G. Santagelo, *Title VII's Anti-Retaliation Provision Extends to Former Employees*, 217 N.Y. L.J. 52 (1997) [hereinafter Frumkin & Santagelo, *Title VII*] (asserting that "neutral" references confirm dates of employment and positions held).

¹¹ John P. Furfaro & Maury B. Josephson, *Workplace Violence II*, N.Y. L.J., July 7, 1995, at 3 [hereinafter Furfaro & Josephson, *Workplace Violence II*]. This article adequately summarizes the employer's dilemma:

On the one hand, it is in a company's interest to know that job references it receives will be accurate, so that it may make appropriate hiring decisions and prevent the possibility of workplace violence in the future. On the other hand, many employers worry that honestly

reference that includes both positive and negative aspects about a former employee's employment, they risk being sued by a former employee for defamation¹² or a Title VII retaliatory claim.¹³ On the other hand, when employers give only favorable recommendations without disclosing any negative facts such as a former employee's criminal behavior, they could be held liable for negligent misrepresentation¹⁴ if the former employee subsequently harms a third person as demonstrated in the opening illustration.¹⁵ Faced with a dichotomy of conflicting tort doctrines,

disclosing a former employee's violent record in a negative job reference might expose the company to potential liability for defamation or invasion of privacy. Consequently, many employers simply give a former employee's name and dates of employment when asked for a reference.

Id. See also Michell Quinn, *Sifting Sands of Employment Law Can Trap Unwary Managers*, SAN DIEGO UNION & TRIB., July 22, 1996, at C2 (available on 1996 WL 2170951) (quoting a lawyer from a San Diego law firm, "You are liable if you open your mouth...you're now liable if you don't").

¹² MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.8 (1994) [hereinafter ROTHSTEIN, EMPLOYMENT LAW] (stating that written and oral statements in the workplace have given rise to defamation actions); see also Kathy Hagood, *Employers Wary of References Lawsuit-Fearing Companies Limit Information on Ex-Workers*, FLA. TODAY, July 13, 1997, at 01E (available on 1997 WL 11484603) (stating that employers' former employees who allege that they have been defamed by references have taken many of those employers to court); *References Once More Become a Land Mine*, BALT. BUS. J., Mar. 14, 1997 (available on 1997 WL 7896485) [hereinafter *Land Mine*] (expressing that traditionally, employers have been most concerned with defamation claims where an employer falsely informs another person and damages the employees' reputation). Anne Lewis, *References: An Employer's Dilemma* (visited Feb. 13, 1998) <<http://www.fryberger.com/referenc.html>> (stating that many businesses fear possible defamation claims if they give out negative information about former employees); Kenny, *supra* note 9, at 1 (expressing that attorneys have advised employers to merely confirm dates of employment because a reference of this nature keeps employers out of trouble with respect to defamation, and precludes prospective employers from claiming that the employer misled them); See *infra* notes 53 to 126 and accompanying text.

¹³ See *infra* notes 261 to 276 and accompanying text.

¹⁴ See *infra* notes 230 to 248 and accompanying text.

¹⁵ Julie Forster, *25 States Adopt "Good Faith" Job Reference Laws to Shield Business from Liability*, WEST'S LEGAL NEWS, July 2, 1996, at 6402 (available in 1996 WL 363324) [hereinafter Forster, *Good Faith Reference Laws*]. This article quotes Allen Willis, a lobbyist in Idaho and Oregon, who states, "Some companies have been sued for not giving out information when they knew that the terminated employee was involved in some criminal conduct or conduct such that the employee could not be retained. It was one of those damned if you do, damned if you don't...." *Id.* Employees have taken their former employers to court, claiming that they were defamed in employment references. However, in other cases, prospective employers have sued former employers for failing to disclose that employees displayed problems such as violent behavior. Hagood, *supra* note 12, at 01E. See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997). In this case, an injured third party sued a former employer, absent a special relationship between these two parties, for negligent misrepresentation and intentional misrepresentation. *Id.*

employers have chosen to say very little about a former employee's work performance or displayed violent behavior.¹⁶ Thus, employers have created either "no comment" policies or neutral job reference schemes in order to protect themselves from potential liability.¹⁷

Furthermore, employers who fail to disclose criminal information about a former employee in fear of defamation claims should be aware that they not only put themselves at risk for negligent misrepresentation, but they also place at risk the physical safety of third parties.¹⁸ For example, in *Randi W. v. Muroc Joint Unified School District*¹⁹ a former employer provided a favorable reference that omitted negative information regarding an employee's past sexual misconduct.²⁰ The California Supreme Court held that the former employer was liable for injuries sustained by a third party who was sexually assaulted by the employee.²¹ The *Randi W.* court determined that liability could be imposed against former employers if a recommendation amounted to an affirmative misrepresentation that presented a foreseeable and substantial risk of physical harm to a third person.²² Therefore, employers who give false or only partially correct favorable references in order to avoid defamation claims could be held liable to unknown third

¹⁶ See *supra* notes 7 to 15; see also *infra* notes 279 to 284 and accompanying text.

¹⁷ See *supra* notes 7 to 15; see also *infra* notes 279 to 284 and accompanying text.

¹⁸ Richard J. Reibstein, *California Supreme Court Recognition of Common Law Claim Based on Favorable Job Reference Could Put Employers Nationwide Between a Rock and a Hard Place*, 19 NAT'L L.J., Mar. 10, 1997, at B5 (expressing that if employers fail to disclose the accusation or refuse to provide a job reference, they may expose others to harm, and themselves to substantial liability to unknown third parties under the *Randi W.* decision); J. Gregory Cornett, *Reference Request Demands Caution*, COURIER J., Sept. 7, 1997, at 03E (available on 1997 WL 6648149). This article provides that:

In certain situations, such as where the former employee was violent toward co-workers or stole from [an employer], [the employer] may have a duty to disclose that information to protect the inquiring person from suffering injury. There are an increasing number of lawsuits against former employers by subsequent employers or third parties based on failure to disclose relevant information.

Id. See generally *Doe v. Garcia*, 961 P.2d 1181 (Idaho 1998); *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); *Jerner v. Allstate Ins. Co.*, Fla. Cir. Ct. No. 93-09472 (1993); *Gutzan v. Altair Airlines Inc.*, 766 F.2d 135 (3d Cir. 1985); *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990); *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1986).

¹⁹ 929 P.2d 582 (Cal. 1997).

²⁰ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 585 (Cal. 1997).

²¹ See *infra* part IV. This discussion closely examines the case of *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997).

²² *Randi W.*, 929 P.2d at 584.

parties for not stating the "whole truth" regarding a former employee's dangerous proclivities.²³

In addition, employees and third parties are vulnerable to a growing epidemic of workplace violence.²⁴ Presently, more than 1,000 employees are murdered in workplaces each year, which is thirty-two percent more homicides than the annual average in the 1980's.²⁵ Ironically, despite an increase in workplace violence,²⁶ employers choose not to talk about their former employees.²⁷ As a result, prospective employers simply cannot obtain a solid character reference for an applicant; therefore, prospective employers unknowingly hire violent or dangerous individuals and subject themselves to negligent hiring liability.²⁸ Hiring dangerous employees has serious consequences in the workplace because these employees jeopardize the safety of all co-workers and the public-at-large.²⁹ As the opening scenario demonstrates, the former employer's neutral job reference policy could have been a factor in the death of Tom's co-worker, Lisa. If Stereo, Inc. had been more open and willing to disclose information regarding Tom's violence and alcohol abuse, then Tom would not have been hired. Further, Tom would not

²³ Reibstein, *supra* note 18, at B5 (expressing that if employers fail to disclose the accusation or refuse to provide a job reference, it may expose others to harm, and itself to substantial liability to third parties under the *Randi W.* decision); see also *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067, 1073 (1st Cir. 1986). In *O'Brien*, an employer's failure to tell the whole truth for the reasons regarding a former employee's dismissal constituted a lie. *Id.* Thus, the court barred the employer from asserting a "truth" defense in a defamation claim brought by the former employee. *Id.*

²⁴ See *infra* part III.C.

²⁵ Kenneth McCormick & James Darren Stewart, *Employers Confront Violence in the Workplace of the '90s*, MED. LAB. OBSERVER, May 1, 1996, at 34 [hereinafter McCormick & Stewart].

²⁶ See *infra* notes 313 to 317 and accompanying text.

²⁷ See *infra* notes 329 to 340 and accompanying text; see also Christine A. Mansfield, *When References Come Back to Haunt You* (visited Feb. 13, 1998) <<http://www.arentfox.com/newslett/employ/emp962d.htm>>. Checking an applicant's background has become increasingly necessary with the increase of workplace violence; however, paradoxically, former employers are rarely candid when providing references for their former employees because they fear potential defamation liability. *Id.*

²⁸ See *infra* notes 318 to 340 and accompanying text. McMorris, *supra* note 8, at B1. This Wall Street Journal article described a case where a company would not have hired a woman that it eventually fired when the woman threatened a co-worker. *Id.* After terminating the employee, the company discovered that the woman's previous employer fired her for displaying violent behavior on the job. *Id.* See also Sherwood Ross, *Hiding Reason for Firing Just Passes Buck*, SEATTLE POST-INTELLIGENCER, Mar. 24, 1997, at B4 (available in 1997 WL 3191269) (quoting a president of a New York consulting firm who stated, "a large percentage of companies only verify dates of employment...[former employers] just pass along the problem to somebody else").

²⁹ See *supra* notes 1, 27-28; see *infra* notes 318-40 and accompanying text.

have had the opportunity to murder Lisa, and Stereo, Inc. would have avoided liability for negligent misrepresentation. Therefore, “no comment” policies and neutral job reference policies have become a problem in the workplace whereby prospective employers are unable to obtain relevant information on a job applicant.³⁰

This Note contends that employers should re-examine their “no comment” and neutral job references polices and discard them in order to promote safer workplaces. Specifically, this Note asserts that employers should not only be more willing to give accurate and complete references, but that they also have a duty to disclose information regarding a former employee’s criminal behavior, previous sexual misconduct, and dangerous tendencies. Employers should have a duty to disclose this particular information upon request of prospective employers, provided that states adopt “good faith” reference statutes³¹ that protect employers from potential defamation or negligent misrepresentation claims. By opening the channels of communication, employers may freely discuss an employee’s job performance, negative or positive, without fear that a disgruntled former employee could bring a defamation claim against them.³² Furthermore, with the elimination of “no comment” policies or neutral job reference schemes in the workplace, prospective employers will be able to learn whether an applicant acted violently at his or her prior place of employment.³³ Moreover, prospective employers will have the necessary information in choosing whether to hire individuals based on truthful and complete character references, which will in turn provide a safer work place for all employees and the public-at-large.³⁴

Section II discusses why employers originally created “no comment” or neutral job reference policies.³⁵ This Section also gives a sufficient background in defamation, negligent misrepresentation,

³⁰ See *supra* notes 1, 27-28, see *infra* notes 318-40 and accompanying text; Saxton, *Flaws in the Laws*, *supra* note 9, at 46-52.

³¹ Currently, most “good faith” reference statutes or qualified privilege statutes permit employers to freely discuss an applicant’s employment history in a reference so long as statements are made in “good faith” and the former employer responds to a prospective employer’s request for such a reference. See *infra* notes 204, 221 and accompanying text.

³² See *infra* note 223; see also *infra* notes 305-18 and accompanying text.

³³ See *infra* notes 310-40 and accompanying text.

³⁴ See *infra* notes 310-40 and accompanying text.

³⁵ See *infra* notes 45-51 and accompanying text.

intentional misrepresentation, and Title VII retaliatory reference claims.³⁶ Additionally, this Section discusses the defenses to defamation,³⁷ including the qualified privilege defense, which protects employers from defamation liability when supplying reference information.³⁸ Section III unfolds the negative effects of "no comment" and neutral job reference policies, such as workplace violence and negligent hiring liability.³⁹ Section IV introduces several cases, including *Randi W. v. Muroc Joint Unified School District*,⁴⁰ in which some state courts have carved out exceptions to the required special relationship of a negligence claim, holding that former employers may be held liable for negligent misrepresentation to unknown third parties.⁴¹ Finally, Section V proposes a model statute that alleviates the problem of "no comment" and neutral job reference policies for all states, including those states that have already promulgated job reference immunity statutes.⁴² The proposed statute provides an incentive for employers to implement a more open communication practice regarding references by granting employers civil immunity for not only defamation charges brought by former employees, but also negligent misrepresentation claims brought by unknown third parties.⁴³ The proposed statute also recommends that states adopt a "duty to disclose" condition to be imposed on employers in special circumstances where the employer reasonably believes that a former employee has engaged in criminal behavior, previous sexual misconduct, or possesses dangerous and violent tendencies.⁴⁴

II. A BACKGROUND ON DEFAMATION, DEFENSES TO DEFAMATION, NEGLIGENT MISREPRESENTATION, INTENTIONAL MISREPRESENTATION, AND TITLE VII RETALIATION

In order to fully understand the shortcomings of "no comment" reference policies and neutral job reference practices, a discussion

³⁶ See *infra* notes 53-126 and accompanying text; see *infra* notes 230-76 and accompanying text.

³⁷ See *infra* notes 127-221 and accompanying text.

³⁸ See *infra* notes 158-221 and accompanying text.

³⁹ See *infra* notes 279-340 and accompanying text.

⁴⁰ 929 P.2d 582 (Cal. 1997).

⁴¹ See *infra* notes 337-491 and accompanying text.

⁴² See *infra* Part V. This part sets forth a model statute that provides civil immunity for employers who give references. The statute also imposes a duty on employers to disclose in a reference regarding a former employee's or departing employee's criminal behavior, previous sexual misconduct, or dangerous and violent tendencies.

⁴³ See *id.*

⁴⁴ See *id.*

regarding the underlying reasons why employers created and implemented "no comment" and neutral job reference policies is warranted. In addition, an explanation is necessary regarding the possible claims that certain parties, such as former employees and unknown third parties, may bring against employers who choose to give a recommendation to prospective employers. These claims include defamation, negligent misrepresentation, intentional misrepresentation, and Title VII retaliation claims.

A. *The Reason for "No Comment" Reference Policies*

The method with which employers try to handle reference information may be one of the most difficult issues facing employers today.⁴⁵ "No comment" or neutral job reference policies have been popular methods for many companies in answering reference requests.⁴⁶ As a result, companies today are finding it more difficult to obtain complete references for an applicant than companies in the past.⁴⁷ According to a 1992 survey of 200 executives from 1000 U.S. companies, sixty-eight percent of these executives found that it was more difficult to obtain reference information in 1992 than compared to 1989.⁴⁸ In short, this statistic indicates that employers are able to obtain little or no information about prospective employees, because former employers refuse to give complete character references.⁴⁹

The development and acceptance of "no comment" or neutral reference policies resulted from employers' fears of potential defamation liability.⁵⁰ With a defamation cause of action, an employee could bring a

⁴⁵ ROGER B. JACOBS, ESQ. & CORA S. KOCH, LEGAL COMPLIANCE GUIDE TO PERSONNEL MANAGEMENT 272 (1993) [hereinafter JACOBS & KOCH].

⁴⁶ Furfaro & Josephson, *Workplace Violence II*, *supra* note 11, at 4 (stating that many employers give a former employee's name and dates of employment when asked for a reference); see also Edward McDonough, *Bosses Tread Legal Line on References*, SALT LAKE TRIB., Apr. 6, 1997, at AA5 (expressing that although a former employee has been fired for a serious cause, many employers as a matter of policy, will give good or at least a neutral job reference of that employee to a prospective employer since these policies protect employers from defamation suits); Michelle Quinn, *Shifting Sands of Employment Law Can Trap Unwary Managers*, SAN DIEGO UNION & TRIB., July, 22, 1996, at C2 (stating that managers now just verify names and dates of employment because they know better than to be completely open when called by another company for reference).

⁴⁷ Saxton, *Flaws in the Laws*, *supra* note 9, at 46-49.

⁴⁸ See *id.*

⁴⁹ See *id.* See *supra* notes 8-10 and accompanying text.

⁵⁰ See *supra* notes 11-12 and accompanying text. In order to avoid defamation liability, many employers provide only "neutral" references for former employees confirming dates of employment and positions held. Frumkin & Santagelo, *Title VII*, *supra* note 10, at 52. In

claim against a former employer if, when giving a reference, the employer stated something negative and false about the employee.⁵¹ However, employers' fears concerning defamation accountability seem to be unfounded.⁵² The next section addresses the tort of defamation and analyzes its complex constitutional requirements in relation to the employment setting.

B. *The Law of Defamation*

When giving a reference, employers should keep in mind the possible claims that various parties could bring against them such as defamation, Title VII retaliation, negligent misrepresentation, and intentional misrepresentation claims.⁵³ For the purposes of discussion, an understanding of the fundamental elements of defamation and its role in an employment context is imperative. Further, an explanation of First Amendment jurisprudence and constitutional restrictions on the freedom of speech must also be addressed.

The First Amendment provides in part, "Congress shall make no law...abridging the freedom of speech, or of the press."⁵⁴ Some legal

recent years, employees have brought defamatory reference claims against their former employers. Consequently, to reduce exposure to defamation lawsuits, employers are giving fewer and less complete job references. Furfaro & Josephson, *Workplace Violence II*, *supra* note 11, at 3.

⁵¹ See *supra* notes 11-12 and accompanying text.

⁵² See *infra* part III.A. See also Amy Saltzman, *Suppose They Sue? Why Companies Shouldn't Fret So Much About Bias Cases*, U.S. NEWS & WORLD REP., Sept. 22, 1997 [hereinafter Saltzman, *Shouldn't Fret So Much*].

⁵³ The SOHO Guidebook—*Limiting Employment Reference Risks* (visited Feb. 13, 1998) <http://www.toolkit.cch.com/text/P05_8670.htm> [hereinafter SOHO Guidebook]. Other claims that employees may bring against their former employers include the following: invasion of privacy, interference with prospective employment claims, and blacklisting claims. *Id.* Under invasion of privacy claims, employers may be taken to court if they provide personal information about an employee such as marital or financial status, even though the information is true because the truth is not a defense to this cause of action, unlike defamation. *Id.* Therefore, an employer should only disclose private information if she believes that it will serve a business purpose; and to avoid liability, the employer should obtain an employee's consent to disclosure. *Id.* In addition, blacklisting laws make it a crime when employers provide bad references in retaliation for a former employee's participation in union activities. *Id.* However, most blacklisting laws allow employers to send recommendations if the information is neither defamatory nor false. *Id.*

⁵⁴ The First Amendment of the Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. CONST. amend. I

commentators and judges have adopted an "absolutist" position⁵⁵ by interpreting this text to mean that no law shall ever restrict a person's First Amendment right to speak freely.⁵⁶ However, over the course of the twentieth century, the Supreme Court has placed restrictions on a person's right to freely express her ideas; thus, some forms of speech and expression are not protected by the First Amendment.⁵⁷ Under the common law, unprotected speech includes but is not limited to libelous speech,⁵⁸ obscene speech,⁵⁹ child pornography,⁶⁰ and speech that incites acts to overthrow the government.⁶¹ Moreover, a person's First Amendment right to free speech is not an absolute right, but rather in special circumstances, speech may be regulated and suppressed by the government.⁶² The following discussion addresses one limitation on free

⁵⁵ An individual undertakes an "absolutist" position by literally interpreting the First Amendment text whereby all speech is protected under the First Amendment, including obscene speech and defamatory speech; hence, no speech shall be regulated by the government. Edmund Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962). Justice Black held an "absolutist" position of the First Amendment:

I believe when our Founding Fathers, with their wisdom and patriotism, wrote this Amendment, they knew what they were talking about. They knew what history was behind them and they wanted to ordain in this country that Congress, elected by the people, should not tell people what religion they should have or what they should believe or say or publish, and that is about it. [The First Amendment] says "no law," and that is what I believe it means.

Id.

⁵⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 994 (5th ed. 1995) [hereinafter NOWAK & ROTUNDA]. Although Justice Black and Justice Douglas observed an "absolutist" view towards free speech, the United States Supreme Court has never adopted an "absolute position." *Id.*

⁵⁷ See generally *Schenck v. United States*, 249 U.S. 47 (1919); *Gitglow v. New York* (1925); *Near v. Minnesota* 283 U.S. 697 (1931); *Beulaharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15, 23 (1973); *New York v. Ferber*, 458 U.S. 747 (1982).

⁵⁸ *Beulaharnais*, 343 U.S. at 266 (deciding that libelous utterances are not within the area of constitutionally protected speech).

⁵⁹ *Roth*, 354 U.S. at 484 (determining that obscenity is not protected under the First Amendment because it is "without redeeming social importance"); and *Miller*, 413 U.S. at 23 (holding that obscene material is not protected by the First Amendment).

⁶⁰ *Ferber*, 458 U.S. at 774 (holding that child pornography is not entitled to First Amendment protection).

⁶¹ *Near*, 283 U.S. at 716. A few cases permit prior restraint on speech. *Id.* The government may regulate and suppress speech for the prevention of the obstruction to its recruiting services when the nation is at war. *Id.* The government may also suppress obscene publications, and it may regulate statements that create incitement to acts of violence and the overthrow of government. *Id.*

⁶² WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 614 (8th ed. 1996). Justice Holmes observed that citizens are not free to yell "fire" falsely in a crowded theater. *Id.* Moreover,

speech, namely the law of defamation, and the constitutional standards that a plaintiff must meet in order to recover damages under this theory.

Defamation occurs when statements injure an individual's reputation and diminish the esteem, respect, goodwill or confidence in which the individual is held.⁶³ Defamation tends to "excite adverse, derogatory or unpleasant feelings or opinions against" an individual.⁶⁴ Generally, the elements of defamation⁶⁵ include a false, unprivileged statement that was defamatory to the plaintiff, published to a third party, and caused actual injury to the plaintiff.⁶⁶ The following section provides a more detailed discussion of these elements in an employment setting.

1. The Elements of Defamation

For defamation to occur in the employment context there must be a false statement about an employee.⁶⁷ Originally, under the common law, an employer would be held strictly liable for false and defamatory statements made about employees.⁶⁸ In other words, no matter how

the Court has not treated the First Amendment guarantees as an absolute right. In certain special circumstances, an individual's right to freely express her beliefs must be balanced against other interests of society. NOWAK & ROTUNDA, *supra* note 56, at 1007-08. Additionally, in *Near v. Minnesota*, the Supreme Court proclaimed that liberty of speech is not an absolute right, and the state may punish its abuse. See *Near v. Minnesota*, 283 U.S. 697, 708 (1931).

⁶³ KEETON ET AL., *supra* note 6, at 773.

⁶⁴ See *id.*

⁶⁵ RODNEY A. SMOLLA, LAW OF DEFAMATION § 1.08 (1997) [hereinafter SMOLLA]. Smolla recognized that a succinct definition of a modern cause of action for defamation would be difficult to surmise since the constitutional requirements differ depending on the public or private status of the individual. *Id.* Further, states disagree on the method of which they apply the requirement of special harm. *Id.* Consequently, this Note only refers to the above elements of defamation. Other elements may be included or excluded depending on the jurisdiction. See RESTATEMENT (SECOND) OF TORTS § 558 (1977). The elements of a defamation claim consist of the following: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Id.*

⁶⁶ ROTHSTEIN, EMPLOYMENT LAW, *supra* note 12, at § 2.8.

⁶⁷ *Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767 (1986) (concluding that both a private plaintiff and a public plaintiff must prove falsity of a defamatory statement in order to recover damages); see also Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)Rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123, 129 (1992) [hereinafter Paetzold & Willborn].

⁶⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-50 (1974). Under the common law for libel actions, the Court presumed that the plaintiff had been injured from the fact of publication without a showing of harm to the plaintiff. *Id.* The Court in *Gertz* discussed why the

reasonably the employer checked for the accuracy of her statements made to prospective employers, courts would hold the employer strictly liable for communicating such false statements.⁶⁹ Thus, the employer had the burden of proving the truth of the statement.⁷⁰ However, in 1974, the Supreme Court held in *Gertz v. Robert Welch, Inc.*⁷¹ that the First Amendment would not permit strict liability for defamatory speech.⁷² Therefore, in an employment situation, employers would only be held liable for defamation if the employees could prove that the employers were negligent or at fault in discovering the truthfulness of a statement.⁷³

The second element of defamation is that the employer's statement must be defamatory to the employee or former employee.⁷⁴ Under this factor, the statement must consist of some element of personal disgrace; however, the mere fact that the person finds it offensive is not enough to constitute a defamatory statement.⁷⁵ A few examples of defamatory remarks include, "he is a coward, a drunkard, a hypocrite, a liar, a crook or...unfair to labor," or "he has done a thing that is...heartless."⁷⁶ These assertions affect the esteem that a person holds with his community; thus, courts have found them to be facially defamatory if untrue.⁷⁷ In contrast, courts have not found other statements to be defamatory such as "he has left his employment during a strike" or "he has refused to make concessions to a union."⁷⁸ Although the question of whether a particular remark is defamatory is one for the courts to decide, courts

common law of strict liability should no longer apply to the law of defamation. *Id.* See RESTATEMENT (SECOND) OF TORTS: CONDITIONAL PRIVILEGES § 259 (1977). The common law imposed strict liability for publishing of a false and defamatory statement about another. *Id.*

⁶⁹ RESTATEMENT (SECOND) OF TORTS: CONDITIONAL PRIVILEGES § 259 (1977). The publisher or employer was liable even though he used due care to check the accuracy of his statement and thus reasonably believed the information to be true. *Id.*

⁷⁰ See *supra* notes 68-69.

⁷¹ 418 U.S. 323 (1974).

⁷² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974).

⁷³ Paetzold & Willborn, *supra* note 67, at 129. *But see* KEETON ET AL., *supra* note 6, at 1099 n.11 (recognizing that lower courts are split on whether to apply the *Gertz* standard of proving fault on the part of the defendant as applied to a non-media defendant such as an employer).

⁷⁴ See RESTATEMENT (SECOND) OF TORTS § 558 (1977), which states that an element of a defamation claim includes a false and defamatory statement about another.

⁷⁵ KEETON ET AL., *supra* note 6, at 775.

⁷⁶ Prosser & Keeton present a list of facially defamatory remarks including the following: "the plaintiff has attempted suicide...he refuses to pay his bill...he is immoral...or queer, or has made improper advances toward women." KEETON ET AL., *supra* note 6, at 775.

⁷⁷ KEETON ET AL., *supra* note 6, at 775.

⁷⁸ See *id.* at 774.

disagree about which communications constitute defamatory statements.⁷⁹

The third element of defamation is that the employer's statement must have been published to a third party.⁸⁰ The law of defamation requires that the defamatory statement be communicated to someone other than the alleged defamed individual, because the interest that the law protects is the individual's reputation.⁸¹ However, the doctrine of "compelled self-publication" carved out an exception to this general rule that defamatory statements must be published to third parties.⁸² Employers should recognize "compelled self-defamation," also known as "compelled self-publication," because this doctrine not only provides a new basis for maintaining a defamation cause of action against employers, but it also closely relates to defamation regarding references.⁸³

In a compelled self-defamation situation, an employer terminates an employee and directly conveys defamatory statements regarding the discharge to the employee who then feels compelled to reiterate these remarks to prospective employers.⁸⁴ Because the employer could foresee that the employee would feel compelled to reveal the defamatory statements to other employers, courts have held the employer liable for defaming the prior employee.⁸⁵ *Lewis v. Equitable Life Assurance Society of the United States*⁸⁶ is a prime example of the compelled self-defamation principle. In *Equitable Life*, a former employer discharged four employees for "gross insubordination" after the employees refused to change their travel expense reports.⁸⁷ When searching for other

⁷⁹ See *id.*

⁸⁰ RESTATEMENT (SECOND) OF TORTS § 558 (1977).

⁸¹ KEETON ET AL., *supra* note 6, at 779.

⁸² SMOLLA, *supra* note 65, at § 15.02[3].

⁸³ *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 888 (Minn. 1986) (finding that "compelled self-publication" provides plaintiffs with a new cause of action for defamation).

⁸⁴ William C. Martucci & Denise Drake Clemow, *Workplace Violence: Incidents and Liability on the Rise*, EMPLOYMENT REL. TODAY, Dec. 22, 1994, at 463 [hereinafter Martucci & Clemow]. A former employer may be held liable for compelled self-defamation when the employer terminates an employee listing defamatory statements, and that employee feels compelled to tell a prospective employer about these statements. *Id.*

⁸⁵ *Id.*

⁸⁶ 389 N.W.2d 876 (Minn. 1986).

⁸⁷ *Equitable Life*, 389 N.W.2d at 881. The Equitable Life Assurance Society admitted that the employee's production and performance were satisfactory and even commendable, and that the company should have given the employees more thorough instructions regarding the expense reports. *Id.* at 882. The company sought a refund from the employees for the

employment, each admitted the reason for termination in an interview with a prospective employer.⁸⁸ The *Equitable Life* court held that the former employer was liable for the "self-publication" defamation that occurred when the employees were compelled to reveal the grounds for their dismissal to prospective employers.⁸⁹ The court found that the employee's conduct of failing to change their expense reports did not constitute "gross insubordination"; therefore, the company's reasons for discharge were false.⁹⁰ The court also determined that under the doctrine of compelled self-defamation, the former employer was liable even though the former employer did not directly communicate or publish the statements to a prospective employer.⁹¹ The court found the former employer liable under this theory, because the employer could foresee that the employees would feel compelled to repeat these false statements regarding their dismissal to prospective employers.⁹²

In addition to the publication element, defamation requires that the statement caused actual injury to the employee.⁹³ Harm or actual injury is presumed with written defamatory statements, because written statements are likely to be permanent.⁹⁴ In contrast, for slander or verbal defamatory statements, an employee must prove that she experienced a special harm or actual pecuniary loss by the employer's statements unless these remarks fall under the "slander per se" exception.⁹⁵ For

amount of \$200, but the employees refused to pay this amount, and as result, the company terminated the employees citing "gross insubordination." *Id.* at 881-82.

⁸⁸ *Id.* at 882.

⁸⁹ *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 882 (Minn. 1986).

⁹⁰ *Id.* at 889.

⁹¹ *Id.*

⁹² *Id.* at 888 (stating that in a defamation action, the publication requirement may be satisfied where the plaintiff was compelled to publish a defamatory statement to a third person if the defendant could foresee that the plaintiff would be so compelled).

⁹³ RESTATEMENT (SECOND) OF TORTS § 558 (1977). An element of a defamation claim consists of either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Id.*

⁹⁴ ROTHSTEIN, EMPLOYMENT LAW, *supra* note 12, at § 2.8.

⁹⁵ The "slander per se" exception states that the plaintiff need not prove harm if the statements were made as an attack on the plaintiff's competency in his business, trade or profession. ROTHSTEIN, EMPLOYMENT LAW, *supra* note 12, at § 2.8. See also RESTATEMENT (SECOND) OF TORTS § 615 (1977) which provides:

- (1) The court determines whether a crime, a disease or a type of sexual misconduct imputed by spoken language is of such a character as to make the slander actionable per se.
- (2) Subject to the control of the court whenever the issue arises, the jury determines whether spoken language imputes to another conduct,

example, an employee must prove special harm under slander if the employee cannot find another job because of the statements made by her former employer.⁹⁶ However, an employee will not have to prove special harm for slander if the former employer's statements about the employee fall under the "slander per se" exception.⁹⁷ The "slander per se" exception states that the employee need not prove harm if the statements were made as an attack on the employee's competency in his business, trade, or profession.⁹⁸ For instance, with an employment reference, the departing employee or former employee may not have to prove that the employer's statements harmed her reputation, because employment references may fall under "slander per se" exception.⁹⁹

Additionally, the elements of defamation are subject to constitutional requirements in determining which standard of proof should apply for either a public or private plaintiff.¹⁰⁰ In *New York Times Co. v. Sullivan*,¹⁰¹ the United States Supreme Court found that a public official must prove that a statement made against her was made with "actual malice," defined as "knowledge that it was false, or with reckless disregard of whether it was false or not."¹⁰² However, in *Gertz v. Robert*

characteristics or a condition incompatible with the proper conduct of his business, trade, profession or office.

Id.

⁹⁶ SMOLLA, *supra* note 65, at § 15.04. See also RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

⁹⁷ SMOLLA, *supra* note 65, at § 15.04.

⁹⁸ See *supra* note 95.

⁹⁹ Paetzold & Willborn, *supra* note 67, at 130.

¹⁰⁰ See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Dun & Bradstreet, Inc. v. Green Moss Builders, Inc.*, 472 U.S. 749 (1985). According to Smolla, employment lawsuits tend to fall in a profile where the plaintiff is a private figure, defamation is published in a non-media setting, and the subject matter involves a private concern. The standard that the plaintiff must meet to be awarded actual damages depends upon the plaintiff's status as a private figure or a public figure. SMOLLA, *supra* note 65, at § 15.07[1]. For instance, under *New York Times v. Sullivan*, if the plaintiff is a public figure, then she will have to prove that the defendant published a statement with "actual malice" or with "reckless disregard for the truth" in order to recover actual damages. See *New York Times v. Sullivan*, 376 U.S. 254, 279, 280 (1964). However, the case of *Gertz v. Robert Welch* introduced the principle that if the plaintiff is a private figure, she will only have to prove that the defendant had been negligent in publishing a defamatory statement in order to recover for actual damages. See *Gertz v. Robert Welch*, 418 U.S. 323, 346-47 (1974).

¹⁰¹ 376 U.S. 254 (1964).

¹⁰² *New York Times*, 376 U.S. at 279-80. The *New York Times* Court held that a public official must show that a media defendant made statements with "actual malice" in order to recover actual damages. *Id.* The Supreme Court defined "actual malice" as follows:

Welch, Inc.,¹⁰³ the Court held that a *private* plaintiff need not meet the *New York Times* definition of "actual malice" in order to recoup compensatory damages.¹⁰⁴ Specifically, when establishing a *prima facie* case for defamation, a private plaintiff would have to prove only some degree of fault such as negligence on the part of the defendant in publishing the defamatory statement.¹⁰⁵ Thus, a private plaintiff would not be required to show a knowing or reckless falsehood on the part of the employer's actions. Under this decision, however, the *Gertz* Court held that a private plaintiff must demonstrate the *New York Times* standard of "actual malice" in order to recover punitive damages.¹⁰⁶ These two cases, *New York Times* and *Gertz*, determined the breadth of constitutional protection based on the status of an individual, private or public, but the Court had not yet considered analyzing the law of defamation according to the nature of the speech.¹⁰⁷

Furthermore, *Frank B. Hall & Co., Inc. v. W. Buck*¹⁰⁸ illustrated a private plaintiff who brought a defamation cause of action against his

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

Id.

¹⁰³ 418 U.S. 323 (1974).

¹⁰⁴ *Id.* at 346-47.

¹⁰⁵ *Id.* The *Gertz* court explained, "[so] long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher...of defamatory falsehood injurious to a private individual. *Id.* The Court also expressed, "[T]he *New York Times* standard [applied] to private defamation actions inadequately serves...competing values at stake." *Id.*

¹⁰⁶ *Gertz*, 418 U.S. at 350. The *Gertz* Court determined, "[T]he private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury...[t]here is no justification for allowing punitive damage awards against publishers...under a state-defined standard of fault." *Id.*

¹⁰⁷ KEETON ET AL., *supra* note 6, at 108-09. *But see Dun & Bradstreet, Inc. v. Green Moss Builders, Inc.* 472 U.S. 749 (1985). In *Dun & Bradstreet*, the Supreme Court added a new category to the analysis of defamation law under First Amendment jurisprudence. *Id.* at 761. Specifically, the Supreme Court distinguished defamatory speech with private content from defamatory speech with public content. *Id.* See *infra* notes 117-23 and accompanying text.

¹⁰⁸ 678 S.W.2d 612 (Tex. Ct. App. 1984). In *Frank B. Hall & Co., Inc.*, Larry W. Buck was an established salesman working for Frank B. Hall, Inc., an insurance company. *Id.* at 616. The president of Hall informed Mr. Buck that his salary would be cut from \$80,000 to \$65,000 and his profit sharing benefits would be eliminated because Mr. Buck failed to

former employer.¹⁰⁹ The plaintiff received punitive damages after showing that the employer's statements met the *New York Times* "actual malice" standard as well as proving the "fault" for a prima facie case as required under the *Gertz* ruling.¹¹⁰ In *Frank B. Hall*, a jury found a former employer liable for \$1.9 million, because the former employer informed a prospective employer¹¹¹ that his former employee was a "zero" and "a Jekyll and Hyde person" who was "lacking in communication or scruples."¹¹² The court ruled that the previous employee, a private-actor employee, met his burden of proof under the *New York Times* "actual malice" standard for punitive damages by showing that the former employer was reckless in submitting false, defamatory statements to a prospective employer.¹¹³ Therefore, the court affirmed the substantial jury award.¹¹⁴ The court also found that the former employer's statements were not mere expressions of opinion but were false and derogatory statements of fact.¹¹⁵ The court also reasoned that proof of an employer's ill will towards an employee coupled with other evidence constituted a sufficient basis for establishing "actual malice" for punitive damages.¹¹⁶

produce sufficient income for Hall. *Id.* Shortly thereafter, the president fired Mr. Buck, and Mr. Buck searched for other employment in the insurance industry but he failed. *Id.* at 617. Then, Mr. Buck hired an investigator to find the true reasons for his dismissal. *Id.* The investigator contacted Hall personnel who told him that Mr. Buck was "horrible in a business sense, irrational, ruthless, and disliked by office personnel," and further described Mr. Buck as a "classic sociopath." *Id.* The evidence proved that at the time of termination, Mr. Buck had generated \$300,000 in outstanding commissions and Hall dismissed Mr. Buck, avoiding payment of these commissions. *Id.* at 616-18.

¹⁰⁹ *Frank B. Hall & Co., Inc.*, 678 S.W.2d at 620.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 617. In *Frank B. Hall & Co., Inc.*, an investigator hired by the former employee posed as the "prospective employer." *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Frank B. Hall & Co., Inc. v. W. Buck*, 678 S.W.2d 612, 619-20 (Tex. Ct. App. 1984). The *Frank B. Hall & Co., Inc.* court recognized that the Supreme Court had not ruled on whether the *New York Times* definition of "actual malice" was proper in a case involving a private individual and a non-media defendant, such as an employer, but neither party objected to this standard. *Id.* Therefore, for the issue of punitive damages, the court applied the more strict *New York Times* definition of malice, which is whether the former employer's statements were made with knowledge of their falsity or with reckless regard of the truth of the statements. *Id.*

¹¹⁵ *Id.* at 617.

¹¹⁶ *Id.* at 620 (providing proof that the defendant entertained ill will toward the plaintiff is probative evidence that the defendant published the information knowing its falsity or with reckless disregard for its truth. "Other evidence" revealed that the employer's relationship with the former employee was "strained at best").

One year after the Texas appellate court decided *Frank B. Hall*, the Supreme Court in *Dun & Bradstreet, Inc. v. Green Moss Builders, Inc.*¹¹⁷ added a new category for constitutional analysis under the law of defamation by observing the nature of the speech.¹¹⁸ For the first time, the Court distinguished speech that contained private content from speech that embodied public content.¹¹⁹ First Amendment jurisprudence no longer required private plaintiffs to demonstrate that the defendant committed "actual malice" under the *Gertz* decision in order to recover a punitive damage award so long as the defamatory speech was a private concern.¹²⁰ Moreover, to recover a punitive damage award, private plaintiffs merely need to show that the defendant was negligent or at "fault" in publishing a defamatory statement of *private concern*.¹²¹ This is a much less stringent standard of proving punitive damages than a showing of "actual malice" under *New York Times* and *Gertz*.¹²² However, *Dun & Bradstreet* did not change the *Gertz* "fault" requirement for establishing a *prima facie* case for defamation.¹²³

To summarize the present legal requirements for establishing a *prima facie* case for defamation, private plaintiffs, like most employees, may recover both compensatory and punitive damages with a mere showing that the employer was negligent or at "fault" when publishing a defamatory statement.¹²⁴ Therefore, a private plaintiff in today's society may recover punitive damages more readily than the private plaintiffs in *Frank B. Hall*, because, in that case, the court forced the plaintiffs to meet rigorous *New York Times* standard of "actual malice."¹²⁵ However,

¹¹⁷ 472 U.S. 749 (1985).

¹¹⁸ *Dun & Bradstreet, Inc. v. Green Moss Builders, Inc.*, 472 U.S. 749, 761 (1985).

¹¹⁹ KEETON ET AL., *supra* note 6, at 109.

¹²⁰ *Dun & Bradstreet*, 472 U.S. at 761.

¹²¹ *Id.*

¹²² *Id.* at 760.

¹²³ SMOLLA, *supra* note 65, at § 8.07[3][a] (contending that in private figure cases which are subject to the *Gertz* fault requirement, negligence is automatically part of the plaintiff's *prima facie* case); KEETON ET AL., *supra* note 6, at 109 (stating that *Dun & Bradstreet* did not address the *Gertz* requirement of fault).

¹²⁴ *Dun & Bradstreet, Inc. v. Green Moss Builders, Inc.*, 472 U.S. 749, 761 (1985). The Supreme Court in *Dun & Bradstreet* expressed, "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice." *Id.*

¹²⁵ Compare *Frank B. Hall & Co., Inc. v. W. Buck*, 678 S.W.2d 612, 620 (Tex. Ct. App. 1984) with *Dun & Bradstreet*, 472 U.S. 749, 761 (1985). The Texas court in *Frank B. Hall* set forth a higher standard of proof for punitive damages for private plaintiffs which was the *New York Times* "actual malice." Whereas in the later case of *Dun & Bradstreet*, the Supreme

although employees may recover punitive damages from their employers or former employers for defamation claims with a lower standard of proof than such claims brought prior to *Dun & Bradstreet*, employers have numerous defenses against employees' claim of defamation.¹²⁶ In fact, employers should recognize these invaluable defenses when considering to discard "no comment" and neutral job reference policies.

2. Employer Defenses Against Defamation Liability

The *Frank B. Hall* decision coupled with the *Dun & Bradstreet* lower standard for proving punitive damages in defamation cases urge employers to exercise caution when making comments about their current employees or former employees. However, employers should also be informed that they have the right to assert successful affirmative defenses to claims of defamation such as the simple truth; a statement of a mere opinion rather than statement of fact; the consent of the employee; and the common law or statutory qualified privilege defense.

a) The Truth as an Employer's Defense to Defamation

The truth is an absolute defense against a defamation cause of action.¹²⁷ Generally, defendants need only show that their statements were substantially true; thus, proof of the literal truth of an accusation in every detail would not be necessary.¹²⁸ However, this general rule may not always be appropriate in an employment setting.¹²⁹ In *O'Brien v. Papa Gino's America, Inc.*,¹³⁰ a case from the First Circuit, an employer stated that a former employee had been discharged from his job for drug use, and though the court found this statement to be substantially correct, it denied the employer the truth defense.¹³¹ Specifically, the employer's actual statement that he discharged the employee for abusing cocaine on the job was substantially true, but the statement failed to

Court provided a lower standard of proof for punitive damages for private plaintiffs which was proving mere fault or negligence.

¹²⁶ See *infra* notes 127-221 and accompanying text.

¹²⁷ RESTATEMENT (SECOND) OF TORTS § 581(A) (1997) states, "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." See also RESTATEMENT (SECOND) OF TORTS § 581(A) (1997) cmt. d, "Truth of a defamatory statement of fact is a complete bar to recovery for an action for harm caused to another's reputation."

¹²⁸ KEETON ET AL., *supra* note 6, at 842.

¹²⁹ See, e.g., *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067 (1st Cir. 1986).

¹³⁰ 780 F.2d 1067 (1st Cir. 1986).

¹³¹ *Id.* at 1073.

explain that the dismissal was also a result of retaliation against the employee.¹³² The court reasoned that failing to tell the whole truth was tantamount to a lie; therefore, the employer's incomplete explanation for the discharge amounted to a false statement, prohibiting the employer from asserting the truth defense.¹³³ This case demonstrates another reason why employers should be more willing to set forth more complete and accurate information to prospective employers. When employers provide some facts but omit others, they could create a defamatory implication, and the law may hold them liable for this implication.¹³⁴

Additionally, the employer should never state a suspicion until she can support it with objective and detailed evidence.¹³⁵ In general, commentators have advised former employers to provide objective facts or opinions that can be supported by objective evidence, rather than mere allegations, exaggerations,¹³⁶ gossip, or speculation.¹³⁷ For instance, an employer may assert that the company discharged an employee for missing too many days of work.¹³⁸ However, employers should not provide untenable opinions for the reasons for absenteeism, because the employer will increase her risk of potential defamation liability.¹³⁹

Employer accusations regarding an employee who had been involved in illegal conduct or acted improperly have become a common source of defamation suits.¹⁴⁰ If the employer terminates an employee for such circumstances and provides a reference to this effect, the employer should restrict statements to that suspicion.¹⁴¹ For example,

¹³² *Id.* In *O'Brien*, the jury found that the employee's "termination was largely due to drug use, but he also had retaliatory motives arising from a personal grudge." *Id.* The subordinate employee who the employee refused to promote was the godson to the president of the company and the son of the employee's supervisor. *Id.* at 1067.

¹³³ *Id.*

¹³⁴ KEETON ET AL., *supra* note 6, at 117 (Supp. 1988).

¹³⁵ SOHO Guidebook, *supra* note 53.

¹³⁶ *See, e.g., Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986). The *Equitable Life* court held a former employer liable for defamation when discharging former employees and listing "gross insubordination" as the reason for termination; however the employer actually terminated the employees because they merely refused to change travel expense reports and refused to reimburse the company for \$200. *Id.* at 882, 888.

¹³⁷ SOHO Guidebook, *supra* note 53.

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.* For example, an employer should state, "[t]he Company fired the employee because his supervisor suspected that the former employee took company property." *Id.*

when an employer fires an employee for entering work while intoxicated, defamation does not occur if the employer honestly believed that the employee was intoxicated, and then tells the prospective employer the truth about such an incident.¹⁴²

b) Opinion as an Employer's Defense to Defamation

Employers should also recognize that if they communicate a mere opinion about an employee or former employee, a jury would likely find employers not liable for defamation.¹⁴³ In the *Gertz* decision, the Supreme Court expressed that under the First Amendment, "there is no such thing as a false idea."¹⁴⁴ Hence, lower courts have construed this infamous statement as being tantamount to an individual having absolute immunity against liability for giving opinions.¹⁴⁵

For example, in a federal district court case, *I. Karp v. Hill and Knowlton, Inc.*¹⁴⁶ an employer raised this opinion defense when it made statements against its former employee in a press release regarding a pending lawsuit between the two parties.¹⁴⁷ The employer discussed the

However, the employer should refrain from stating, "an employee was fired because he stole company property." *Id.*

¹⁴² Steven C. Bahls & Jane Easter Bahls, *Point of Reference*, *ENTREPRENEUR MAG.*, June 1, 1997, available in 1997 WL 12231332 [hereinafter Bahls & Bahls]; Paul W. Barada, *Check Please: Thorough Reference Checking Should Be Central to the Hiring Process*, *FIN. PLAN.*, Sept. 1, 1998, available in 1998 WL 11190514 (stating, "telling the truth or giving honestly held opinion about a former employee is a perfectly lawful thing to do"); and *Land Mine*, *supra* note 12 (explaining that an employer will not be held liable for defamation when the employer tells a prospective employer that an employee was discharged for theft if the employer had an honest belief that the employee committed theft and the employer fired the employee for theft).

¹⁴³ See RESTATEMENT (SECOND) OF TORTS § 566 (1977). This section provides: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed facts as the basis for the opinion." *Id.*; See RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1977). Although the *Gertz* decision was based on facts related to public matters, a private person-defendant communicating private information would be subject to the same constitutional protection provided for in *Gertz* whereby the defendant's opinions would prohibit a claim of defamation. *Id.* See *infra* notes 145 and 149 and accompanying text.

¹⁴⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

¹⁴⁵ See, e.g., *Mr. Chow of New York v. Ste. Jour Azure S.A.*, 759 F.2d 219, 224 (2d Cir. 1985) (stating that the First Amendment prohibits statements of opinions from giving rise to defamation claims); *I. Karp v. Hill and Knowlton, Inc.*, 631 F. Supp. 360, 364 (S.D.N.Y. 1986) (expressing, "The First Amendment precludes expressions of opinion from giving rise to defamation claims").

¹⁴⁶ 631 F. Supp. 360 (S.D.N.Y. 1986).

¹⁴⁷ *Id.* at 365.

pending lawsuit and expressed that the court's ruling supported its claim that the former employee defrauded the company.¹⁴⁸ The court held that the comment was a non-actionable statement of opinion and not a statement of fact, thus the court exempted the former employer from defamation liability.¹⁴⁹

c) Consent as an Employer's Defense to Defamation

Consent is another absolute defense¹⁵⁰ in defamation cases, although this defense has rarely been raised in employment defamation cases.¹⁵¹ Under the privilege of consent, the employee is precluded from bringing a defamation claim against the employer if the employee previously consented to such publication.¹⁵² However, the employee takes a risk that the employer's statements will be defamatory.¹⁵³

To ensure that the employee actually gave consent, the employer should obtain written consent by the employee before issuing any reference requested by a prospective employer to avoid defamation liability.¹⁵⁴ Particularly, the employer should obtain prior written consent from the employee when the prospective employer seeks more than the name, title, duties, and dates of employment, and inquires about the employee's job skills or performance.¹⁵⁵ As a general rule, if the information provided to the prospective employer is factual, and the employee has consented to the release of information, it will be absolutely privileged.¹⁵⁶ In short, one author expressed that an employer's best protection against defamation and other claims, which may arise from employment references, is to acquire an employee's or former employee's consent prior to releasing such information.¹⁵⁷

¹⁴⁸ *Id.* at 361. In the press release, the company's public relations agent stated, "Yesterday's decision in no way questions the merits of our case against Mr. Karp, [the former employee]. The ruling supports our claims that Mr. Karp defrauded Buckingham and that substantial relief should be granted...." *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See RESTATEMENT (SECOND) OF TORTS § 583 (1977).

¹⁵¹ Paetzold & Willborn, *supra* note 67, at 132.

¹⁵² See *id.*

¹⁵³ RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (1977).

¹⁵⁴ JACOBS & KOCH, *supra* note 45, at 272-73.

¹⁵⁵ See *id.* at 274.

¹⁵⁶ See *id.*

¹⁵⁷ SOHO Guidebook, *supra* note 53.

d) Common Law and Statutory Law Qualified Privilege
Defense to Defamation

After an employee has established a prima facie case for defamation by demonstrating the *Gertz* "fault" requirement, which entails demonstrating the former employer's negligence in publishing a defamatory statement, the employer now has the opportunity to raise either a common law or statutory qualified privilege defense.¹⁵⁸ Common law qualified privilege, also known as conditional privilege, gives an employer civil immunity against defamation liability that may occur when the employer makes defamatory statements about a departing employee or former employee.¹⁵⁹ Under qualified privilege protection, employers may convey statements to the departing employee or former employee,¹⁶⁰ the employee's co-workers,¹⁶¹ or on the employee's performance evaluation.¹⁶² Moreover, the qualified privilege

¹⁵⁸ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-47. In private figure cases, plaintiffs must show a fault requirement as part of their prima facie case. *Id.* Further, traditional common law of defamation privileges has become extremely important in defamation actions brought by employees against their employers. SMOLLA, *supra* note 65 at § 15.07[2][a]. Note that employers may also be protected under a statutory qualified privilege which provides employers with civil immunity for statements made about employees or former employees as long as the statements are conveyed in "good faith." Most jurisdictions which provide statutory protection allow employer immunity against defamation claims brought by employees or former employees only when a prospective employer requests such information, thus the former employer cannot volunteer the information. See *infra* notes 206 to 211 and accompanying text.

¹⁵⁹ See, e.g., *Erickson v. Marsh & McLennan Co.*, 569 A.D.2d 793 (N.J. 1990). The New Jersey Supreme Court adopted a common law qualified privilege to protect employers in cases where an employer makes a defamatory statement about a former employee to a prospective employer concerning the former employee's qualifications. *Id.*; SMOLLA, *supra* note 65, at §§ 15.07[2][a]-[2][b]; see *infra* notes 160-71 and accompanying text.

¹⁶⁰ See, e.g., *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) and *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 890 (Minn. 1986). Both courts in *Duffy* and in *Equitable Life* recognized that employers may raise the qualified privilege defense in situations of self-compelled defamation in which the employer informs the employee of the reasons for discharge, otherwise employers would decline to inform employees of the reasons for their discharge.

¹⁶¹ See, e.g., *Olson v. 3M Co.*, 523 N.W.2d 578, 582-83 (Wis. Ct. App. 1994). The *Olson* court found that an employer had a common interest with its employees to maintain a harassment-free working environment and such common interest included reasonable communications by the employer to its employees concerning action taken against employees for sexual harassment. *Id.* Thus, the court concluded that the qualified privilege protected the employer from defamation liability for disclosing information to its employees that the former employee-plaintiff had sexually harassed two female co-workers. *Id.*

¹⁶² A conditional privilege extends to reports evaluating employees, including the reports from present or past employers to a prospective employer or between the evaluating

even protects an employer who publishes false and defamatory statements about the employee unless the employer abuses the privilege and the statements are not conditionally privileged.¹⁶³ The fundamental purpose of a qualified privilege is to ensure that information openly flows from one employer to the next concerning facts about former employees and job applicants.¹⁶⁴ If courts did not afford employers this protection, then negative information regarding former employees or departing employees would never be communicated because of the employers' fear of potential defamation liability.¹⁶⁵

Specifically, the common law qualified privilege protects an employer's own interests, the interests of others, or a common interest between the speaker and recipient, such as the common interest of all employers to receive accurate and complete information about job applicants.¹⁶⁶ For instance, a former employer's warning that informs a prospective employer about a former employee's misconduct or bad character will be protected under qualified privilege.¹⁶⁷ Moreover, courts recognize that employers are morally justified for alerting other employers about a former employee who demonstrated dangerous propensities because under "ordinary societal standards a reasonable [person] would feel called upon to speak."¹⁶⁸

Furthermore, when exercising the common law qualified privilege, employers must show that their statements were protected by meeting the standards set forth in Restatement (Second) of Torts section 595,

employee to a fellow a reporting supervisor. SMOLLA, *supra* note 65, at §§ 8.08[2][d] and 15.03[1]. See, e.g., *Kass v. Great Coastal Express, Inc.*, 676 A.D.2d 1099 (N.J. 1990). In this case, a former employee brought a libel action against his former employer for submitting alleged negative and false evaluations to a prospective employer. *Id.*

¹⁶³ RESTATEMENT (SECOND) OF TORTS § 593 (1977) provides:

One who publishes defamatory matter concerning another is not liable for the publication if

- (a) the matter is published upon an occasion that makes it conditionally privileged and
- (b) the privilege is not abused.

Id.

¹⁶⁴ See generally RESTATEMENT (SECOND) OF TORTS, Topic 3 *Conditional Privileges; Occasions Making a Publication Conditionally Privileged* (1977).

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* "Occasions making a publication conditionally privileged afford a protection based upon the public policy that recognizes that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interest, the interests of third persons or certain interests of the public." *Id.*

¹⁶⁷ KEETON ET AL., *supra* note 6, at 827.

¹⁶⁸ See *id.*

which governs the qualified privilege principles for employment references.¹⁶⁹ Under this Restatement, the prospective employer must have an "important interest" in the information, and the former employer must give the information only upon the request of the prospective employer unless some relationship exists between the parties.¹⁷⁰ Protected statements consist of information that relates to the employee's or former employee's honesty and efficiency of her work, or information that relates to the employee's future position with the prospective employer.¹⁷¹

Many states follow the Restatement by observing that employee references are privileged provided that the employer does not abuse the privilege¹⁷² and employers respond to reference requests.¹⁷³ In other words, qualified privilege does not protect all statements contained in

¹⁶⁹ RESTATEMENT (SECOND) OF TORTS § 595 (1977). "Protection of Interest of Recipient or a Third Person" provides that statements are conditionally privileged or qualifiedly privileged when:

- (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
 - (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
 - (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within generally accepted standards of decent conduct.

Id.

- (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that
 - (a) the publication is made in response to a request rather than volunteered by the publisher; or
 - (b) a family or other relationship exists between the parties.

Id. But see RESTATEMENTS (SECOND) OF TORTS §§ 599-605A (1977). These series of Restatements set forth the possible abuses of conditional privilege in which employers could forfeit the common law qualified privilege defense.

¹⁷⁰ RESTATEMENT (SECOND) OF TORTS § 595 (1977).

¹⁷¹ RESTATEMENT (SECOND) OF TORTS § 595 cmt. i. Information having no connection with the present employee's work or regarding the employee's future job with a prospective employer are considered outside the scope of the privilege. *Id.*

¹⁷² See RESTATEMENT (SECOND) OF TORTS §§ 595 to 605A; see *infra* notes 174-80 and accompanying text.

¹⁷³ Consistent with RESTATEMENT (SECOND) OF TORTS § 595(2)(a) (1977), courts generally grant qualified privilege when the information is provided in response to a request rather than the employer volunteering the information about an employee or former employee. SMOLLA, *supra* note 65, at § 8.08 [2][b]. For instance, a former employer may not be privileged to volunteer information that is true with respect to an employee's religious beliefs. If, however, a prospective employer requests such information, then the privilege may protect the former employer and permit disclosure of the information. RESTATEMENT (SECOND) OF TORTS § 595 cmt. i (1977).

references about former employees. After the employer has proven that her statements made in a reference are protected by qualified privilege, the burden shifts to the employee or former employee to prove that the employer "abused" the privilege.¹⁷⁴ If a plaintiff proves that her employer or former employer abused the privilege, then the employer loses the privilege exposing itself to defamation liability.¹⁷⁵ In particular, the employee may defeat the qualified privilege by showing the following "abuse": 1) the prospective employer did not have an important interest to be upheld;¹⁷⁶ 2) the employer published information about an employee or former employee with knowledge or reckless disregard to the falsity of the defamatory statements;¹⁷⁷ 3) the statements were neither limited to a necessary purpose nor made on the proper occasion;¹⁷⁸ 4) the statements were not made in a proper manner;¹⁷⁹ or 5) the employer excessively published the defamatory statements.¹⁸⁰

Unfortunately, prong two may pose a problem for the employee when presenting her case to overcome the qualified privilege defense. Jurisdictions differ with regard to which standard the employee must prove in order to abrogate the qualified privilege defense, thus a court may require the employee to prove some or all of these standards.¹⁸¹ For instance, an employee may be required to show negligence,¹⁸² common law "ill-will malice,"¹⁸³ or the *New York Times* "actual malice"¹⁸⁴ which is

¹⁷⁴ See, e.g., *Olson v. 3M Company*, 523 N.W.2d 578, 583 (Wis. Ct. App. 1994) (stating that since 3M, the former employer, had a conditional privilege, the burden shifts to the plaintiffs to affirmatively prove abuse of the privilege); *Duffy v. Leading Edge Prod., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (stating that when appealing the summary judgment motion favoring the employer, the employee must prove that the employer acted with malice, rather than the employer prove the absence of malice).

¹⁷⁵ See RESTATEMENT (SECOND) OF TORTS § 595 cmt. a; SMOLLA, *supra* note 65 § 8.09[1].

¹⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 595(1)(a).

¹⁷⁷ See RESTATEMENT (SECOND) OF TORTS §§ 600 - 602.

¹⁷⁸ See RESTATEMENT (SECOND) OF TORTS §§ 603 - 605A.

¹⁷⁹ Robert S. Adler & Ellen R. Peirce, *Encourage Employers to Abandon Their "No Comment" Policies Regarding Job Reference: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1409 (1996) [hereinafter Adler & Peirce, *Encourage Employers*].

¹⁸⁰ See RESTATEMENT (SECOND) OF TORTS § 604.

¹⁸¹ See *infra* notes 182-87 and accompanying text.

¹⁸² SMOLLA, *supra* note 65, at § 8.09[4]. In the context of defeating a qualified privilege defense, some courts have defined "negligence" as the lack of "probable cause" or "reasonable belief" in the truth of a statement. *Id.*

¹⁸³ O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305, 313-15 (1988). The employee may overcome the qualified privilege under

defined as "knowledge that it was false, or with reckless disregard of whether it was false or not."¹⁸⁵ However, most jurisdictions with common law qualified privilege require that employees defeat the privilege by a showing of mere negligence, which resembles the constitutional requirement established in *Gertz*.¹⁸⁶ This requires the plaintiff to merely prove that her employer lacked "probable cause" or reasonable belief in the truthfulness of the statement when publishing the statement.¹⁸⁷ Rodney Smolla,¹⁸⁸ however, convincingly argues that requiring a mere negligence standard to defeat the employer's qualified privilege establishes a "meaningless defense," because the court had already subjected the employee to the negligence standard when the employee presented the prima facie case for defamation.¹⁸⁹ To avoid the "meaningless defense," a growing number of jurisdictions are requiring plaintiffs to show that their employer published the statement with "knowledge that it was false, or with reckless disregard of whether it was false or not."¹⁹⁰ Additionally, the Restatement's standard of malice parallels the *New York Times* standard; therefore, the privilege would not be a "meaningless defense" if a court follows the Restatement version.¹⁹¹

common law "ill-will malice" if the employee proves that the employer was motivated by her "ill will" or actual "spite" against the employee upon giving a reference. *Id.*

¹⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 280 (1964) (defining "actual malice" as knowledge that the statement published was "false or with reckless disregard of whether it was false or not").

¹⁸⁵ *Id.*; see, e.g., *Olson v. 3M Co.*, 523 N.W.2d 578, 583 (Wis. Ct. App. 1994) (requiring plaintiff to establish abuse of privilege by showing that the employer had "knowledge or reckless disregard as to falsity of defamatory matter."); *Kass v. Great Coastal Express, Inc.*, 676 A.D.2d 1099, 1106 (N.J. 1990) (declaring that in order to overcome a qualified privilege, plaintiff must prove that the employer "knew the statement to be false or acted in reckless disregard of its truth or falsity." The court noted that this standard is a much higher standard and tougher to meet than the plaintiff's prima facie case for the tort of defamation, which is a showing of mere negligence); *Duffy v. Leading Edge Prod., Inc.*, 44 F.3d 308 (5th Cir. 1995) (stating that the plaintiff was required to show that the employer abused the privilege based on the *New York Times* standard of "actual malice").

¹⁸⁶ SMOLLA, *supra* note 65, at § 8.09[4].

¹⁸⁷ See *id.*

¹⁸⁸ Rodney Smolla is the author of the treatise *LAW OF DEFAMATION* (1997).

¹⁸⁹ In private figure cases, plaintiffs must already show a *Gertz* fault requirement as part of their prima facie case, which renders the conditional privilege a "meaningless defense" that adds nothing to the burden already imposed on the plaintiff. Smolla argues that by imposing a less substantial *Gertz* fault requirement to defeat a conditional privilege defense, *Gertz* will swallow up the conditional privilege defense. SMOLLA, *supra* note 65, at §§ 8.07[3][a], 8.07 [3][c][i], and 8.09 [5].

¹⁹⁰ See *supra* note 185; SMOLLA, *supra* note 65, at § 8.09 [5].

¹⁹¹ Compare *New York Times v. Sullivan*, 376 U.S. 254, 279, 280 (1964). The *New York Times* Court defined "actual malice" as knowledge that the statement published was "false or

Therefore, the courts would subject even private plaintiffs to the stricter *New York Times* "actual malice" standard in order to overcome the employer's qualified privilege defense.¹⁹²

For instance, in *Duffy v. Leading Edge Products, Inc.*,¹⁹³ the Fifth Circuit Court imposed the "actual malice" standard for a former employee seeking to overcome his employer's qualified privilege defense.¹⁹⁴ In *Duffy*, an employer terminated an employee after learning that the worker had sexually harassed two female co-workers.¹⁹⁵ The employee brought a "compelled self-publication" defamation cause of action¹⁹⁶ against the employer, claiming that the employer could reasonably foresee that he would be forced to reiterate the defamatory reasons for his dismissal to prospective employers.¹⁹⁷ The court in *Duffy* had to determine which standard constituted "malice," either the common law "ill will malice" or the more rigorous *New York Times* "actual malice," to defeat the qualified privilege defense.¹⁹⁸ The court ruled that under Texas law, the employee had to prove that at the time the employer stated the reasons for discharge, the employer acted under a *New York Times* "actual malice" standard.¹⁹⁹ Moreover, the employee needed to demonstrate that his employer entertained serious doubts as to the truth of the communication.²⁰⁰ The court also concluded that the

with reckless disregard of whether it was false or not." *Id.*; with RESTATEMENT (SECOND) OF TORTS § 600 (1977) which provides that:

- "abuse" of the qualified privilege may be shown by: [O]ne who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he
- (a) knows the matter to be false, or
 - (b) acts in reckless disregard as to its truth or falsity.

Id. See also RESTATEMENT (SECOND) OF TORTS § 600 (1977) cmt. b which clarifies, "reckless disregard as to the truth or falsity exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement." *Id.*

¹⁹² See *supra* note 185.

¹⁹³ 44 F.3d 308 (5th Cir. 1995).

¹⁹⁴ *Duffy v. Leading Edge Prod., Inc.*, 44 F.3d 308, 313 (5th Cir. 1995). This federal case arose out of the District Court for the Southern District of Texas. Based upon diversity of citizenship, the federal court applied Texas law. *Id.* at 310.

¹⁹⁵ *Id.* at 311.

¹⁹⁶ See *supra* notes 82-92 and accompanying text.

¹⁹⁷ *Duffy*, 44 F.3d at 311.

¹⁹⁸ *Id.* at 313-15. The *Duffy* court properly explained that the *New York Times* "actual malice" standard is a higher standard than common law malice which may be proved by the preponderance of evidence. *Id.* Under *New York Times* "actual malice" standard, however, the plaintiff must provide clear and convincing proof to overcome the employer's qualified privilege defense. *Id.* at 313.

¹⁹⁹ *Id.* at 314.

²⁰⁰ *Duffy v. Leading Edge Prod., Inc.*, 44 F.3d 308, 314 (5th Cir. 1995).

privilege is not lost if the employer actually believed the defamatory statements to be true.²⁰¹ In *Duffy*, the employer believed both women claiming the employee had sexually harassed them to be sincere, and no evidence indicated that the employer wrote the sexual harassment report with a high degree of certainty that the facts disclosed by the women were probably false.²⁰² The employee did not overcome the employer's qualified privilege defense, because he failed to meet the *New York Times* "actual malice" standard; hence, the Fifth Circuit Court dismissed the case.²⁰³

In addition, while some states like Texas recognize the common law qualified privilege defense, other states have codified the common law by constructing statutes that also protect employers against defamation claims.²⁰⁴ Therefore, when asserting a qualified privilege defense, employers are well advised to determine whether their particular state follows a common law qualified privilege or whether the state has enacted a statutory qualified privilege, also known as "good faith" job reference laws.²⁰⁵ Currently, at least twenty-nine states have adopted statutory qualified privilege laws.²⁰⁶ Similar to the common law qualified privilege, the statutory qualified privilege provides employers with a defense against defamation claims brought by disgruntled employees or former employees, encouraging employers to

²⁰¹ *Duffy*, 44 F.3d at 314.

²⁰² *Id.*

²⁰³ *Id.* at 315.

²⁰⁴ See *infra* note 206 and accompanying text. Forster, *Good Faith Reference Laws*, *supra* note 15, at 6402, available in 1996 WL 363324 (reporting that state legislatures have passed bills to protect employers against defamation claims when they provide "good faith" job references to prospective employers).

²⁰⁵ Forster, *Good Faith Reference Laws*, *supra* note 15, at 6402.

²⁰⁶ ALASKA STAT. § 09.65.160 (Michie 1996); ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); CAL. CIV. CODE § 47(c) (West Supp. 1997); COLO. REV. STAT. § 8-2-114 (Supp. 1996); DEL. CODE ANN. tit. 19 § 708 (Supp. 1996); FLA. STAT. ANN. § 768.095 (West. Supp. 1997); GA. CODE ANN. § 34-1-4 (Supp. 1996); IDAHO CODE § 44-201 (Michie 1996); 745 ILL. COM. STAT. ANN. 46.10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1 (West Supp. 1997); KAN. STAT. ANN. § 44-199a (West Supp. 1997); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997); ME. REV. STAT. ANN. tit. 26 § 598 (West Supp. 1996); MD. CODE ANN. § 5-423 (Michie 1997); MICH. COMP. LAWS § 423.452 (West Supp. 1997); NEB. REV. ST. § 48-2304 (1998); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); N.C. GEN. STAT. § 1-539.12 (1997); N.D. CENT. CODE § 34-02-18 (Supp. 1997); OHIO REV. CODE ANN. § 4113.71 (Banks-Baldwin Supp. 1998); OKLA. STAT. ANN. tit. 40 § 61 (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1 (Supp. 1996); S.C. CODE ANN. § 41-1-65 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie 1998); TENN. CODE ANN. § 50-1-105 (Supp. 1998); UTAH CODE ANN. § 34-42-1 (Supp. 1996); WIS. STAT. ANN. § 895.487 (West 1997); WYO. STAT. ANN. § 27-1-113 (Michie Supp. 1996).

communicate employment information to prospective employers.²⁰⁷ According to a 1996 Wall Street Journal article, state legislatures have designed "good faith" reference laws to encourage companies to re-evaluate their "no comment" and neutral job reference policies in order to provide a safer and more efficient workplace.²⁰⁸ However, these laws do not legally require companies to disclose a former employee's past violent behavior.²⁰⁹ Thus, in order to ensure disclosure of information, this Note proposes that these laws should obligate employers to disclose special information such as a former employee's violent behavior, while at the same time, the employers will remain immune from defamation liability.²¹⁰

Furthermore, most of these statutes presume that the employer has acted in "good faith" upon disclosing information about an employee to an inquiring prospective employer.²¹¹ Similar to the common law qualified privilege defense, under most statutes, the employee may rebut the presumption of "good faith" by demonstrating that the employer "abused" the privilege in order to recover damage awards for defamation.²¹² However, states differ on their approach in determining "abuse" on the part of the employer, because the statutes impose different standards of proof and provide various meanings to the definition of "malice" for the employee to overcome the qualified privilege.²¹³ For instance, while fifteen states require a showing of a preponderance of the evidence that the employer abused the qualified

²⁰⁷ Forster, *Good Faith Reference Laws*, *supra* note 15, at 6402.

²⁰⁸ McMorris, *supra* note 8, at B1.

²⁰⁹ *See id.*; *see also* Barry S. Shanoff, *New Regs Reduce Employee Reference Liability*, *WORLD WASTES*, Sept. 1, 1996, at 19 available in 1996 WL 9605417.

²¹⁰ *See infra* part V for proposed model statute, which imposes a duty on employers to disclose a former employee's past criminal behavior, violent tendencies, dangerous propensities, and past sexual misconduct.

²¹¹ 26 statutes out of the 29 expressly state or imply that a presumption of "good faith" exists. The only three statutes which do not provide for this language are the following: CAL. CIV. CODE § 47(c) (West Supp. 1997); KAN. STAT. ANN. § 44-199a (Supp. 1996); and N.C. GEN. STAT. § 1-539.12 (1997).

²¹² *See, e.g.*, Fla. Stat. Ann. § 768.095 (West. Supp. 1997) (stating that the employer's "presumption of good faith is rebutted upon a showing that the information disclosed by the former employer was knowingly false or deliberately misleading...[or] rendered with malicious purpose..."). *See also* 745 ILL. COM. STAT. ANN. 46.10 (West Supp. 1997) (stating that the presumption of good faith "may be rebutted by a preponderance of evidence that the information disclosed was knowingly false...").

²¹³ A problem arises with the term "malice" because a number of states use the term in different ways. *See* Adler & Peirce, *Encourage Employers*, *supra* note 179, at 1453. *See infra* notes 214-16 and accompanying text.

privilege,²¹⁴ seven other states require the employee to show abuse by a higher standard of clear and convincing evidence.²¹⁵ Seven states do not explicitly state the standard of proof needed in order to overcome the statutory qualified privilege defense.²¹⁶ In addition, unlike some common law qualified privilege approaches, none of the "good faith" job reference statutes impose a mere negligence standard on the employee to defeat the employer's qualified privilege defense.²¹⁷ Therefore, these statutes require the employee to show "malice" on the part of the employer preserving the employer's qualified privilege defense and avoiding the "meaningless defense."²¹⁸ Different states use this term "malice" in various ways—referring to either the common-law ill will malice²¹⁹ or the *New York Times* "actual malice,"²²⁰ but that discussion is beyond the scope of this article.²²¹

²¹⁴ Proof by "preponderance of the evidence" means that it is more probable than not that a contested fact exists. 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE 575 (John W. Strong et al. eds. 4th ed. 1992). Statutes that require employees to demonstrate "abuse" of the privilege by a "preponderance of the evidence" include the following: ALASKA STAT. § 09.65.160 (Michie 1996); COLO. REV. STAT § 8-2-114 (Supp. 1996); GA. CODE ANN. § 34-1-4 (Supp. 1996); 745 ILL. COM. STAT. ANN. 46.10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1 (West Supp. 1997); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997); N.C. GEN. STAT. § 1-539.12 (1997); N.D. CENT. CODE § 34-02-18 (Supp. 1997); MICH. COMP. LAWS § 423.452 (West Supp. 1997); OHIO REV. CODE ANN. § 4113.71 (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40 § 61 (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1 (Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); WYO. STAT. ANN. § 27-1-113 (Michie Supp. 1996).

²¹⁵ Proof by "clear and convincing evidence" is a higher burden of proof than "preponderance of the evidence." A burden of "clear and convincing evidence" means that a jury must be persuaded that the truth of a fact is "highly probable." Strong et al., *supra* note 214, at 575-76. Statutes that require employees to demonstrate abuse of the privilege by a "clear and convincing evidence" include the following: FLA. STAT. ANN. § 768.095 (West Supp. 1997); IDAHO CODE § 44-201 (Supp. 1996); ME. REV. STAT. ANN. TIT. 26 § 598 (West Supp. 1996); MD. CODE ANN. § 5-423 (Supp. 1997); S.C. CODE ANN. § 41-1-65 (Law Co-op. Supp. 1996); UTAH CODE ANN. § 34-42-1 (Supp. 1996); WIS. STAT. ANN. § 895.487 (West 1997).

²¹⁶ Statutes that fail to provide guidance for determining which standard of proof is applicable to overcome a qualified privilege defense include the following: ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); CAL. CIV. CODE § 47(c) (West Supp. 1997); DEL. CODE ANN. tit. 19 § 708 (Supp. 1996); KAN. STAT. ANN. § 44-119a (Supp. 1996); NEB. REV. ST. § 48-2304 (1998); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); S.C. CODE ANN. § 41-1-65 (Law Co-op. Supp. 1996).

²¹⁷ See *supra* note 206.

²¹⁸ See *supra* note 206; see *supra* note 189 and accompanying text.

²¹⁹ See *supra* note 183.

²²⁰ See *supra* note 184.

²²¹ See *supra* note 213 and accompanying text.

To summarize, employers should be less fearful when giving out references if they abide by the following defenses: tell the truth, give an honest opinion, or obtain employee consent.²²² Most importantly, employers should consider the qualified privilege defense to defamation when deciding to adopt more open reference practices that convey full and complete references about their employees or former employees.²²³ Ironically, employers may be creating more legal problems if they choose to adopt no-comment reference policies, neutral policies, or policies that give only favorable information to prospective employers.²²⁴ Under a negligent misrepresentation theory, for instance, a former employer may be required to disclose information in order to protect a prospective employer or third parties if the former employer gives a favorable reference and omits negative information, such as an employee's violent behavior.²²⁵ Further, failing to disclose information could lead to negligent hiring liability for prospective employers.²²⁶ Hence, employers should be less worried about defamation suits and more concerned with failing to disclose all relevant information that reveals potential harm to prospective employers or third parties. After discussing the elements of defamation and the defenses to defamation in an employment setting, an explanation of other torts that may affect the employer's decision in determining whether to give references needs to be addressed as well.

²²² See *supra* notes 127-57 and accompanying text.

²²³ See *supra* notes 158-221 and accompanying text. McMorris, *supra* note 8, at B1 (reporting that some companies changed their "no comment" policies after their particular state adopted [qualified privilege] laws that make it more difficult for former employees to win lawsuits over negative job references).

²²⁴ A growing trend reflects that companies are suing former employers who failed to provide references alerting them to problems with an employee, particularly if the worker had demonstrated violent behavior. Courts are increasingly naming this as negligent referencing. Saltzman, *Shouldn't Fret So Much*, *supra* note 52; see also McMorris, *supra* note 8, at B1 (referring to a Vice President's statements that his company verifies only dates of employment, and is considering changing its policy because of the new California law presented by *Randi W.* and the *Allstate* case).

²²⁵ See *infra* notes 230-48 and accompanying text. See part IV. This part explains the expanded tort liability imposed on employers who give favorable references but fail to disclose information, which would have prevented substantial foreseeable risks to unknown third parties.

²²⁶ See *infra* notes 318-40 and accompanying text. See also Paul W. Barada, *Check Please: Thorough Reference Checking Should Be Central to the Hiring Process*, FIN. PLAN., Sept. 1, 1998, available in 1998 WL 11190514 (stating that checking references reduces the employer's potential liability for negligent hiring claims).

C. *Background of Other Torts and Title VII Retaliatory Reference Claims*

Employers should also have a working knowledge of other torts, which may seem to conflict with the law of defamation and Title VII. The law of defamation directs employers to give neutral, positive, or no information regarding a former employee's job performance in the interest of preventing an employee from bringing a defamation claim.²²⁷ However, for the torts of negligent misrepresentation and intentional misrepresentation, employers may be required to disclose negative information about an employee and may be penalized for giving a neutral or positive reference.²²⁸ By understanding these torts and statutory obligations, employers may properly discard "no comment" and neutral reference policies and tailor their new reference policies in order to open the channels of communication among employers.²²⁹ Thus, the fundamental concepts behind negligent misrepresentation, intentional misrepresentation, and Title VII retaliatory claims must be discussed.

1. *Negligent Misrepresentation*

An individual owes no duty to warn others who are threatened by a third party's conduct absent a "special relationship" between that individual and other parties according to Restatement (Second) of Torts section 315.²³⁰ Generally, in order to prove negligent misrepresentation, under Restatement (Second) of Torts section 311,²³¹ a plaintiff must prove

²²⁷ See *supra* notes 11-15. See *supra* notes 50-51 and accompanying text.

²²⁸ See *infra* part IV.

²²⁹ Richard J. Reibstein, *California Supreme Court Recognition of Common Law Claim Based on Favorable Job Reference Could Put Employers Nationwide Between a Rock and a Hard Place*, NAT'L L.J., Mar., 10, 1997, at B5 (stating, "one way to minimize or eliminate the risk of liability is to include a legally sufficient reservation or qualification in an employment reference. In drafting such reservations, or qualifications, both the law of defamation and the law of misrepresentation must be taken into consideration").

²³⁰ RESTATEMENT (SECOND) OF TORTS § 315 (1965) provides:

There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

²³¹ RESTATEMENT (SECOND) OF TORTS § 311 (1965) involves negligent conduct and provides that:

that the individual owed a duty not to misrepresent the truth because this theory is a negligence-based tort.²³² Further, prospective employers, employees, or injured third parties must also prove that they reasonably relied on the past employer's statements, and that these misrepresentations proximately caused their injuries.²³³ Similar to these Restatements, courts have not yet imposed a blanket duty on the part of former employers to disclose negative information about a former employee to prospective employers when no special relationship exists between the parties.²³⁴

However, some courts, like California and Florida, have carved out exceptions²³⁵ to the "no duty" to disclose rule, holding that former employers have a duty to disclose information to prospective employers when employers give a favorable reference but fail to disclose negative information, such as a former employee's dangerous propensities.²³⁶

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

Id.

²³² *Id.* See also *Garcia v. Superior Court*, 789 P.2d 960, 963-64 (Cal. 1990).

²³³ See *supra* note 231.

²³⁴ See, e.g., *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990) (holding that a former employer had no duty to disclose information about a former employee's violent behavior to a prospective employer); *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1986) (holding that a former employer had no duty to disclose information to a prospective employer regarding a teacher's past sexual misconduct with a student); see also *Adler & Peirce, Encourage Employers*, *supra* note 179, at 1417 (stating that courts have not established a blanket duty on the former employer to disclose information about a former employee to prospective employers); *KEETON ET AL.*, *supra* note 6, at 737 (stating that as a general rule, the deceit action will not be recognized for a tacit nondisclosure).

²³⁵ Courts have carved out exceptions to the general rule that the non-disclosure of facts has no cause of action. Courts create a duty by observing "the importance of the fact not disclosed." *KEETON ET AL.*, *supra* note 6, at 737-39.

²³⁶ See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 593 (Cal. 1997); *Gutzan v. Altair Airlines*, 776 F.2d 135, 139 (3d Cir. 1985); *Garcia v. Superior Court*, 789 P.2d 960 (Cal. 1990). In *Garcia*, the California Supreme Court held that a parole officer had a duty of reasonable care to disclose information to a third party regarding a parolee's threat to end the third party's life. *Id.* at 961. The officer told the victim that she had nothing to worry about and that he would not come looking for her. *Id.* However, the parolee told the officer that he would kill her if he found her. *Id.* at 963. The parolee acted on this threat by kidnapping and then shooting the victim. *Id.* The court reasoned that since the parole

This exception to the general rule was formed through the expansion of the tort of negligent misrepresentation.²³⁷ A few courts have extended the application of negligent misrepresentation to employers who knew or should have realized that the safety of others may depend on the accuracy of the information.²³⁸ Courts have held employers liable for negligent misrepresentation regardless of the existence of a special relationship between the employer and prospective employer or third parties.²³⁹ Thus, an alternative method in measuring a negligent act is to regard negligence as an act or *omission* that would be avoided by a reasonable person who would consider the safety of others.²⁴⁰ Also, when carving out an exception to the "no duty" rule, courts have considered the foreseeability of harm, public policy, moral blame, and social requirements.²⁴¹

For instance, the employees as well as injured third parties in *Randi W. v. Muroc Joint Unified School District*,²⁴² *Jerner v. Allstate Insurance Company*,²⁴³ and *Gutzan v. Altair Airlines, Inc.*²⁴⁴ asserted negligent misrepresentation actions against former employers for their injuries or injuries sustained by deceased family members as a result of the former employers' omissions in their employment references.²⁴⁵ In these cases, the former employers gave recommendations for a potentially dangerous former employee but failed to disclose these dangerous

officer chose to communicate information to the third person, he owed a reasonable duty to speak truthfully even though no "special relationship" existed between the two parties. *Id.* at 964. The court also determined that he either knew or should have known that the victim's safety might depend on the accuracy of the information. *Id.*

²³⁷ See, e.g., *Randi W.*, 929 P.2d at 591; *Gutzan*, 776 F.2d at 139; *Garcia*, 789 P.2d at 964.

²³⁸ *Id.* See also RESTATEMENT (SECOND) OF TORTS § 311 cmt. b (1965). This comment provides, "[§ 311] extends to any person who, in the course of an activity which is in furtherance of his own interests, undertakes to give information to another, and knows or should realize that the safety of others may depend upon the accuracy of the information." *Id.*

²³⁹ See *supra* note 237.

²⁴⁰ See *Gutzan v. Altair Airlines*, 776 F.2d 135, 139 (3d Cir. 1985).

²⁴¹ *Malorney v. B & L Motor Freight, Inc.* 496 N.E.2d 1086 (Ill. App. Ct. 1986); see also *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588 (Cal. 1997).

²⁴² 929 P.2d 582 (Cal. 1997).

²⁴³ Fla. Cir. Ct. No. 93-09472 (1993).

²⁴⁴ 766 F.2d 135 (3d Cir. 1985).

²⁴⁵ See *infra* part IV. These cases are discussed in greater detail in part IV. Part IV distinguishes employment reference-related cases between states which hold former employers liable for giving a neutral or positive recommendation while not disclosing negative facts and states that do not hold former employers liable under these circumstances.

propensities to prospective employers.²⁴⁶ For example, in both the *Randi W.* and *Gutzan* opinions, the courts held the former employers liable for negligent misrepresentation when they omitted facts in a recommendation even though no special relationship existed between the former employer and the injured third parties.²⁴⁷ Disclosure of these facts could have prevented a substantial risk of foreseeable physical injury to the employees at the new workplace.²⁴⁸ Negligent misrepresentation liability has been a more common source of litigation for former employers; however, exposure to intentional misrepresentation liability has also given employers something to consider when they omit information in a job reference.

2. Intentional Misrepresentation

Unlike negligent misrepresentation, intentional misrepresentation does not require a duty of care analysis in determining liability.²⁴⁹ According to Restatement (Second) of Torts section 310,²⁵⁰ employers who make a misrepresentation in a reference may be held liable to a victim for her physical injuries if the misrepresentations lead a prospective employer to rely on the truth of that information and to the employer's subsequent hiring of a dangerous employee.²⁵¹ More specifically, the former employer must intend to induce action or realize that his statement would induce action by the prospective employer, which would place an unreasonable risk of physical harm to others.²⁵² Former employees or third parties must show the element of intent by

²⁴⁶ See *id.*

²⁴⁷ See *id.*

²⁴⁸ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997); *Gutzan v. Altair Airlines*, 776 F.2d 135 (3d Cir. 1985).

²⁴⁹ *Randi W.*, 929 P.2d at 587.

²⁵⁰ RESTATEMENT (SECOND) OF TORTS § 310 (1965) involves intentional conduct or fraud and provides that:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

- (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
- (b) knows
 - (i) that the statement is false, or
 - (ii) that he has not the knowledge which he professes.

Id.

²⁵¹ *Id.*; see also *Randi W.*, 929 P.2d at 593.

²⁵² See *supra* note 250.

proving that the former employer knew that the statements she conveyed to the prospective employer were false, or that the former employer did not have the knowledge that she claimed to have had when making such statements.²⁵³ According to William Prosser and W. Page Keeton, the culpability of "intent" means the "intent to deceive, to mislead, [or] to convey false impression."²⁵⁴ Furthermore, the reliance factor for intentional misrepresentation would be met in cases where a prospective employer hires a dangerous employee and a third party becomes a victim of that employee; the third party need not rely on the statements made in the reference.²⁵⁵ In other words, the authors of the Restatement (Second) of Torts section 310 intended for the doctrine of intentional misrepresentation to apply to cases in which third parties are endangered by the misrepresentation.²⁵⁶

In short, a former employer has no affirmative duty to respond to reference requests from prospective employers.²⁵⁷ However, when a former employer chooses to respond to a prospective employer's reference request, and the former employer negligently or intentionally omits material information about a former employee's unfavorable characteristics, then the former employer risks being subject to potential liability for misrepresentation brought by an unknown third party.²⁵⁸ Therefore, employers should properly consider defamation, negligent misrepresentation, and intentional misrepresentation when drafting more open reference policies. One final consideration that employers should observe with regard to reference information is Title VII retaliatory claims. The landmark United States Supreme Court case, *Robinson v. Shell Oil Co.*,²⁵⁹ brings new liability to employers who give

²⁵³ See *id.*

²⁵⁴ Intent involves that a representation will be made, that the representation is directed to a certain person or class or persons, the representation shall convey a certain meaning, it will be believed, and acted upon. KEETON ET AL., *supra* note 6, at 74.

²⁵⁵ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 593 (Cal. 1997).

²⁵⁶ *Id.* See RESTATEMENT (SECOND) OF TORTS § 310 cmt. c (1965) which provides, "A misrepresentation may be [made] not only toward a person whose conduct it is intended to influence but also toward all others whom the maker should recognize as likely to be imperiled by action taken in reliance upon his misrepresentation." *Id.*

²⁵⁷ See *supra* note 234 and accompanying text.

²⁵⁸ Saxton, *Flaws in the Laws*, *supra* note 9, at 66; see *supra* notes 230-56 and accompanying text.

²⁵⁹ 519 U.S. 337, 117 S. Ct. 843 (1997).

negative references to subsequent employers regarding their former employees.²⁶⁰

3. *Robinson v. Shell Oil Co.* Expands Former Employer's Liability Under Title VII

The Supreme Court rendered a landmark decision that holds an employer liable when giving a negative reference in retaliation of a former employee who had previously filed a Title VII discrimination claim against the employer.²⁶¹ Unfortunately, the decision of *Robinson v. Shell Oil Co.*²⁶² supports company decisions to retain "no comment" or neutral job reference practices.²⁶³ In fact, employment lawyers believe that this decision will exacerbate the prospective employer's inability to obtain useful information concerning job applicants.²⁶⁴

In *Robinson*, Shell Oil fired an employee from his sales position, and shortly thereafter, the employee filed a Title VII²⁶⁵ claim alleging that he

²⁶⁰ David C. Wilkes, *Negative Job References May Now Expose Employers to Title VII Liability*, LITIG. NEWS, Sept. 1997, at 1-2 [hereinafter Wilkes].

²⁶¹ *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

²⁶² 519 U.S. 337 (1997).

²⁶³ Wilkes, *supra* note 260, at 1 (stating that the United States Supreme Court has sanctioned a new class of lawsuits against employers who give negative references concerning former employees).

²⁶⁴ *Id.*

²⁶⁵ 42 U.S.C. § 2000e et. seq. (1994); see also MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 225 (3d ed. 1994) [hereinafter ROTHSTEIN & LIEBMAN]. Congress enacted Title VII of the Civil Rights Act of 1964, primarily to eliminate racial discrimination in the workplace and also to prohibit such discrimination in the social and economic arenas. *Id.* Presently, however, Title VII's protection against employment discrimination covers many classes including race, color, creed, sex, religion and national origin. *Id.* Title VII applies to public and private employers with fifteen or more employees. *Id.* at 226. See also Americans with Disabilities Act, 42 U.S.C. § 12101 (1994) (prohibiting discrimination based on disability) and Age Discrimination in Employment Act, 29 U.S.C. § 621 (1994) (prohibiting discrimination based on age). In addition, the essential language under Title VII of the Civil Rights Act of 1964 that prohibits discrimination in the workplace provides:

It shall be unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2 (1994).

had been fired because of his race.²⁶⁶ While the case was pending, the employee applied for another job with a different employer.²⁶⁷ The prospective employer contacted Shell Oil, the former employer, to secure an employment reference; and Shell Oil replied by giving a negative reference.²⁶⁸ The former employee brought a retaliatory discrimination action under Title VII section 704(a),²⁶⁹ contending that Shell Oil gave a negative reference in retaliation for having previously filed the Title VII claim with the Equal Employment Opportunity Commission ("EEOC").²⁷⁰

The Supreme Court held that a former employer may be found liable under Title VII's retaliatory discrimination provision if the former employer gave a negative reference in retaliation of a former employee having previously filed a Title VII discrimination claim with the EEOC against the employer.²⁷¹ The Supreme Court reasoned that the reach of

²⁶⁶ *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ 42 U.S.C. § 2000e-3 (1994). This section of Title VII has been labeled the "anti-retaliation discriminatory provision," whereby an employer, with fifteen or more employees, may not retaliate against an employee for filing a Title VII claim by firing the employee or demoting the employee. Section 704(a) of Title VII provides:

It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.

²⁷⁰ *Robinson*, 519 U.S. at 339. Note that the Equal Employment Opportunity Commission or "EEOC" is the federal agency responsible for enforcing Title VII. An employee or complainant must first file a Title VII claim with the EEOC, then the EEOC conducts an investigation. The EEOC must issue the employee or complainant a "right to sue" letter. See 42 U.S.C. § 2000e-5 (1994) for enforcement provisions.

²⁷¹ *Robinson*, 519 U.S. at 346. In *Robinson*, the Supreme Court, per Justice Clarence Thomas, resolved the conflict among the circuit courts regarding the question of whether Section 704(a) of Title VII retaliatory section's statement of the word "employees" included former employees. *Id.* Before the *Robinson* opinion, some circuit courts held that the word "employee" included only current employees, thus only current employees, and not former employees, would be able to bring a charge for retaliation under Title VII. *Id.* at 346. For example, a current employee could file a retaliatory discrimination charge against his employer if the employer fired him in retaliation of his having previously filed a Title VII

the Title VII retaliatory provision extended to both current employees and former employees, because the exclusion of former employees from the anti-retaliation provision would permit employers to engage in post-employment retaliation that would deter victims of discrimination from filing a cause of action under Title VII.²⁷²

The *Robinson* decision suggests that employers should maintain their "no comment" policies or policies that reveal only the name and dates of employment in order to protect themselves from a Title VII retaliation claim brought by a disgruntled former employee.²⁷³ Consequently, former employers will be even more reluctant to warn prospective employers about an applicant's past violent behavior or dangerous propensities because of the new potential liability imposed on employers.²⁷⁴ Employers may attempt to protect themselves from Title VII retaliation claims regarding negative references by requiring former employees to sign a waiver releasing the employer from negative

discrimination claim with the EEOC. However, a former employee would have no cause of action for an employer who retaliates against him if the retaliation occurred after the employee had been terminated from his job. *See, e.g.,* *Veprinsky v. Flour Daniel, Inc.*, 87 F.3d 881 (7th Cir. 1996). In contrast, other circuit courts have ruled in the past that the word "employee" included not only current employees but also former employees. Therefore, these circuit courts held that a former employee could sue his former employer claiming that his former employer acted in retaliation for the employee previously filing a Title VII discriminatory charge. *See, e.g.,* *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988); *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 (3rd Cir. 1994).

²⁷² *Robinson*, 519 U.S. at 346. The Supreme Court also determined that Congress could have used the words "current employees" to denote that only current employees could file a retaliatory discrimination claim with the EEOC. *Id.* at 846. However, since Congress used the word "employees" in this section, it did not intend to limit the law to only current employees, but rather Congress designed the law to be applicable to former employees as well. *Id.*

²⁷³ *Frumkin & Santangelo, Title VII, supra* note 10, at 52. The *Robinson* decision provides another reason for employers to refrain from giving substantive references as a matter of policy. *Id.*; *Wilkes, supra* note 260, at 1-2 (quoting Herbert E. Gerson, Co-Chair of the Section of Litigation's Employment and Labor Relations Law Committee, "I would think that with [the *Robinson*] opinion, the message is 'don't tell anyone anything about former employees'").

²⁷⁴ *Wilkes, supra* note 260, at 2; *Stephanie Armour, EEOC Sets Guidelines to Fend Off Retaliation, USA TODAY*, May 27, 1998, at 03B. This article reports that there has been a sharp increase in retaliation complaints with the EEOC. *Id.* "Claims have jumped from about 7,900 in fiscal year 1991 to more than 18,100 [in 1997]." *Id.*

reference suits.²⁷⁵ However, the EEOC usually frowns upon such releases under Title VII.²⁷⁶

This discussion addressed the fundamental elements of defamation, the defenses to defamation in an employment context, and other torts that employees, former employees or third parties may bring against employers as a result of a reference given by that employer. A solid understanding of these torts and the new Title VII retaliation liability should assist employers when adopting more open reference practices and discarding their "no comment" neutral job reference practices.

In addition, employers should take note that the problem of defamation with regard to references seems to be unwarranted.²⁷⁷ Employers shall find that a much greater problem lies with the adoption of "no comment" and neutral job reference schemes, because these practices may contribute to workplace assaults and homicides as well as increase the possibility of negligent hiring claims against prospective employers.²⁷⁸ Therefore, a more comprehensive explanation of "no comment" and neutral job reference policies and their socially undesirable effects is essential to illustrate how such practices may contribute to violence in the workplace.

III. THE NEGATIVE EFFECTS OF "NO COMMENT" AND NEUTRAL JOB REFERENCE POLICIES

Employers have adopted "no-comment" reference policies or neutral job references for their businesses primarily to avoid litigation involving defamation.²⁷⁹ Specifically, employers fear that if they include negative information in a reference, such as a former employee's dangerous behavior in the workplace, then the former employee could bring a claim of defamation.²⁸⁰ As already indicated, employers may now be held liable for Title VII retaliatory claims for giving negative

²⁷⁵ See *id.*; Frumkin & Santangelo, *Title VII*, *supra* note 10, at 52 (contending that as a result of the *Robinson* decision, employers will require a general release from employees as a condition precedent to obtaining a full and complete reference).

²⁷⁶ Wilkes, *supra* note 260, at 2.

²⁷⁷ See *infra* part III.A.

²⁷⁸ See *infra* notes 310-40 and accompanying text.

²⁷⁹ See *supra* notes 7-17 and accompanying text. See *supra* notes 50-51 and accompanying text.

²⁸⁰ See *supra* notes 7-17 and accompanying text. See *supra* notes 50-51 and accompanying text.

references regarding employees or former employees who have previously filed a Title VII discrimination suit against their employers.²⁸¹

On the other hand, employers may be held liable for negligent misrepresentation²⁸² if they choose to give positive references while failing to reveal criminal or violent conduct of former employees.²⁸³ As a result of the potential liability for these claims, attorneys have advised their corporate clients to give little or no information to inquiring prospective employers.²⁸⁴ Although this advice may deter some litigation for employers, this Note contends that it may add to the problem of violence in the workplace, because prospective employers are unable to obtain sufficient information about a job applicant who may be violent, dangerous, or criminal.²⁸⁵

A. *The Employer's Fear of Defamation Claims Involving References Is Unwarranted*

Employers believe that defamation claims regarding negative references may pose a serious threat to their business; however, this belief seems to be unfounded. Between 1985 and 1990, only twelve employment-related defamation cases involving references were filed in federal and state courts.²⁸⁶ Despite this data, employers have observed a few high-profile cases with million-dollar jury awards making the

²⁸¹ Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

²⁸² See *supra* notes 230-48 and accompanying text.

²⁸³ See *supra* notes 230-48 and accompanying text. See *infra* part IV.

²⁸⁴ Kenny, *supra* note 9, at 1 (stating that lawyers recommend that their clients adopt tight-lipped policies who are concerned about being sued for providing negative or misleading information regarding a current or former employee); Anne Lewis, *References: An Employer's Dilemma* (visited Feb. 13, 1998) <<http://www.fryberger.com/referenc.html>>. Many businesses fear possible defamation claims should they give negative information about former employees, thus on the advice of their attorneys, many employers have a policy to say nothing to prospective employers, except an employee's dates of employment. *Id.* For the past decade, attorneys have advised employers not to provide references because a former employee might sue over defamation. Bahls & Bahls, *supra* note 142. Employers are reluctant to give any information beyond name and employment dates in fear of discrimination and defamation suits. See also Saxton, *Flaws in The Laws*, *supra* note 9, at 45.

²⁸⁵ See *infra* notes 310-40 and accompanying text.

²⁸⁶ Paetzold & Willborn, *supra* note 67, at 135 (reporting that in 1990, 118 employment-related defamation cases were filed in federal and state courts, and of these cases, only 12 cases involved references); see also Saltzman, *Shouldn't Fret So Much*, *supra* note 52 (asserting that in the mid-eighties only a handful of high-profile defamation cases against employers gave job references a bad name).

headlines, such as *Frank B. Hall & Co., Inc. v. Buck*,²⁸⁷ and their attorneys have advised them not to provide references, fearing that former employees would sue their previous employers for defamation.²⁸⁸ With only a handful of employment defamation suits involving references filed in the late eighties, the creation of “no comment” reference policies and neutral references may have been unwarranted.²⁸⁹

Furthermore, employers should remember that the “truth” is an absolute defense for defamation.²⁹⁰ Therefore, employers, who document incidents and tell the truth about a former employee’s violent behavior in the workplace, will not be held liable for defamation.²⁹¹ Alternatively, even though the “truth” of a particular event may become a disputed factual issue for the jury to decide, employers who give negative references regarding a former employee’s violent behavior may claim that the statements made to prospective employers are protected under a common law qualified privilege or statutory “good faith” reference laws.²⁹²

Nevertheless, commentators argue that the costs and expense of defending defamation lawsuits have caused most employers to be reluctant in supplying complete and detailed references.²⁹³ Particularly,

²⁸⁷ *Frank B. Hall & Co., Inc. v. W. Buck*, 678 S.W.2d 612 (Tex. Ct. App. 1984). A jury awarded a former employee \$1.9 million against a former employer for defamation regarding a reference. *Id.* at 630. See *supra* notes 108-16 and accompanying text for a discussion on *Frank B. Hall & Co., Inc.* case. See also Bahls & Bahls, *supra* note 142 (referring to an Ohio attorney who said that many companies were already refusing to provide references out of concern for defamation suits).

²⁸⁸ Employers were fearful that they would be sued for millions of dollars, thus they stopped handing out references or limited information as to a worker’s name, position, and dates of employment. Saltzman, *Shouldn’t Fret So Much*, *supra* note 52. For the past decade, employers have received advice from their attorneys to not give references because a former employee might sue for defamation. Bahls & Bahls, *supra* note 142.

²⁸⁹ Paetzold & Willborn contend that employer behavior of adopting “no comment” policies is irrational because the number of defamation cases regarding employment references is small, privileges in defamation law provide that plaintiffs seldom win any award, and the size of awards has declined over time. Paetzold & Willborn, *supra* note 67, at 124. See also Saltzman, *Shouldn’t Fret So Much*, *supra* note 52 (expressing that employers had “little reason to fear that providing an honest reference of a former employee would spark legal action”).

²⁹⁰ See *supra* note 127 and accompanying text; Barada, *supra* note 226.

²⁹¹ JACOBS & KOCH, *supra* note 45, at 281.

²⁹² See *supra* notes 158-221 and accompanying text; Furfaro & Josephson, *Workplace Violence Part II*, *supra* note 11, at 3.

²⁹³ Kimberly Lambert Love & Mary L. Lohrke, *Employer Defamation: The Role of Qualified Privilege and the Impact of New Employer Reference Checking Legislation* (visited Feb. 13, 1998) <<http://www.glastar.com/~radrob/employer.html>> (stating that employers are reluctant

employers may be protected from defamation by stating the "truth" as a defense or by asserting a qualified privilege defense; however, former employees could file a defamation lawsuit against them regardless of this protection when employers decide to freely discuss negative aspects of the employees' past performance.²⁹⁴ Therefore, the expense of litigation alone deters employers from communicating to prospective employers that former employees displayed violent behavior.²⁹⁵

This Note provides three responses to these counter arguments in support of employers discarding "no comment" policies and beginning the practice of open communication. First, many companies could acquire business liability insurance to shield them from various tort claims like defamation and negligent misrepresentation among others.²⁹⁶ Second, if an employer's statements are found to be protected under a qualified privilege, then as a matter of law, the case could be dismissed in an early proceeding such as a summary judgment motion.²⁹⁷ Thus, litigation would not be too costly for the former employer because the case could end early in the litigation process.²⁹⁸ Additionally, this Note proposes a model statute showing that the employer who abused the privilege is judged as a matter of law, thus possibly dismissing the case without a long jury trial.²⁹⁹

to give detailed employee references because of the potential liability and cost of defending defamation lawsuits).

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997). The *Randi W.* court concluded that employers could acquire business liability insurance to cover claims of negligent misrepresentation, but not for intentional misconduct such as fraud. *Id.*

²⁹⁷ See, e.g., *Duffy v. Leading Edge Prods.*, 44 F.3d 308, 312 (5th Cir. 1995). The *Duffy* court granted summary judgment in favor of the former employer and against a former employee who brought a compelled self-publication defamation charge against the former employer. *Id.* The court concluded that the "truth" defense and the qualified privilege defense protected the employer from defamation liability *Id.*; *Olson v. 3M Co.*, 523 N.W.2d 578, 582 (Wis. Ct. App. 1994). The *Olson* court granted summary judgment in favor of the employer, holding that the former employer had a conditional privilege to issue a press release and make statements to its employees and the press regarding a former employee's assaults and harassment at work. *Id.*; *Boehm v. American Bankers Ins. Group, Inc.*, 557 So. 2d 91 (Fla. Dist. Ct. App. 1990). The *Boehm* court found that a former employer's statements did not constitute an "abuse" under a qualified privilege defense when it responded to an executive agent's private inquiry. *Id.* The court found that the former employer's statements, which revealed that its former employee was or might be a homosexual and that this fact caused an \$8 million loss to the former employer was protected under qualified privilege. *Id.*

²⁹⁸ See e.g., *Duffy*, 44 F.3d at 312; *Olson*, 523 N.W.2d at 582.

²⁹⁹ See *infra* part V for proposed statute.

Finally, former employers also take on the role of prospective employers who must seek out job applicants in order to fulfill employment positions.³⁰⁰ Thus, employers who have "no comment" policies which reveal nothing about an employee to other companies will become frustrated when they, as prospective employers, begin searching for potential employees.³⁰¹ Moreover, employers could discover that other employers have adopted the same restrictive practices that fail to reveal essential information about former employees because these employers will confirm only dates of employment or the title of position.³⁰² Therefore, all employers have a common business interest to hire the best employees, and all employers have safety interests in avoiding a job applicant who may be a dangerous or violent.³⁰³ As a result of this common interest, employers should be more open when communicating to other employers particularly when they have information regarding an employee's dangerous propensities.³⁰⁴

B. The Real Problem Lies not with Defamation Claims but with "No Comment" Policies and Neutral Job Reference Schemes

Ironically, the employers' solution against defamation litigation, namely the adoption of "no comment" and neutral job reference policies, created other workplace problems leaving socially undesirable effects for both employers and employees.³⁰⁵ In a recent law article, Professor Bradley Saxton³⁰⁶ observed that nationwide acceptance of "no comment" policies is damaging to employees attempting to find employment when their former employer refuses to give a reference to a prospective employer.³⁰⁷ Some employers may interpret this "no comment" response to a reference request as an implied negative response.³⁰⁸ Thus, employers may unfairly hold prejudices against a job applicant whose

³⁰⁰ McMorris, *supra* note 8, at B1 (quoting a San Francisco attorney, "In the ideal world, you want to be giving out more information [about employees] because, when you're hiring, you want to find out about someone who may be problematic").

³⁰¹ *See id.*

³⁰² *See id.*

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ *See infra* notes 307-40 and accompanying text.

³⁰⁶ Bradley Saxton is an Associate Professor of Law at the University of Wyoming College of Law.

³⁰⁷ *See* Bradley Saxton, *Employment References in California After Randi W. v. Muroc Joint Unified School District: A Proposal For Legislation to Promote Responsible Employment Reference Practices*, 18 BERKELEY J. EMP. & LAB. L. 240, 266 (1997) [hereinafter Saxton, *Employment References*].

³⁰⁸ Saxton, *Flaws in the Laws*, *supra* note 9, at 50.

former employer refuses to give a character reference, and consequently, prospective employers may choose not to hire these applicants.³⁰⁹

Professor Saxton also maintained that "no comment" policies injure employers, because they discover that they need full and complete references in order to make well-informed hiring decisions.³¹⁰ Detailed references enable prospective employers to hire the most qualified persons by learning about the applicant's strengths and weaknesses or finding whether that individual could safely work with other employees and the public-at-large.³¹¹ Moreover, one unfortunate effect of "no comment" policies relates to workplace violence.³¹² Therefore, the next part examines the nation's concern over workplace violence and the fact that "no comment" policies may frustrate solutions to this growing epidemic.

C. *Workplace Violence on the Rise: Prospective Employers Need More Information Regarding Job Applicants*

The Bureau of Labor Statistics has estimated that homicide accounts for seventeen percent of all occupational fatalities, making homicide the second leading cause of job-related deaths nationwide.³¹³ Presently, more than 1,000 employees are murdered in workplaces each year, which is thirty-two percent more homicides than the annual average in the 1980s.³¹⁴ Homicide is the leading cause of death for women in the workplace, and the second leading cause of death for men.³¹⁵ Additionally, statistics estimate that more than two million physical assaults occur annually in workplaces.³¹⁶ According to Northwestern

³⁰⁹ See *id.*

³¹⁰ See *id.* at 49.

³¹¹ See *id.*

³¹² See *id.* at 50.

³¹³ CC & Associates Private Investigators, *Workplace Violence* (visited Feb. 13, 1998) <<http://www/cc-investigations.com/wrkviol.htm>>.

³¹⁴ Romuald A. Stone & Ronda Hayes, *Developing Policies Addressing Workplace Violence*, EMPLOYMENT REL. TODAY, Sept. 1, 1995, at 25.

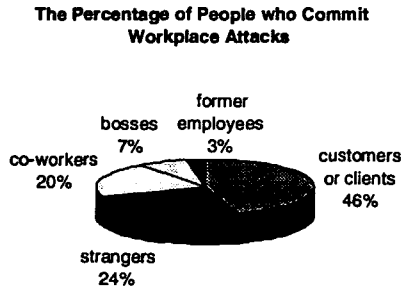
³¹⁵ CC & Associates Private Investigators, *supra* note 313 (stating that United States Department of Labor, Bureau of Statistics has advised that homicide accounts for 17% of all occupational fatalities, making homicide the second leading cause of job-related deaths nationwide); Stone & Hayes, *supra* note 314, at 25 (reporting that husbands and boyfriends of working women commit 13,000 acts of violence against women in the workplace annually).

³¹⁶ McCormick & Stewart, *supra* note 25, at 34.

National Life Insurance Company, 2,500 for every 100,000 employees have been physically attacked on the job.³¹⁷

These statistics show that workplace violence should not be taken lightly by employers. As a result of this growing problem, the state and federal courts have made employers responsible for preventing workplace violence.³¹⁸ Specifically, courts have recognized a new cause of action for employers, known as negligent hiring, which places an obligation on employers to learn about an applicant's criminal and violent behavior before and after hiring takes place.³¹⁹ Under a negligent hiring theory, courts will hold a new employer liable for a person's injuries committed by an employee whom the employer hired without conducting a background check.³²⁰ Further, courts may hold employers liable for negligent hiring if it breaches this duty and hires a person that the employer knew or should have known would pose a risk of harm to

³¹⁷ Larry J. Chavez, *Workplace Violence* (visited Feb. 13, 1998) <<http://members.aol.com/Endwpv/index.htm#1>>. The following pie chart breaks down the percentages of people who commit attacks in the workplace, based on the statistic that 2,500 workers per 100,000 have been physically attacked on the job:



Id.

³¹⁸ Martucci & Clemow, *supra* note 84, at 463; See also Sam Friedman, *Allstate Faces Suit Over Fireman's Fund Shooting*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Sept. 26, 1994, at 3 available in 1994 WL 2867564.

³¹⁹ SMOLLA, *supra* note 65, at § 15.07[2][b] (asserting that the tort system adopted a new theory of liability for employers called "negligent hiring," and under this new tort, third parties and employees bring this cause of action when the employer fails to properly investigate a new employee); see also Michele R. Gagnon, *Employee Liability for Workplace Violence* (visited Feb. 13, 1998) <<http://www.nvc.org/idir/nettex33.htm>>. A claim for negligent hiring requires the plaintiff to show that the employer knew or should have known of the offending employee's criminal and violent behavior, but decided to hire or retain the dangerous employee anyway. *Id.*

³²⁰ SMOLLA, *supra* note 65, at § 15.07[2][b].

other employees or to the public.³²¹ Approximately thirty states recognize that employers have a duty to hire and retain only safe employees.³²²

However, with “no comment” and neutral job reference policies widely adopted by many companies, prospective employers will not be able to obtain the necessary information regarding an applicant; thus employers hire dangerous individuals.³²³ In fact, a 1995 Human Resource Management Survey revealed that more than half of the 1,331 personnel managers surveyed stated that they were not obtaining enough information from former employers about applicants who show violent tendencies.³²⁴ The reason is that companies refuse to provide references out of fear of defamation lawsuits.³²⁵

*Doe v. Garcia*³²⁶ illustrates the seriousness of this social and legal problem. In *Garcia*, a hospital employee molested a minor patient, and as a result, the patient brought a negligent hiring claim against the hospital.³²⁷ The evidence showed that the employee’s former employer did not have to reveal that it discharged the employee because he sexually molested a patient.³²⁸ In particular, the former employer had a neutral job reference policy in which it would disclose only the dates of employment when asked to give a reference.³²⁹ Thus, because of the former employer’s neutral job reference policy, the new employer had no means to learn about the applicant’s sexual proclivities and hired the applicant.³³⁰ Nevertheless, the Idaho supreme court precluded the new employer’s motion for summary judgment on the negligent hiring claim.³³¹

³²¹ Michele R. Gagnon, *Employee Liability for Workplace Violence* (visited Feb. 13, 1998) <<http://www.nvc.org/idir/nettex33.htm>>.

³²² Martucci & Clemow, *supra* note 84, at 463.

³²³ With the widespread adoption of negligent hiring, employers must exercise reasonable care upon hiring workers who will work safely with co-employees and with the public. “No comment” policies preclude prospective employers from investigating a job candidate’s background, and as a result, the underlying principles behind negligent hiring of social safety will become frustrated. Saxton, *Flaws in the Laws*, *supra* note 9, at 51.

³²⁴ David A. Price, *Good References Pave Road to Court*, USA TODAY, Feb. 13, 1997, at 11A.

³²⁵ *See id.*

³²⁶ 961 P.2d 1181 (Idaho 1998).

³²⁷ *Id.* at 1182.

³²⁸ *Id.* at 1183, 1185.

³²⁹ *Id.* at 1185.

³³⁰ *Id.*

³³¹ *Garcia*, 961 P.2d at 1185.

To summarize, with the increase in workplace violence and negligent hiring liability,³³² prospective employers should be able to obtain complete and accurate references of an applicant without placing the former employers at risk for defamation liability.³³³ However, under the current law, prospective employers are not able to obtain character references regarding an applicant's violent behavior or dangerous propensities, because former employers have no duty to disclose negative information about a former employee.³³⁴ Note that in California, employers do have a duty to disclose this information if they give a purely favorable reference while omitting the fact the employee has shown violent behavior and its foreseeable that the employee will injure a third party.³³⁵ With no legal duty to disclose information, employers say very little about former employees in fear that they will be subject to defamation lawsuits.³³⁶ Additionally, prospective employers may become frustrated to learn that many states restrict

³³² See *supra* notes 313-31 and accompanying text.

³³³ See Adler & Peirce, *Encourage Employers*, *supra* note 179, at 1428. This article asserts that with the increasing national concern about workplace violence, prospective employers should have access to information which could avoid injury and save lives. *Id.* Employers have difficulty when searching criminal records through other means because the process is time consuming and expensive. *Id.* See also Saxton, *Employment References*, *supra* note 307, at 266. Professor Saxton contends, "[T]he public is poorly served if former employers hide behind "no comment" reference policies to avoid disclosing information that would alert a prospective new employer that a job applicant is dangerous or even merely incompetent or unpleasant." *Id.* See also Christine A. Mansfield, *When References Come Back to Haunt You* (visited Feb. 13, 1998) <<http://www.arentfox.com./newslett/employ/emp962d.htm>>. With the increase in workplace violence, prospective employers interest in checking an applicant's history is increasingly necessary. *Id.* A reference check could protect prospective employers from lawsuits for negligent hiring. *Id.* See also Furfaro & Josephson, *Workplace Violence II*, *supra* note 11, at 3 (stating that the employer wants accurate job references so that it may make appropriate hiring decisions and prevent workplace violence in the future). For more discussion on workplace violence see McCormick & Stewart, *supra* note 25, at 34 and see Martucci & Clemow, *supra* note 84, at 463.

³³⁴ See Adler & Peirce, *Encourage Employers*, *supra* note 179, at 1417 (stating that to date, courts have not established a blanket duty on the former employer to disclose information about a former employee to prospective employers); see also Alex B. Long, Note, *Addressing the Cloud over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177, 184 (1997) (stating that an employer has no affirmative duty to provide employee references for prospective employers).

³³⁵ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997) (holding that a former employer was liable for negligent misrepresentation when it gave a favorable reference to a prospective employer and failed to disclose former employee's past sexual misconduct with students).

³³⁶ See *supra* notes 279-84 and accompanying text. See generally Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645-70 (1991).

information about criminal convictions.³³⁷ When making a hiring decision, prospective employers may not easily obtain essential information through the criminal justice system.³³⁸ Their only source of information regarding a job applicant will be the former employer who may say very little about a prior employee's character.³³⁹ Thus, with such a restrictive information flow, prospective employers may unknowingly hire a violent individual, place its employees and the public at risk for their safety, and place themselves at risk for negligent hiring liability.³⁴⁰

IV. AN ANALYSIS OF STATE COURT DECISIONS ON REFERENCE LIABILITY

This material explained the socially undesirable effects of "no comment" and neutral policies. In particular, these restrictive policies lead to workplace injuries and assaults as well as negligent hiring liability, because prospective employers are unable to gather the critical employment backgrounds on job applicants. Thus, employers may unknowingly hire dangerous individuals who later attack their employees or the public. In the following case law, although the former employers did not have "no comment" policies, some of these employers had neutral job reference policies that resulted in the deaths of workers at a prospective employer's workplace.³⁴¹ Further, other former employers provided favorable references but failed to disclose negative information regarding previous employees such as the employees past sexual misconduct or violent tendencies that resulted in violent crimes toward students or co-workers.³⁴² This discussion asserts that the harm to third parties that results from a full non-disclosure in "no comment" policies can be compared to the harm that third parties face when former employers give references but fail to reveal information about their

³³⁷ ROTHSTEIN & LIEBMAN, *supra* note 265, at 146 (expressing that many states restrict information about criminal convictions, thus this information is not easily available to prospective employers).

³³⁸ *See id.*

³³⁹ *See id.*

³⁴⁰ *See, e.g., Doe v. Garcia*, 961 P.2d 1181 (Idaho 1998). The former employer's reluctance places a heavy social cost for other employers who seek to make well-informed hiring decisions. SMOLLA, *supra* note 65 at § 15.07[2][b]. *See also* Saxton, *Employment References*, *supra* note 307, at 266 (stating that *Randi W.* is an example of how the public is adversely effected when employers try to avoid liability by using "no comment" policies).

³⁴¹ *See generally* *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); *Jerner v. Allstate Ins. Co.*, Fla. Cir. Ct. No. 93-09472 (1993); *Gutzan v. Altair Airlines Inc.*, 766 F.2d 135 (3d Cir. 1985); *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990); and *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1986).

³⁴² *Id.*

previous employees. Moreover, undesirable effects and dangers found in "no comment" and neutral reference practices are equivalent to those hazards found in favorable references that omit material information.³⁴³

A. *States Holding that Former Employers Have a Duty to Disclose Information in a Favorable or Neutral Reference Regarding an Employee's Propensity for Violence*

A complex issue is whether a former employer's silence that takes the form of a "no comment" policy could constitute an action of deceit or misrepresentation when a former employer has knowledge of particular facts about a former employee.³⁴⁴ This Note stated previously that currently courts have refused to impose a blanket duty on the part of former employers to disclose negative information about a former employee to prospective employers.³⁴⁵ However, employers should not relax on this issue because some state courts like California and Florida have begun to expand a former employer's duty of reasonable care to unknown third parties with regard to employment references.³⁴⁶ More specifically, when giving a favorable or neutral reference, an employer may be held liable to third parties if the employer failed to disclose information about a former employee's violent behavior in the workplace.³⁴⁷ This type of liability has been found under negligent misrepresentation and intentional misrepresentation theories in *Randi W. v. Muroc Joint Unified School District*³⁴⁸ and *Gutzan v. Altair Airlines, Inc.*,³⁴⁹ as well as argued in *Jerner v. Allstate Insurance Co.*³⁵⁰

In the future, other state courts may expand on these principles set forth in the *Randi W.* decision. Courts may determine that former employers may be held liable for misrepresentation when they not only give favorable references, but also when they say "no comment" or submit neutral job references that fail to reveal a former employee's

³⁴³ See, e.g., *Doe v. Garcia*, 961 P.2d 1181 (Idaho 1998); *Jerner v. Allstate Ins.*, Fla. Cir. Ct. No. 93-09472 (1993).

³⁴⁴ KEETON ET AL., *supra* note 6, at 737 (expressing the difficult problem as to whether silence or a passive failure to disclose facts that the defendant has knowledge of could be a basis for a deceit action).

³⁴⁵ See *supra* notes 230-34 and accompanying text.

³⁴⁶ See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); *Jerner v. Allstate Ins.*, Fla. Cir. Ct. No. 93-09472 (1993).

³⁴⁷ *Randi W.*, 929 P.2d at 593; *Jerner v. Allstate Ins.*, Fla. Cir. Ct. No. 93-09472 (1993).

³⁴⁸ 929 P.2d 582 (Cal. 1997).

³⁴⁹ 766 F.2d 135 (3d Cir.1985).

³⁵⁰ Fla. Cir. Ct. No. 93-09472 (1993).

dangerous behavior in the workplace.³⁵¹ Presently, a Florida court ruled on the issue of non-disclosure and a neutral reference supplied by a former employer.³⁵² In *Jerner v. Allstate Insurance Co.*,³⁵³ the Florida court determined that a jury would decide whether a former employer's neutral reference constituted fraud and negligent misrepresentation.³⁵⁴ Thus, saying very little about an employee when asked to give a reference may save an employer from defamation litigation, but silence may expose the employer to misrepresentation or negligence liability in the future. These are more compelling reasons as to why employers should re-examine their "no comment" and neutral job reference policies and adopt reference practices that open the channel of communications among employers. A closer study of the state opinions of *Randi W. v. Muroc Joint Unified School District*,³⁵⁵ *Jerner v. Allstate Insurance*,³⁵⁶ and *Gutzan v. Altair Airlines, Inc.*³⁵⁷ solidifies the reasons why employers should openly communicate with one another.

1. *Randi v. Muroc Joint Unified School District*

The state of California has chosen to hold former employers liable when giving a favorable reference that omits negative information regarding a former employee's past sexual misconduct to prospective employers under the theories of negligent misrepresentation³⁵⁸ and

³⁵¹ Reibstein, *supra* note 18, at B5 (predicting that future plaintiffs may seek to expand the *Randi W.* decision to include neutral job references and references that do not include an express recommendation to hire. Thus, the *Randi W.* decision suggests that employers should re-examine their employment reference policies); See part IV.D. for an explanation of the future effects of the *Randi W.* decision.

³⁵² *Jerner v. Allstate Ins.*, Fla. Cir. Ct. No. 93-09472 (1993).

³⁵³ *Id.*

³⁵⁴ See Adler & Peirce, *Encourage Employers*, *supra* note 179, at 1418. In *Allstate*, the plaintiffs supported their argument for fraud and negligent misrepresentation by comparing Allstate's neutral reference letter addressed to a prospective employer with an Allstate supervisor who stated in a deposition that the former employee was a "total lunatic." *Id.* 929 P.2d 582 (Cal. 1997).

³⁵⁵ Fla. Cir. Ct. No. 93-09472 (1993).

³⁵⁶ 766 F.2d 135 (3d Cir. 1985).

³⁵⁷ See *supra* part II.C.1. See also RESTATEMENT (SECOND) OF TORTS § 311 (1965). Section 311 deals with negligent conduct and provides that:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
 - (a) to the other, or
 - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or

intentional misrepresentation.³⁵⁹ In *Randi v. Muroc Joint Unified School District*,³⁶⁰ a former employer, Muroc Joint Unified School District (Muroc), failed to disclose to a prospective employer, Livingston Middle School (Livingston), that its former employee had been forced to resign because of sexual misconduct towards female students.³⁶¹ Muroc gave only a positive job reference stating that Robert Gadams, the former employee, was "an upbeat, enthusiastic administrator who relate[d] well [with] the students."³⁶² Livingston relied on this favorable recommendation and hired Robert as a vice-principal.³⁶³ While in his office, Robert "offensively touched and molested" a 13 year-old female student.³⁶⁴

The minor student, Randi W., filed a lawsuit against Muroc,³⁶⁵ claiming negligent misrepresentation and intentional misrepresentation,

(b) in the manner in which it is communicated.

Id.

³⁵⁹ See *supra* part II.C.2. See also RESTATEMENT (SECOND) OF TORTS § 310 (1965). Section 310 involves intentional conduct or fraud and provides that:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor

- (c) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and
- (d) knows
 - (i) that the statement is false, or
 - (ii) that he has not the knowledge which he professes.

Id.; *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591, 593 (Cal. 1997).

³⁶⁰ *Randi W.*, 929 P.2d at 582.

³⁶¹ *Id.* at 585. Among other things, Robert was charged with sexually touching female students at Muroc, and disciplinary actions were taken against Robert regarding sexual harassment. *Id.* Additionally, at a previous school, Mendota Unified School District, Robert had been charged with giving back massages to female students and making sexual remarks to them. *Id.* At another school, Golden Plains Unified School District, parents of the students complained that Robert "led a panty raid [and] made sexual overtures to the students...." *Id.* Both of these schools, Mendota and Golden Plains, forced Robert to resign because of his sexual misbehavior, yet both schools gave positive recommendations for Mr. Adams to pursue an administrative position at Muroc, and eventually at Livingston. *Id.*

³⁶² *Id.* Muroc Joint Unified School District, the former employer, made positive recommendations on forms that Fresno Pacific College had supplied. *Id.* These recommendation forms expressly stated that the information provided would be sent to prospective employers. *Id.*

³⁶³ *Id.* at 588.

³⁶⁴ *Id.* at 585.

³⁶⁵ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997). Specifically, the student, Randi W., filed this lawsuit through her guardian ad litem against Livingston Unified School District for negligent hiring, and Muroc Joint Unified School District,

and filed another action against Livingston for negligent hiring.³⁶⁶ In deciding this case, the *Randi W.* court had to determine whether to expand the theories of negligent misrepresentation and intentional misrepresentation to these circumstances in which the former employer had no special relationship with student, a third party.³⁶⁷ The student had to provide sufficient evidence demonstrating that Muroc, the former employer, owed her a duty of care, and that it breached that duty by making misrepresentations or giving false information.³⁶⁸

a) The Former Employer's Duty to the Injured Third Party

Muroc, the former employer, argued that it owed no duty to the student because no special relationship existed between them.³⁶⁹ Further, Muroc argued that the student was not a "readily identifiable" victim, and thus it had no duty to warn the student about the charges against Robert Gadams.³⁷⁰ However, the *Randi W.* court applied a four-part "duty" test to determine whether the tort of negligent misrepresentation should be expanded whereby a former employer owed a duty to use reasonable care to unknown third parties upon giving an incomplete recommendation.³⁷¹ Specifically, the court looked to the foreseeability of harm to the student, the moral blame attached to Muroc's conduct, the availability of insurance or alternative courses of conduct that Muroc could have taken, and public policy considerations.³⁷²

Golden Plains Unified School District, Mendota Unified School District, the State of California, et al. for negligence per se, negligent misrepresentation, and intentional misrepresentation. *Id.*

³⁶⁶ See *supra* part III.C. for a discussion regarding negligent hiring liability imposed on prospective employers.

³⁶⁷ *Randi W.*, 929 P.2d 582, 587, 590.

³⁶⁸ *Id.* at 588.

³⁶⁹ *Id.*; see *supra* note 234 and accompanying text.

³⁷⁰ *Randi W.*, 929 P.2d at 588. However, the student did not contend that a special relationship existed between her and Muroc or between Muroc and Robert. *Id.*

³⁷¹ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 588-91 (Cal. 1997).

³⁷² *Id.* See also *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968). The *Randi W.* court relied on the balancing test set forth in *Rowland* for determining duty which includes the following:

[t]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting

Under the first prong of the duty test, foreseeability and causation, the *Randi W.* court found that Robert's assault on the plaintiff was a reasonably foreseeable event.³⁷³ The court determined that Muroc could foresee that Livingston would rely on the positive recommendation from Muroc in deciding whether to hire Robert; and absent this favorable referral, Livingston would not have hired him.³⁷⁴ Muroc could also foresee that after being hired by Livingston, Robert might molest a Livingston student such as the plaintiff.³⁷⁵ Therefore, Muroc's omission and misrepresentations of not stating Robert's past sexual misconduct in the recommendation letter directly and proximately caused plaintiff's injuries.³⁷⁶

Under the second prong of the duty test, moral blame, the *Randi W.* court decided that Muroc was morally blameworthy.³⁷⁷ Muroc's favorable recommendation coupled with the failure to communicate facts about Robert's past sexual misconduct failed to prevent a further risk of child molestation.³⁷⁸ Additionally, under the third prong, the availability of insurance or alternative courses of conduct, the court found that Muroc could have acquired business liability insurance for any negligent misrepresentations.³⁷⁹ In addition, for alternative courses of conduct other than the affirmative misrepresentation, the court determined that Muroc could have written a "full disclosure" letter revealing both good and bad information regarding Robert's character and performance.³⁸⁰ On the other side of the spectrum, the *Randi W.* court found that Muroc could have also chosen to produce a "no comment" letter that would prohibit any affirmative misrepresentations regarding Robert's character.³⁸¹ Finally, under the fourth prong of the duty test, the public policy considerations, the court recognized the public policy in preventing a future harm like child molestation if the court expanded the tort duty of care to former employers.³⁸² Under this

liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id.

³⁷³ *Randi W.*, 929 P.2d at 589.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997).

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.* The *Randi W.* court states, "[o]ne of society's highest priorities is to protect children from sexual or physical abuse. *Id.*

four-part test, the *Randi W.* court concluded that it would indeed expand the former employer's duty of care to convey information that would prevent substantial and foreseeable risk of harm to others but only when the former employer gives a favorable referral.³⁸³

b) The Former Employer's Misrepresentations to the Prospective Employer

Next, the *Randi W.* court looked to whether Muroc made a misleading misrepresentation or a mere nondisclosure.³⁸⁴ The *Randi W.* court determined that Muroc, the former employer, made an affirmative misrepresentation, because the school implied that Robert was fit to interact safely with female students when it stated in its letter that he was an "upbeat, enthusiastic administrator who relates well to the students."³⁸⁵ Thus, this letter amounted to a favorable yet an unqualified recommendation of Robert's character.³⁸⁶ Additionally, the court concluded that Muroc made misleading "half-truths" by stating only the positive characteristics of Robert, while concealing Robert's "sexual situations" with prior female students.³⁸⁷

c) The Prospective Employer's Reliance on the Former Employer's Statements

The court found that the law of intentional misrepresentation did not bar the student from recovering under this doctrine even though Muroc made no misrepresentations directly to the student that the

³⁸³ *Id.* at 590-91. Muroc, however, argued that imposing tort duty of care on former employers who choose to write recommendation letters would foster "no comment" policies which restrict the flow of information that prospective employers need to make sound well-informed hiring decisions. *Id.* Conversely, the plaintiffs argued that employers would be protected from defamation liability through the use of qualified privilege statutes for non-malicious communications. *Id.* Muroc did not respond to the plaintiffs qualified privilege argument; however, amicus curiae briefs argued that the privilege protects employers from defamation as well as other torts such as negligent misrepresentation. *Id.* However, the *Randi W.* court interpreted the qualified privilege statute as being intended to provide employers with a defense by former employee only, rather than to protect employers from all tort liability arising from employment disclosures that third parties could bring against them. *Id.* The court determined that Muroc was not protected under the qualified privilege since under the statute, prospective employers must request a reference from former employers whereas Muroc, the former employer, solicited the information without such a request from Livingston, the prospective employer. *Id.*

³⁸⁴ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997).

³⁸⁵ *Id.* at 593.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

student would reasonably rely on.³⁸⁸ The court reasoned that the authors of the Restatement (Second) of Torts section 310 on intentional misrepresentation intended for courts to apply this doctrine to cases in which third parties are endangered by the misrepresentation.³⁸⁹ Therefore, the *Randi W.* court found that Muroc made misrepresentations that resulted in physical harm by reason of an act done by Livingston, namely hiring Robert, in reliance on the truth of the representations.³⁹⁰

d) A Response to the Decision of *Randi v. Muroc Joint Unified School District*

The *Randi W.* court provided a solution to a former employer's potential liability of misrepresentation when giving a job reference.³⁹¹ The solution was simply to refrain from giving such a reference altogether and issue a "no comment" letter.³⁹² However, these restrictive policies contain serious social and economic consequences for third parties and prospective employers. By advocating these practices, the *Randi W.* ruling only exacerbates the problems of "no comment" and neutral job reference policies, such as increasing the likelihood of workplace violence and negligent hiring liability.³⁹³ This decision further frustrates the prospective employer's efforts in attempting to obtain an applicant's employment history used to hire the best person for the job.³⁹⁴ Whether Muroc gave an affirmative misrepresentation that failed to uncover Robert's past sexual relations with young girls, or whether Muroc submitted a "no comment" letter that revealed nothing about Robert's past sexual misconduct, Livingston would not have obtained any facts regarding Robert's propensities to commit gruesome acts toward young students.³⁹⁵ As discussed, "no comment" and neutral

³⁸⁸ *Id.* at 594.

³⁸⁹ *Id.* at 593. See also RESTATEMENT (SECOND) OF TORTS § 310 cmt. c (1965) which provides, "A misrepresentation may be [made] not only toward a person whose conduct it is intended to influence but also toward all others whom the maker should recognize as likely to be imperiled by action taken in reliance upon his misrepresentation." *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.* at 589 (stating that a former employer could write a "no comment" letter omitting any affirmative representations regarding a former employee's qualifications, or merely verifying basic employment dates and details).

³⁹² *Id.*

³⁹³ See *supra* part III.B. and part III.C.; See *infra* notes 485-89 and accompanying text.

³⁹⁴ Saxton, *Employment References*, *supra* note at 307, at 266.

³⁹⁵ See *id.* at 266. *Randi W.* is an example of how public policy is adversely affected when employers try to avoid liability by hiding behind "no comment" policies. *Id.* "When our legal rules encourage employers to use 'no comment' reference policies to avoid liability—as the [*Randi W.*] court acknowledged they could—prospective employers may be unable

job reference policies work to restrict open communication between employers.³⁹⁶ Therefore, these policies could be equally dangerous as an affirmative misrepresentation because prospective employers cannot obtain essential information about job applicants.³⁹⁷ As a result, third parties, who become injured at the hands of violent employees, could bring lawsuits based on a negligent hiring theory against prospective employers.³⁹⁸

In a nutshell, *Randi W.* is a prime example of how a former employer's duty of care could be expanded to an unknown third party even though no special relationship exists between the former employer and the third party.³⁹⁹ The *Randi W.* court carved out an exception to the general "no duty" rule that precludes liability for a mere non-disclosure or other failure to act unless a "special relationship" exists between the parties.⁴⁰⁰ At least in California, the former employer's duty arises once the employer chooses to speak favorably about the employee.⁴⁰¹ Thus, employers who give positive references out of fear for defamation liability should take note that a positive reference may lead to intentional and negligent misrepresentation liability.

On the other hand, *Randi W.* implies that if a former employer conveys nothing or gives neutral information, then the employer has no duty to disclose any negative information even if disclosure could prevent a future harm.⁴⁰² However, courts should find that the interest in protecting the safety of society outweighs the interest of employees from being defamed.⁴⁰³ Naturally, a public interest exists to prevent potential danger to employees and to the public-at-large.⁴⁰⁴ Unfortunately, the *Randi W.* decision just reinforces the idea that employers are right to keep their "no comment" policies and remain silent when faced with a reference request.⁴⁰⁵ Thus, absent a common

to obtain information that, if available, would discourage them from hiring employees with demonstrated propensities to hurt or abuse others, including children." *Id.*

³⁹⁶ See *supra* part III.C.

³⁹⁷ See *id.*

³⁹⁸ See *id.*

³⁹⁹ See generally *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997).

⁴⁰⁰ *Id.* at 593.

⁴⁰¹ Saxton, *Employment References*, *supra* note 307, at 265.

⁴⁰² See *id.*

⁴⁰³ See Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645, 1668 (1991).

⁴⁰⁴ *Id.* at 1670.

⁴⁰⁵ See *infra* notes 485-91 and accompanying text. Saxton, *Employment References*, *supra* note at 307, at 265 (expressing that the *Randi W.* decision gives a message to employers that they

law duty to disclose, a statutory duty to disclose a former employee's dangerous tendencies should be imposed on employers provided that they are protected under qualified privilege statutes for disclosing both positive and negative information.⁴⁰⁶

The case of *Jerner v. Allstate Insurance Company*⁴⁰⁷ presents a situation that goes one step further than the *Randi W.* decision, because *Allstate* involves a neutral job reference rather than a favorable recommendation. Similar to the plaintiff in the *Randi W.* case, the plaintiffs in *Allstate* brought both negligent and intentional misrepresentation claims against an employer who recommended a former employee to another employer without mentioning the employee's dangerous proclivities. A closer investigation of the *Allstate* case reveals that employers may want to observe the defenses to defamation⁴⁰⁸ and reveal more information about a former employee's history even when giving a neutral job reference.

2. *Jerner v. Allstate Insurance Company*

Although the Florida case of *Jerner v. Allstate Insurance Company*⁴⁰⁹ settled out of court, this case represents another illustration of how former employer's liability could be extended when the former employer gives a recommendation and fails to disclose a former employee's dangerous propensities.⁴¹⁰ Allstate Insurance, a former employer, sent a neutral but incomplete referral letter, which merely stated that Allstate released Paul Calden from his employment for restructuring reasons.⁴¹¹ Allstate's referral failed to warn the prospective employer, Fireman's Fund Insurance Co., that Mr. Calden had been fired for bringing a gun to work and for threatening his co-workers.⁴¹² Based on the neutral

may completely avoid liability including defamation, negligent misrepresentation, and intentional misrepresentation if they refuse to give references because they have no duty to disclose any information).

⁴⁰⁶ See *infra* part V for proposed statute.

⁴⁰⁷ Fla. Cir. Ct. No. 93-09472 (1993).

⁴⁰⁸ See *supra* notes 127-221 and accompanying text.

⁴⁰⁹ *Jerner v. Allstate Ins., Co.*, Fla. Cir. Ct. No. 93-09472 (1993).

⁴¹⁰ Asra Q. Nomani, *A Special News Report About Life On the Job and Trends Taking Shape There*, WALL ST. J., Aug. 15, 1995, at A1.

⁴¹¹ Vickie Chachere, *Suit Settled in Rocky Point Shootings: The Gunman's Former Employer Reaches a Pact with the Victims and Families*, TAMPA TRIB., Oct. 3, 1995, at 1, available in 1995 WL 14264532.

⁴¹² Larry J. Chavez, *What Organizations and Individuals Have Done to Invite Workplace Violence* (visited Feb. 13, 1998) <<http://members.aol.com/endwpv/invite.html>>. See also Friedman, *supra* note 313, at 3 (stating that John Deufel who had been Paul Calden's supervisor at Allstate, stated that he had found Mr. Calden with a gun in his briefcase three years before

recommendation, Fireman's Fund hired Mr. Calden.⁴¹³ However, Fireman's Fund eventually fired him after several incidents of threatening his co-employees.⁴¹⁴ Shortly thereafter, a group of managers from the nearby Fireman's Fund were having lunch when Mr. Calden approached them and fired ten shots from a semi-automatic handgun, killing three, and wounding two of his former co-workers.⁴¹⁵ The two surviving victims along with the widows of the three managers who were killed brought a lawsuit claiming negligence and intentional misrepresentation against the former employer, Allstate Insurance.⁴¹⁶ The issue in *Allstate* was whether Allstate had a duty to warn the new employer, Fireman's Fund, that the former employee had been fired from Allstate for violent behavior and for bringing a gun to work.⁴¹⁷ The plaintiffs claimed that Allstate did have a duty of reasonable care to the Fireman's Fund's employees, and argued that Allstate's neutral reference, which failed to warn Fireman's Fund of the former employee's violent behavior, constituted a breach of this duty.⁴¹⁸

A Florida Judge⁴¹⁹ ruled that Allstate, Mr. Calden's former employer, could be sued by the surviving victims and families of the murdered managers for giving Mr. Calden a neutral recommendation that failed to disclose Mr. Calden's propensity for dangerous activity and violent tendencies.⁴²⁰ The Judge further ruled that the families of the employees who had been killed could claim punitive damages against Allstate.⁴²¹ Although the case had been set for trial, the parties settled out of court for an undisclosed amount of money.⁴²²

the Fireman's Fund Shooting. The lawsuit claimed that Allstate representatives "learned that Calden was mentally troubled...and had a dangerous propensity for violence").

⁴¹³ Chachere, *supra* note 411, at 1; Alder & Peirce, *Encouraging Employers*, *supra* note 179, at 1418.

⁴¹⁴ Chavez, *supra* note 412, at 4 (stating before Mr. Calden parted with Fireman's Fund, he threatened his fellow employees by stating, "You haven't heard the last of me").

⁴¹⁵ *Id.* at 3 (reporting that after the gruesome shooting, witnesses heard Mr. Calden say "That's what you get for firing me." Two hours later, Mr. Calden shot himself).

⁴¹⁶ Alder & Peirce, *Encouraging Employers*, *supra* note 179, at 1418.

⁴¹⁷ *References Unavailable*, BUS. INS., Aug. 21, 1995, at 8.

⁴¹⁸ *Id.* Chachere, *supra* note 411, at 1 (reporting that the plaintiffs claimed that Allstate knew Paul Calden was dangerous when the company fired him, but the company gave him a letter of recommendation anyway).

⁴¹⁹ Asra Q. Nomani, *A Special News Report About Life on the Job and Trends Taking Shape There*, WALL ST. J., Aug. 15, 1995, at A1 (reporting that the presiding judge over *Jerner v. Allstate Ins., Co.* was the honorable Robert Bonnano in Hillsborough County, Florida).

⁴²⁰ *Id.*

⁴²¹ *References Unavailable*, *supra* note 417, at 8.

⁴²² Chachere, *supra* note 411, at 1.

Arguably, the deaths of three Fireman's Fund managers and the injuries of the two others could have been avoided had Allstate not given Paul Calden a letter of recommendation that failed to inform the prospective employer of his mental state and his propensity for violence.⁴²³ One article recognized that there is an increase in workplace violence and a growing trend to hold employers liable for the consequences of the violence.⁴²⁴ In *Allstate*, the injured parties chose to hold the former employer liable for failing to inform a prospective employer about an employee's dangerous behavior.⁴²⁵ Thus, former employers should beware of what they conceal even when giving neutral references, because they may be held liable for misrepresentation. In addition to the *Randi W.*, and *Allstate* cases, the federal case of *Gutzan v. Altair Airlines, Inc.*⁴²⁶ poses a similar risk of negligent liability for employers who choose to give incomplete references to prospective employers.

3. *Gutzan v. Altair Airlines, Inc.*

In *Gutzan v. Altair Airlines, Inc.*,⁴²⁷ an employment agency interviewed an applicant for a position with a prospective employer, Altair Airlines.⁴²⁸ While interviewing with the agency, the applicant disclosed that he was convicted of raping his ex-girlfriend while serving in the military in a foreign country.⁴²⁹ However, he explained that he really did not rape her but that the military incarcerated him merely to "appease foreign women who made such charges."⁴³⁰ No one at the referral agency looked into the incident that led to the applicant's rape conviction.⁴³¹ The applicant then told the same story to Altair Airlines, the prospective employer.⁴³² Relying on the agency's referral, Altair Airlines hired the candidate not knowing the true story behind the rape conviction.⁴³³ A year later, the new employee raped a co-employee.⁴³⁴ Both the referral agency and Altair Airlines later learned that the

⁴²³ Friedman, *supra* note 318, at 3.

⁴²⁴ *See id.*

⁴²⁵ *See id.*

⁴²⁶ 766 F.2d 135 (3d Cir. 1985).

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 137.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Gutzan v. Altair Airlines, Inc.*, 766 F.2d 135, 137 (3d Cir. 1985).

⁴³³ *Id.*

⁴³⁴ *Id.* at 138.

offending employee fabricated his original story regarding the rape charge and found that the candidate was convicted of assaulting and raping a former co-worker who also worked in the military.⁴³⁵

A jury found for the employee who was raped by her violent co-worker based on the theory of negligence against the employment agency who gave the referral.⁴³⁶ The plaintiff also brought a negligent hiring charge against Altair Airlines, the prospective employer, but the company settled out of court.⁴³⁷ On appeal, the court affirmed the jury's verdict and held that the referral agency was liable under the theory of negligent misrepresentation.⁴³⁸ The *Gutzan* court reasoned that the agency had reason to believe that Altair Airlines had no knowledge of the danger and risk of harm of the applicant's past employment with female employees because of the agency's reassurances.⁴³⁹ Therefore, a reasonable jury could conclude that the agency did not alert Altair Airlines to be on guard of the applicant's violent tendencies, but rather permitted Altair Airlines to lower its guard and refrain from exercising proper care for the safety of Altair Airlines' employees.⁴⁴⁰ This decision indicates that an agency owes a duty to third parties not to act negligently when giving a referral and that the agency's acts and omissions are important.⁴⁴¹ While this discussion provided examples of why employers should re-evaluate their job reference policies, the next section addresses jurisdictions that presently do not hold employers accountable for concealing information about a former employee.

B. States that do not Hold Former Employers Liable for Failing to Disclose Information in a Reference about an Employee's Propensity for Violence

Although a federal district court in *Gutzan* and the California Supreme Court in *Randi W.* imposed a "duty" on employers who omit negative information when giving a favorable reference under theories of negligent misrepresentation and intentional misrepresentation, the New York and Michigan legal systems refuse to expand these theories.⁴⁴²

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 138.

⁴³⁷ *Id.*

⁴³⁸ *Gutzan v. Altair Airlines, Inc.*, 766 F.2d 135, 141 (3d Cir. 1985). See *supra* part II.C.1.

⁴³⁹ *Gutzan*, 766 F.2d 141.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* at 139. The trial court judge stated, "Still another way of measuring negligent behavior is to call negligent an act or omission that would be avoided by a reasonable man, properly considerate of the safety of others...." *Id.*

⁴⁴² See *supra* part IV.C. for a comparison of case law.

Particularly, under current New York and Michigan state laws, employers in these jurisdictions are not required to disclose negative information regarding a former employee's past sexual misconduct or violent propensities even when providing a favorable reference.⁴⁴³ A detailed analysis of the New York case, *Cohen v. Wales*,⁴⁴⁴ and the Michigan case, *Moore v. St. Joseph Nursing Home, Inc.*,⁴⁴⁵ is necessary to comprehend the differences in these opinions.

1. *Cohen v. Wales*

Although the case of *Cohen v. Wales*⁴⁴⁶ had a similar fact pattern to the *Randi W.* case, the Appellate Division of the New York Supreme Court decided not to hold a former employer negligently liable for giving a good recommendation about a teacher who previously sexually assaulted a student.⁴⁴⁷ In *Cohen*, an employer recommended a former employee for a position as an elementary school teacher to another school without disclosing the fact that the teacher had been previously charged with sexual misconduct.⁴⁴⁸ The prospective employer hired the recommended teacher, and subsequently, the teacher assaulted a minor student at the new school.⁴⁴⁹ The *Cohen* court held that upon writing a letter of recommendation, a former employer owed no duty to a third party victim, the minor student, even though the former employer failed to disclose that the teacher had been charged with sexual misconduct.⁴⁵⁰ Particularly, the court determined that a mere recommendation of a person to a prospective employer was not a proper basis for a claim of negligence where another party is responsible for the actual hiring.⁴⁵¹ The court reasoned that under common law, a person has no duty to warn third parties about potential danger unless a special relationship exists between that person and the third party or a foreseeable victim.⁴⁵² Therefore, the court could not find a sound public policy to expand the

⁴⁴³ See *infra* notes 444-67 and accompanying text.

⁴⁴⁴ 133 A.D.2d 94 (N.Y. App. Div. 1987).

⁴⁴⁵ 459 N.W.2d 100 (Mich. Ct. App. 1990).

⁴⁴⁶ *Cohen*, 133 A.D.2d 94.

⁴⁴⁷ *Id.* at 95.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Cohen v. Wales*, 133 A.D.2d 94, 95 (N.Y. App. Div. 1987).

⁴⁵¹ *Id.*

⁴⁵² *Id.*

common law duty needed to hold the former employer negligently liable.⁴⁵³

2. *Moore v. St. Joseph Nursing Home, Inc.*

The *Moore v. St. Joseph Nursing Home, Inc.*⁴⁵⁴ case described in the opening paragraph demonstrates that the State of Michigan does not impose a duty on a former employer to disclose information in a favorable reference regarding a former employee's dangerous and violent propensities to a prospective employer.⁴⁵⁵ In *Moore*, St. Clair had been employed with St. Joseph Nursing Home.⁴⁵⁶ After St. Clair received numerous disciplinary warnings for violent conduct as well as for the use of drugs and alcohol on the job, St. Joseph terminated his employment.⁴⁵⁷ St. Clair then applied for another job with a new employer and listed his former employer, St. Joseph Nursing Home, as a reference.⁴⁵⁸ Although the new employer never contacted St. Joseph Nursing Home, the latter confessed that if it had been asked to provide a reference, it would have only given a neutral reference merely confirming dates of employment.⁴⁵⁹

Consequently, St. Clair savagely beat and murdered a security guard at the new employer's workplace.⁴⁶⁰ The plaintiffs brought a negligence action against St. Joseph claiming that the omission of information regarding St. Clair's past violent behavior and drug use constituted negligence.⁴⁶¹ The plaintiffs further argued that the former employer had a duty to disclose his violent behavior to the new employer under the Michigan's qualified privilege statute.⁴⁶² Specifically, the plaintiffs asserted that a special duty existed between the former employer and the new employer which arose from a moral and social duty implied in the qualified privilege statute.⁴⁶³

⁴⁵³ *Id.*

⁴⁵⁴ 459 N.W.2d 100 (Mich. Ct. App. 1990).

⁴⁵⁵ *Id.* at 103.

⁴⁵⁶ *Id.* at 101.

⁴⁵⁷ *Id.* at 101, 102.

⁴⁵⁸ *Id.* at 102.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W. 2d 100, 101 (Mich. Ct. App. 1990).

⁴⁶¹ *Id.* at 102.

⁴⁶² *Id.*

⁴⁶³ *Id.*

However, the *Moore* court disagreed with the plaintiffs by holding that under the Michigan qualified privilege statute, employers have no legal obligation to disclose negative information about a former employee.⁴⁶⁴ The Michigan statute's conditional privilege merely allows or permits employers to divulge information concerning a former employee to a prospective employer, but employers are not legally obligated to do so.⁴⁶⁵ The court also weighed the competing interest of confidential employment records and a prospective employer's right to know about an applicant and determined that the former interest was paramount.⁴⁶⁶ The court concluded that the legislature was the appropriate branch to regulate defamation law and declined to find a former employer's duty under the existing Michigan qualified privilege statute.⁴⁶⁷

C. *A Comparison of Case Law*

In order to fully understand the different outcomes between the cases of *Randi W. v. Muroc Joint Unified School District*,⁴⁶⁸ *Gutzan v. Altair Airlines, Inc.*,⁴⁶⁹ and the precedents of *Moore v. St. Joseph Nursing Home, Inc.*,⁴⁷⁰ and *Cohen v. Wales*,⁴⁷¹ a comparison of the case law is essential.⁴⁷² The courts in *Cohen* and *Moore* relied on the general principle⁴⁷³ that a person owes "no duty" of care to another unless a special relationship exists between the two parties or when there is a foreseeable victim.⁴⁷⁴ In

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at 102, 103.

⁴⁶⁶ *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W. 2d 100, 102 (Mich. Ct. App. 1990).

⁴⁶⁷ *Id.* at 103.

⁴⁶⁸ 929 P.2d 582 (Cal. 1997).

⁴⁶⁹ 766 F.2d 135 (3d Cir. 1985).

⁴⁷⁰ 459 N.W.2d 100 (Mich. Ct. App. 1990).

⁴⁷¹ 133 A.D.2d 94 (N.Y. App. Div.1987).

⁴⁷² Note that although the facts in the New York case of *Cohen* were almost identical to those in the California opinion of *Randi W.*, surprisingly the two judgments were inconsistent.

⁴⁷³ See also *supra* Part II.C.1. See also RESTATEMENT (SECOND) OF TORTS § 315 (1965) which provides:

There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Id.

⁴⁷⁴ Compare *Cohen v. Wales*, 133 A.D.2d 94, 95 (N.Y. App. Div. 1997) (holding that a former employer owes no duty to a third party or prospective employer when giving a favorable

contrast, the court in *Randi W.* and *Gutzan* carved out an exception to the “no duty” rule by expanding the tort liability to former employers who made misrepresentations that placed a substantial foreseeable risk of physical injury to third persons.⁴⁷⁵ Specifically, the *Randi W.* and *Gutzan* courts referred to the Restatement (Second) of Torts section 311 negligent misrepresentation in their analysis; however neither the *Cohen* court nor the *Moore* court recognized this doctrine in their opinions.⁴⁷⁶ The *Randi W.* forum also considered moral blameworthiness, foreseeability of harm, and public policy arguments when expanding the duty of care whereas the *Cohen* court did not observe these factors.⁴⁷⁷ In particular, the *Cohen* court did not recognize an important public policy consideration to protect children from sexual or physical abuse, which was dissimilar to *Randi W.* court’s analysis.⁴⁷⁸

In addition, similar to the court’s reasoning in *Randi W.* but unlike the *Cohen* judicial analysis, the *Moore* court keenly observed moral and social duties on the part of former employers to release information regarding an employee’s violent behavior.⁴⁷⁹ Unfortunately, the *Moore* court still decided not to carve out an exception to the general “no duty” rule by concluding that employers have no legal duty to disclose negative information about a former employee to prospective employers, which was similar to the *Cohen* court’s conclusion.⁴⁸⁰

reference that omits information regarding a former employee’s past sexual misconduct with students), *with Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. Ct. App. 1990) (stating that it would be necessary to demonstrate a special relationship between the parties to impose an actionable duty. In this case, there is no duty to warn since no special relationship existed between the former employer and injured third party and the third party was not a foreseeable victim).

⁴⁷⁵ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (1997) (holding that a former employer owes a duty of care to third parties when a favorable reference fails to disclose a former employee’s past sexual misconduct which amounts to misrepresentations); *Gutzan v. Altair Airlines, Inc.*, 766 F.2d 135 (3d Cir. 1985).

⁴⁷⁶ *Randi W.*, 929 P.2d at 591, *Gutzan*, 766 F.2d at 140. See generally *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990); *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1997).

⁴⁷⁷ *Randi W.*, 929 P.2d at 588-91. See generally *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1997).

⁴⁷⁸ *Randi W.*, 929 P.2d at 589. See generally *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1997).

⁴⁷⁹ *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. Ct. App. 1990), *with Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (1997) and *Cohen v. Wales*, 133 A.D.2d 94 (N.Y. App. Div. 1997).

⁴⁸⁰ *Moore*, 459 N.W.2d at 102, 103. The Michigan courts have refused to impose a legal duty to disclose facts where the relationships were much closer than that between a former

The *Randi W.* court rendered a different outcome than the *Moore* and *Cohen* forums, because the *Randi W.* court simply dismissed these persuasive authorities to conclude that the former employer made favorable assertions and omissions about the employee, which constituted a deceptive recommendation.⁴⁸¹ Under the theory of negligent misrepresentation, the *Randi W.* court ruled the former employer had a duty not to mislead a prospective employer.⁴⁸² Therefore, the plaintiff in *Randi W.* was able to recover damage awards simply because the court chose not to follow other state precedents and decided to expand the tort duty owed to third parties. In short, although the California forum in *Randi W.* and the federal court in *Allstate* pose new liability on employers to disclose negative information when giving a favorable reference and possibly a neutral reference, the New York and Michigan legal systems are reluctant to expand the theory of negligence.

D. The Future Effects of the Randi W., Allstate, and Gutzan Decisions

Some commentators predict that courts may go one step further than the courts in *Randi W.*, *Allstate* and *Gutzan*.⁴⁸³ When a former employer gives a favorable reference, the *Randi W.* court held that the former employer owes a duty of care to unknown third parties even though no special relationship exists between the former employer and the third party.⁴⁸⁴ Further, the *Allstate* court attempted to expand that duty one step further and explained that a former employer may be liable when they provide a neutral reference to prospective employers and the employee subsequently harms a third person.⁴⁸⁵ This expanded tort liability demonstrates that courts are becoming less tolerant of workplace violence and that they are holding employers responsible.⁴⁸⁶ In the future, courts could further expand the duty of care owed to third parties when the former employer decides not to comment at all when asked to give a reference.⁴⁸⁷ In other words, employers should be aware that in upcoming decisions, plaintiffs could argue that "no comment" policies and neutral job references that omit information about a former employee's violent nature lead to misrepresentation or negligence

employer and prospective employer, or third parties. *Id.* But see *Randi W.*, 929 P.2d at 591 and *Cohen*, 133 A.D.2d at 95.

⁴⁸¹ *Randi W.*, 929 P.2d at 592.

⁴⁸² *Id.*

⁴⁸³ See *infra* note 484 and accompanying text.

⁴⁸⁴ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (1997).

⁴⁸⁵ See *supra* notes 409-22 and accompanying text.

⁴⁸⁶ Friedman, *supra* note 318, at 3.

⁴⁸⁷ Reibstein, *supra* note 18, at B7.

liability.⁴⁸⁸ By this reasoning, former employers will want to avoid a negligence action and abandon their “no comment” and neutral reference policies. Employers may also be more encouraged to recognize the protection against defamation liability under the qualified privilege statutes, because they may be held to disclose negative information under this expanded tort liability.

Conversely, the ultimate effect of the *Randi W.*, *Allstate* and *Gutzan* opinions may be that employers will keep their “no comment” and neutral job reference practices and refrain from giving purely positive or purely negative references.⁴⁸⁹ The courts in *Randi W.* and *Gutzan* determined that misrepresentation liability could ensue once the employer chooses to speak favorably about an employee.⁴⁹⁰ The *Allstate* court indicated that such liability could occur once the employer gives a neutral reference.⁴⁹¹ These decisions reinforce the idea that these restrictive policies will prevent not only defamation liability but also negligent misrepresentation and intentional misrepresentation liability.⁴⁹² The bottom line is that under the current legal climate, employers are safe if they just say nothing.⁴⁹³

However, employment law experts say that information that could prevent risking the safety of co-workers and the public-at-large should be disclosed.⁴⁹⁴ Similarly, this Note posits that these restrictive policies present many problems because they deter the free flow of information

⁴⁸⁸ Reibstein, *supra* note 18, at B5 (asserting, “[e]mployers...should bear in mind that future plaintiffs may seek to expand the court’s decision so as to cover “neutral” job references and those that do not include an explicit recommendation to hire”); McMorris, *supra* note 8, at B1 (referring to a Vice President’s statement that his company verifies only dates of employment, and is considering changing its policy because of the new California law presented by *Randi W.* and the *Allstate* case).

⁴⁸⁹ Allan H. Weitzman and Kathleen M. McKenna, *In Light of Several Decisions Holding Employers Liable for Their Employee References, Many Companies Choose Not to Give Any*, NAT’L L.J., May 19, 1997, at B4; Jeff Richgels, *Giving References Has Become a Sticky Widget*, WIS. ST. J., Feb. 12, 1997, at 1C available in 1997 WL 7052124; Kenny, *supra* note 9, at 1; Saxton, *Employment References*, *supra* note 307, at 262.

⁴⁹⁰ *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (1997); *Gutzan v. Altair Airlines, Inc.*, 766 F.2d 135, 141 (3d Cir. 1985); Saxton, *Employment References*, *supra* note 307, at 265.

⁴⁹¹ See *supra* notes 409-22 and accompanying text.

⁴⁹² See *supra* notes 402, 420 and accompanying text.

⁴⁹³ See *supra* notes 402, 420 and accompanying text. See also *supra* note 489.

⁴⁹⁴ McMorris, *supra* note 8, at B1; Shanoff, *supra* note 209, at 19 (reporting that although the statutory qualified privilege laws do not force employers to disclose past violent behavior, employment experts say employers should disclose such information).

among employers.⁴⁹⁵ Prospective employers cannot obtain complete and accurate information about an applicant because former employers refuse to discuss the applicant's performance in fear of defamation liability and now, possible negligent misrepresentation liability. Consequently, as illustrated in the opening paragraph, prospective employers may hire a dangerous and violent individual, and unknowingly place innocent third parties' or co-workers' safety at risk. In turn, if the individual harms third parties, they are likely to file a lawsuit against the new employer for negligently hiring a dangerous employee. Former employers are also prospective employers, thus "no comment" or neutral job reference policies expose all employers to negligent hiring liability not just those employers hiring at that time. In short, employers should be persuaded to discard their "no comment" and neutral job reference policies, because there are serious negative social and legal consequences if they do not. Furthermore, to encourage employers to abandon their policies, this Note proposes that state legislatures adopt "good faith" reference statutes that also place a narrow duty to disclose information regarding a departing employee's or former employee's violent or dangerous behavior.

V. A PROPOSED MODEL STATUTE TO ELIMINATE "NO COMMENT" AND NEUTRAL JOB REFERENCE POLICIES

This Note proposes a model statute to be adopted by all states, including those states that have already enacted "good faith" reference laws.⁴⁹⁶ As already indicated, under the current qualified privilege statutes, former employers *may* openly discuss negative information about an employee as long as employers state the information in good faith.⁴⁹⁷ However, the existing privilege statutes do not legally *require* former employers to disclose this essential information.⁴⁹⁸ Furthermore, employers have no common law duty to speak about an employee or former employee.⁴⁹⁹ However, the proposed statute imposes a legal duty on former employers to freely discuss with prospective employers, an employee's violent tendencies, dangerous propensities, or past sexual misconduct. The proposed statute shields former employers from the conflicting tort doctrines including defamation, negligence, and negligent misrepresentation so long as former employers discuss an

⁴⁹⁵ See *supra* Part III, for a discussion on social and legal problems.

⁴⁹⁶ See *supra* note 206 and accompanying text.

⁴⁹⁷ See *supra* notes 206-09 and accompanying text.

⁴⁹⁸ See *supra* notes 208-09 and accompanying text.

⁴⁹⁹ See *supra* notes 230-34, 333 and accompanying text.

employee's violent tendencies, dangerous propensities, and past sexual misconduct. Former employers must also act in "good faith" and not abuse the privilege or else the privilege will be lost.

In essence, this new statute promotes strong public policy of a former employers' social and moral duty⁵⁰⁰ to communicate information to prospective employers and transforms this moral duty into a legal obligation. Under the proposed law, employers will be forced to discard their "no comment" policies or neutral job reference schemes and openly discuss information without fear of litigation. Prospective employers will be able to obtain the necessary information that they need from former employers in order to hire qualified individuals. This statute is intended to promote safer workplaces for employees and the public and to protect prospective employers from potential negligent hiring liability. Therefore, every state should ratify the following statutory provisions:

Sec. 1 Civil Immunity for Providing Employment References

- (1) *If an employer provides a reference upon the request of an employee, former employee, or prospective employer, the employer is presumed to be acting in good faith and is immune from all civil liability that may result from providing that reference as a matter of law, including but not limited to defamation, negligent misrepresentation, and negligence.*

Commentary

Section 1(1) sets forth the concept of civil immunity for employers who provide references upon the request of an employee, former employee, or prospective employer. Most of the current twenty-nine states incorporated "upon the request" requirement in their immunity statutes, thus the proposed statute will be consistent with these incumbent statutes.⁵⁰¹ Moreover, the statute's immunity applies only to those employers who answer requests for referrals in order to protect the former employee or departing employee from unnecessary defamatory statements that could damage the employee's reputation.

- § 1(2) *The presumption of good faith may be rebutted by showing clear and convincing evidence that the employer made the reference with actual malice. Actual malice means knowledge*

⁵⁰⁰ See, e.g., Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100, 103 (Mich. Ct. App. 1990); Randi W. v. Muroc Joint Unified Sch. Dist., 929 P.2d 582, 591 (1997).

⁵⁰¹ See *supra* note 206 and accompanying text.

that the information was false or a reckless disregard of whether the information was false. The rebutted presumption of good faith shall be judged as a matter of law.

Commentary

Section 1(2) of the statute establishes a presumption that the employer acted within "good faith" and places the burden on the complainant to prove by clear and convincing evidence that the employer acted with malicious intent or knowingly gave false information in the reference. Similar to the common law qualified privilege⁵⁰² and most qualified privilege statutes,⁵⁰³ under the proposed statute, an employer will forfeit the privilege if it is abused. Nevertheless, the presumption of "good faith" favors the employer. If an employer is aware that the law places the burden of proof on the employee to show that the employer did not act in good faith by a showing of clear and convincing evidence, then the employer will be more comfortable with providing both positive and negative information about the employees. Hence, the employer will be encouraged to open the channels of communication. Additionally, under Section 1(2), the cases involving civil immunity for employers will be tried as a matter of law. Hence, the judge will decide whether the complainant provided clear and convincing evidence that the employer did not act in good faith. By having the case decided early in the litigation process regarding the issue of whether the employer has acted in good faith, the employer faces relatively low litigation expenses. The low cost of defending a defamation claim provides an excellent incentive for employers to discard their "no comment" policies and exchange them for more open reference policies.⁵⁰⁴ In addition, this statute applies compatible terms by incorporating the *New York Times* standard of "actual malice" with the corresponding clear and convincing burden of proof.⁵⁰⁵ By requiring the states to adopt a more rigorous "actual malice" standard rather than the mere negligence standard, which is already required for an employee's prima facie case for a defamation cause of

⁵⁰² See *supra* notes 172-80 and accompanying text.

⁵⁰³ See *supra* notes 206-21 and accompanying text.

⁵⁰⁴ See *supra* notes 293-99 and accompanying text.

⁵⁰⁵ See *supra* notes 212-21 and accompanying text.

action, the statute preserves the employer's qualified privilege—avoiding the “meaningless defense.”⁵⁰⁶

Sec. 2 An Employer's Statutory Duty to Disclose Information for Employment References

(1) *If a prospective employer requests a reference, and the responding employer honestly believes that an employee or former employee demonstrated violent tendencies, dangerous propensities, or past sexual misconduct, the employer shall disclose such information to a prospective employer, if disclosing such information would prevent a foreseeable risk of harm to others.*⁵⁰⁷

Commentary

Section 2(1) supports the public policy argument that all employers have a social and moral duty to offer information that could prevent foreseeable physical safety risks to co-employees at the new employer's

⁵⁰⁶ See *supra* notes 189-92 and accompanying text; see *supra* notes 217-21 and accompanying text.

⁵⁰⁷ The “duty to disclose” requirement under Section 2(1) of the proposed statute may present a constitutional issue regarding an employer's First Amendment “right not to speak.” Under a First Amendment analysis, there is a substantial dissimilarity between this Note's proposed “duty to disclose” principle with a “duty to disclose” standard presented in the case of *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). In *Amestoy*, dairy manufacturers constitutionally challenged a Virginia statute that required the manufactures to disclose information that revealed whether their milk product contained milk from cows that had been treated with a growth hormone. *Id.* at 72, 74. The manufacturers claimed that this infringed upon their First Amendment right not to speak. *Id.* The Second Circuit Court agreed with the manufactures and held that the statute infringed upon their right not to speak. *Id.* at 73. The *Amestoy* court reasoned that since Vermont defended the statute's “duty to disclose” requirement on the basis of strong consumer interests and the public's right to know, instead of health and safety concerns, it did not provide a substantial state interest for the compelled disclosure. *Id.* Therefore, the Court implied that a substantial state interest would consist of a showing of the public's health and safety concerns and that the safety interest of the public would have passed constitutional muster. *Id.* In comparing the Virginia statute in the *Amestoy* case to the proposed statute, the legislative intent for proposing the Virginia statute was not based on health and safety concerns, but mere consumer interests in the purchase of milk products. Whereas the primary purpose of this Note's proposed law is the health and safety of employees and the public-at-large. Unlike the Court in *Amestoy*, other courts shall find that the proposed statute containing a “duty to disclose” limited information about a departing employee or former employee, has a substantial interest in preventing harm to the public. Therefore, the proposed statute should pass First Amendment scrutiny.

workplace and to the public-at-large.⁵⁰⁸ The legislative intent is to create a statutory duty for employers to disclose information concerning a former employee's dangerous propensities, violent behavior, or past sexual misconduct. The disclosure of these critical facts will help prospective employers gather essential information about a job applicant and make well-informed hiring decisions. Moreover, this statutory duty imposed on employers ensures that third parties harmed by the omission of such essential information will not be barred from bringing negligence claim or negligent misrepresentation claim against the former employer. The proposed statute prevents the harsh outcome in *Moore v. St. Joseph Nursing Home, Inc.*⁵⁰⁹ The *Moore* Court held that the Michigan statute's conditional privilege merely permitted employers to reveal information concerning a former employee to a prospective employer, but employers were not legally obligated to do so.⁵¹⁰ Therefore, the plaintiffs in *Moore* had no legal cause of action against the former employer, because the employer had no statutory or common law duty to disclose such information regarding a former employee's violent behavior on the job.⁵¹¹ This section prevents the unjust outcome found in the *Moore* case by ensuring that injured third parties have an opportunity to bring legal action against former employers who refused to disclose information that could have prevented harm to them. In such a situation, employers will be in a position to supply the essential employment information because the qualified privilege statute provides civil immunity from defamation liability.

§ 2(2) *If the employer fails to comply with the statutory duty to disclose an employee's or a former employee's violent tendencies, dangerous propensities, past sexual misconduct under § 2(1) of this statute, then civil immunity shall not protect the employer under this statute.*

Commentary

Section 2(2) expands the ruling in *Randi W. v. Muroc Joint Unified School District*⁵¹² and exposes employers to defamation, negligence, and

⁵⁰⁸ See, e.g., *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. Ct. App. 1990); *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (1997).

⁵⁰⁹ 459 N.W.2d 100 (Mich. Ct. App. 1990).

⁵¹⁰ *Id.* 102, 103.

⁵¹¹ *Id.* at 103. Note that in all of the twenty-nine "good faith" reference laws, there is no duty to disclose information about an employee even if such information would prevent foreseeable risk of harm to third parties. See *supra* notes 206-09 and accompanying text

⁵¹² See discussion *supra* Part II.C.1.

negligent misrepresentation liability when they fail to disclose to prospective employers information about an employee's or former employee's dangerous propensities, violent tendencies, or past sexual misconduct. In other words, if employers say nothing about an employee's or former employee's violent behavior, and give just a favorable reference, a neutral reference, or no reference, the employer forfeits the civil immunity provided for in section 1(1). Moreover, omitting this essential information will subject employers to liability regardless of whether the employer provided a favorable reference only, a neutral reference, or no information under a "no comment" policy. When disclosing this limited information, employers should not fear that courts will hold them liable for defamation since employers will be protected against such claims under section 1(1) provided that employers do not abuse the privilege. As indicated, section 1(1) encourages employers to discard neutral references and "no comment" policies by granting them civil immunity for not only defamation charges brought by former employees but also negligent misrepresentation and negligent claims brought by unknown third parties such as the plaintiffs in *Randi W.*, *Gutzan*, and *Allstate*.⁵¹³ Under the current law, courts have refused to impose a blanket duty on the part of former employers to disclose negative information about a former employee to prospective employers.⁵¹⁴ Furthermore, under statutory qualified privilege law, legislatures have not approved a statutory duty to disclose information about a departing employee's or former employee's violent tendencies.⁵¹⁵ However, the proposed statute works to prevent hideous and violent crimes described in the cases of *Garcia*, *Randi W.*, *Gutzan*, *Allstate*, *Cohen*, and *Moore* because under the new statute, former employers will have a legal duty to disclose information regarding a former employee's propensity for violence, criminal behavior, or past sexual misconduct. Former employers will alert prospective employers to a potentially dangerous applicant or employee. From this essential information, prospective employers will be able to make more well informed hiring decisions and prevent harm to employees and the public.

⁵¹³ See *supra* notes 358-441 and accompanying text.

⁵¹⁴ See *supra* notes 230-34, 334 and accompanying text.

⁵¹⁵ See *supra* notes 208-09 and accompanying text.

VI. CONCLUSION

This Note asserts that by trading in their "no comment" and neutral job reference policies in exchange for more open policies, former employers will avoid potential tort claims such as defamation and negligent misrepresentation, and prospective employers will have the essential information to make sound hiring decisions. Currently, prospective employers are unable to obtain complete references, and as a result, they may hire an individual without knowing whether that individual engaged in violent or criminal behavior, or is simply incompetent. This lack of knowledge regarding a new employee's violent behavior may place the safety of co-employees as well as other third parties at risk. "No comment" and neutral job reference policies seemed to be an excellent solution to potential defamation litigation, but these practices created further problems for prospective employers seeking to obtain full and truthful references, such as negligent hiring liability. This Note asserts that if former employers embrace the defamation defenses such as the truth or the qualified privilege defense, then employers will be able to freely communicate among themselves and liberally discuss information on former employees without fearing potential defamation liability. Furthermore, the model statute provides an incentive for employers to implement more open communication practices regarding references while simultaneously imposing a legal duty to disclose only limited information regarding departing employees or former employees, such as their violent tendencies, dangerous propensities, and past sexual misconduct. By imposing a "duty to disclose" in special circumstances, prospective employers will have an opportunity to learn about a potentially dangerous applicant. As a result, employers can make proper hiring decisions and provide a safer workplace.

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