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DEFAMATION IN THE WORKPLACE: THE IMPACT OF INCREASING EMPLOYER LIABILITY

INTRODUCTION

The development of workplace privacy rights¹ has caused a dramatic increase in the number of defamation² lawsuits brought against employers by current³ or former employees.⁴ In the past few years nearly 10,000 such

1. The development of workplace privacy rights is becoming the most dynamic area of employment law in the United States. I. Shepard & R. Duston, *Workplace Privacy: Employee Testing, Surveillance, Wrongful Discharge and Other Areas of Vulnerability*, BNA Special Report 1 (1987) [hereinafter *Workplace Privacy*]. This "workplace revolution" is characterized by a greater awareness by employees of their privacy rights. This greater awareness of privacy rights has resulted in employees suing their employers more frequently than in the past and receiving increasingly higher jury verdicts. *Id.* This assertion of rights has been described metaphorically as the use of complex and novel theories "as legal weapons to redress what they [employees] see as a decline in their rights of privacy." *Id.*

The results of a survey of workplace privacy jury verdicts illustrate the increase in workplace privacy actions filed in the 1980's and average jury verdicts against employers from 1985 to late 1987. *Id.* The results conclude as follows: "[J]ury verdicts against employers — based on allegations of invasion of privacy — increased almost 2,000% in the last three years, compared to 1981-84. The average jury verdict from 1985-87 in workplace privacy cases is \$316,000. . . . In 1979-80, there were no reported workplace privacy jury verdicts" *Employees are Suing and Winning, More Often, in Workplace Privacy Cases, BNA Report Says*, Daily Lab. Rep. (BNA) No. 170, at A-10 (Sept. 3, 1987).

The recognition of employees' privacy rights by the court is significant in that it has produced "an array of complex and novel theories for aggrieved employees." *Workplace Privacy, supra*, at 1. Defamation claims, however, are but one of many "legal weapons" used by employees to assert their privacy rights. Among the more recent legal theories used by employees are claims of invasion of privacy and wrongful discharge. See *Workplace Privacy, supra* at 2. It is within the context of the emerging recognition of employee rights that this Comment will examine the development and use of the defamation claim as one such "legal weapon" used by employees against their current or former employers.

2. Defamation is defined in the employment context as any false statement about an employee communicated by an employer to a third party that harms that employee's reputation or deters others from dealing with him or her in a business setting. *Defamation Is Emerging as Source of Multiple Liability for Employers*, [Current Developments] Daily Lab. Rep. (BNA) No. 227, at A-3 (Nov. 27, 1987) [hereinafter *Defamation Emerging*]. For a discussion of the elements of a defamation claim, see *infra* notes 138-207 and accompanying text.

3. Traditionally, defamation claims have arisen out of the termination of an employee. However, in recent years, liability for defamation has arisen in a variety of contexts, including employee evaluations and statements made to other employees. See *Defamation Emerging, supra* note 2, at A-3; Moon, *What Companies Should Know About Employee 'Defamation' Suits*, 7 LAW ALERT 119 (Dec. 28, 1987); see also *infra* notes 81-137 and accompanying text.

4. *Workplace Privacy, supra* note 1, at 99; Middleton, *Employers Face Upsurge in Suits over Defamation*, The Nat'l L.J., May 4, 1987, at 1, col. 4; Stricharchuk, *Fired Employees Turn the Reason for Dismissal into a Legal Weapon*, Wall Street J., Oct. 2, 1986, at 29, col. 2.

lawsuits have been filed by employees,⁵ and it is estimated that one-third of all defamation cases involve employers as defendants.⁶ This dramatic increase in claims, given the existing uncertainty in the law of defamation,⁷ has compelled many state courts to recognize new theories to establish defamation liability, particularly in the employment context.⁸ The recognition of these new theories poses the threat of expanding liability for employers. In response to this threat, and in an attempt to avoid liability, employers have greatly restricted communications concerning former and current employees.⁹ This restriction, or "chilling effect,"¹⁰ has considerable implica-

5. See Turner, *Compelled Self-Publication: How Discharge Begets Defamation*, 14 EMPLOYEE REL. L.J. 19, 19-20 (1988) ("[A]s many as five thousand claims involving employment references are filed each year.") (footnote omitted).

6. Stricharchuk, *supra* note 4, at 29, col. 1; see also Middleton, *supra* note 4, at 1, col. 4.

7. See *Negligence, Defamation Claim Dangers are Assessed at BNA IER Conference*, Daily Lab. Rep. (BNA) No. 213, at A-3 (Nov. 5, 1987) [hereinafter *Claim Dangers Assessed*] ("Many states are recognizing new claims of defamation in the employment context, and given the flux in the law, any generalizations about defamation claims are dangerous . . ."); Middleton, *supra* note 4, at 31, col. 2 ("While defamation law remains in flux, lawyers remain divided over the increasing use of such actions."). See generally SMOLLA, *THE LAW OF DEFAMATION* § 8.08[2][c][ii] (1986) [hereinafter SMOLLA] (discussing uncertainty of first amendment doctrine and its potential impact on the use of common law qualified privilege). For a discussion of the uncertainty in the law of defamation resulting from a decrease of constitutional protection, see *infra* notes 45-80 and accompanying text.

8. *Claim Dangers Assessed*, *supra* note 7, at A-3.

9. Middleton, *supra* note 4, at 30, col. 1 ("The threat of legal actions — and the actual expense in defending against them — also apparently has had a chilling effect on the exchange of information that traditionally has occurred among employers."); Stricharchuk, *supra* note 4, at 29, col. 2 ("Anxious to avoid high costs and aggravation of libel suits, many companies are sharply restricting information they will provide about former employees.").

The expense of defending a defamation action is a major consideration and an impetus in a company's decision to restrict communications. It is claimed that "[d]efending such actions can take years and cost employers tens of thousands of dollars." Stricharchuk, *supra*, at col. 1. One company estimates that defending defamation suits "costs between \$140,000 and \$250,000 each." *Id.* at col. 3.

10. The "chilling effect," or restriction in employer communications, initially came about due to advice given employers by their legal counsel as a means to avoid the liability of a defamation claim. Middleton, *supra* note 4, at 31, col. 2 ("Most lawyers are telling employers that they should give out only the dates of employment and the positions held when asked for a reference."). Traditionally, the term "chilling effect" applied only to employee references; however, in light of the variety of contexts from which defamation can arise, the term "chilling effect" is used to refer to other communications as well. *Id.* at col. 2 ("Statistics show that employers are giving out less information.").

It is recognized that during the past decade, the developments in anti-discrimination, privacy and defamation have tightened constraints on employers seeking information from job applicants. One author has stated:

[C]onstitutional law, common-law, and statutory protections of privacy rights may expressly prohibit or otherwise effectively deter employer administration of polygraph, blood, or urine tests to ascertain veracity, determine the presence of the AIDS virus, or reveal drug or alcohol use. Furthermore, the notorious and real threat of defamation lawsuits has

tions upon the compelling need of employers¹¹ to maintain a safe and efficient workplace.¹²

also infected, and consequently frozen, employer willingness to share information about former employees with prospective new employers. It is now nearly impossible for an employer to ascertain, and most unwise to disclose, substantive information about job applicants within the ranks of fellow employers.

Gregory, *Reducing the Risk of Negligence in Hiring*, 14 EMPLOYEE REL. L.J. 31, 32 (1988). Examples of other communications include performance evaluations, medical reports, substance abuse test results or any similar intra-corporate communication. See *Claim Dangers Assessed*, *supra* note 7, at A-3.

11. The compelling need for improving the flow of information to maintain a safe workplace is evident in light of the development of the torts of negligent hiring and negligent retention of employees. See, e.g., Gregory, *supra* note 10, at 32 ("The rapid proliferation of negligent hiring litigation compels all employers to pursue prudent and adequate investigations of prospective employees before extending an offer to the applicant to commence employment."). The former is a breach of the employer's duty to make adequate investigation of an employee's fitness before hiring. Silver, *Negligent Hiring Claims Take Off*, 73 A.B.A. J. 72 (May, 1987). The latter is the breach of an employer's duty to be aware of an employee's unfitness, and to take corrective action through retraining, reassignment or discharge. *Id.*

The legal duty imposed upon an employer is the duty to investigate and to be aware of employee's qualifications for the job, as well as the duty to maintain those qualifications. This legal duty owed to employees, as well as to the public, is the duty to maintain a safe environment by taking steps to protect those whom the employer might reasonably anticipate would be injured by the hiring. *Id.* at 74. Thus, it is clear, in order to be aware of potential dangerous conduct, an employer should seek and encourage the flow of information relating to his or her employees.

The consequences of an employer's failure to conduct an adequate inquiry into the qualifications of an employee are set forth in the following passage:

[T]he employer can no longer afford to abandon responsible investigation into the pertinent employment-related background of the prospective new employee. If the employer fails to pursue an adequate inquiry before extending the offer of employment, the employer may later find that this was the most costly error in the entire employment relationship. Customers, clients and other employees subsequently injured by dangerous, violent, or criminally disposed employees may successfully sue the employer for the tort of negligently hiring such employees. Courts and legislatures have been markedly unsympathetic to the employer in negligent hiring lawsuits. If a jury finds that the employer was negligent in seeking information about the applicant, but nevertheless hired the person, the jury can return a verdict assessing tremendous monetary damages against the employer.

Gregory, *supra* note 10, at 32.

12. An employer has a legitimate concern in the protection of its business interest and in the maintenance of a profitable and efficient workplace. In doing so, an employer has a compelling need for effective communication. For example, it is important to hire qualified workers; thus, an accurate reference would serve to facilitate a decision in hiring the most productive employee. Furthermore, accurate references aid in facilitating social control:

[E]mployee misconduct is constrained by the fear of bad references. Employees may not fear a bad reference as much as they fear dismissal, but since together these sanctions threaten the loss of present employment and the inability to obtain a new job, the combination probably deters misconduct more effectively than either alone. The availability of such deterrents is especially valuable in an era like the current one, when business spends billions of dollars on security.

This Comment will discuss the impact of the expanding liability of employers resulting from defamation claims arising in the workplace. Part I will discuss the development of the law of defamation and its applicability in the employment context. Part II will analyze the elements of a defamation claim, and Part III will address the various defenses available to the employer. Part IV will discuss new theories of defamation that are being recognized by the courts. Finally, Part V will address the impact of the increasing exposure to liability for defamation claims upon the employer.

I. DEVELOPMENT OF DEFAMATION IN THE EMPLOYMENT CONTEXT

A. *Development of Defamation Law Before 1974*

The development of defamation followed no particular aim or plan.¹³ The common law claim of defamation evolved from the English common law¹⁴, and prior to the evolution of first amendment constraints, was a strict liability tort.¹⁵ The cause of action for defamation, as stated in the original Restatement of Torts,¹⁶ consisted of an unprivileged publication of false and defamatory matter, either actionable irrespective of special harm, or the legal cause of special harm.¹⁷ Under this common law definition, the plaintiff, in order to set forth a prima facie case, had to demonstrate that the communication was defamatory¹⁸ and that the defendant had published

Comment, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143, 148 (1977) (footnote omitted).

13. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 111, at 772 (5th ed. 1984) [hereinafter PROSSER].

14. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975). For general discussion of the history of the law of defamation, see Carr, *The English Law of Defamation: With Especial Reference to the Distinction Between Libel and Slander* (pts. 1 & 2), 18 L.Q. REV. 255, 388 (1902); Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302 (pts. 1 & 2), 397 (1924), 41 L.Q. REV. 13 (pt. 3) (1925); Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969); Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (pt. 1) (1903), 4 COLUM. L. REV. 33 (pt. 2) (1904).

15. This strict liability concerning defamation is characterized by the words of Lord Mansfield as quoted by Justice Holmes: "Whatever a man publishes, he publishes at his peril." Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (citing in *The King v. Woodfall, Lofft*, 776, 781 [98 Eng. Rep. 914, 916 (1774)]). For a discussion of the first amendment constraints, see *infra* notes 45-80 and accompanying text.

16. RESTATEMENT OF TORTS § 559 (1938).

17. *Id.*

18. A statement is defined as defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.*

it.¹⁹ The plaintiff, however, was not required to show that the statement was false, although the plaintiff had to plead falsity.²⁰ It was the defendant who had the burden of proving truth as an affirmative defense.²¹ Damages at common law were presumed, and no actual harm to reputation needed to be proven in establishing a prima facie case.²² Additionally, there was no proof of fault or "malice" requirement.²³ Therefore, once the plaintiff established a prima facie case, the defendant could avoid liability only by proving either substantial truth, or by proving that the statement fell within one of a number of absolute or conditional common law privileges.²⁴

Although bringing a claim under common law for defamation may appear simple, it is complicated by the distinction between libel and slander.²⁵ Although defamation is made up of the twin torts of libel and slander,²⁶ the original common law position was to treat libel as a more serious tort than slander.²⁷ The distinction between the two terms is that libel is defamation by written or printed words or by the embodiment of the communication in some tangible or physical form,²⁸ whereas slander consists of the communication of a defamatory statement by spoken words or by transitory ges-

19. Eaton, *supra* note 14, at 1353.

20. *Id.*

21. *Id.* Truth was a complete defense at common law, although it did not totally absolve a defendant under some state statutory or constitutional modifications of the common law. *Id.* at 1353 n.16. It is interesting to note, however, that the early courts made asserting the defense of truth dangerous for the defendant: If the defense of truth failed, the jury was allowed to find that the defendant, in so trying to prove its truth, reiterated the defamatory statement and was allowed to consider that fact an aggravation of damages. *Id.*

22. *Id.* at 1353.

23. The common law rule after 1825 established that malice resulting from the mere publishing of the defamatory statement is conclusively implied and the defendant cannot rebut it. *Bromage v. Prosser*, 107 Eng. Rep. 1051 (K.B. 1825).

24. RESTATEMENT OF TORTS §§ 582-98 (1938).

25. Eaton, *supra* note 14, at 1354.

26. PROSSER, *supra* note 13, § 111, at 771.

27. The policies underlying this distinction arose when relatively few people could read and the written word was thought to have a more indelible stain on the plaintiff's reputation, was likely to reach a larger audience, and arguably evidenced greater deliberation and premeditation by the defendant.

28. See, e.g., *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936); *Ilitzky v. Goodman*, 57 Ariz. 216, —, 112 P.2d 860, 862 (1941); *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978); *Ostrowe v. Lee*, 256 N.Y. 36, 175 N.E. 505 (1931); *Merle v. Sociological Research Film Corp.*, 166 A.D. 376, 152 N.Y.S. 829 (1915).

tures.²⁹ The distinction between libel and slander is often difficult to apply, and because of this difficulty, a series of specialized rules has evolved.³⁰

Although some common law distinctions remain, the distinction between the two classifications of defamation has disappeared due to technological advances.³¹ Because modern forms of communication often present as much, or more, potential harm when "oral" as when written, the Restatement (Second) of Torts has expanded the definition of libel to include any "form of communication that has potentially harmful qualities characteristic of written or printed words."³² Furthermore, factors to be considered in classifying the defamatory speech were specified. These factors included the area of dissemination, the deliberateness of its publication, and the persistence of the defamation.³³

The significance of the libel/slander classification, however, concerns the common law position "that the plaintiff in an action for slander must prove 'special damages,'³⁴ unless the defamation falls within four particular categories of 'slander per se.'"³⁵ These categories include: (1) imputation of a serious crime involving moral turpitude;³⁶ (2) possession of a loathsome disease;³⁷ (3) an attack on the plaintiff's competency in his business, trade, or profession;³⁸ or (4) an attack on chastity in a woman.³⁹ Thus, in order to

29. See, e.g., *Simpson v. Oil Transfer Corp.*, 75 F. Supp. 819, 822 (N.D.N.Y. 1948) (telephone conversations); *Aiken v. May*, 73 Ga. App. 502, —, 37 S.E.2d 225, 226 (1946) (slander defined as oral communication); *Foley v. Hoffman*, 188 Md. 273, —, 52 A.2d 476, 481 (1947) (published statement); *Reiman v. Pacific Dev. Soc'y*, 132 Or. 82, —, 284 P. 575, 577 (1930) (slander disposes with the necessity of writing).

30. For an example of the confusion in applying the specialized rules distinguishing libel and slander, see *Douglas v. Janis*, 43 Cal. App. 3d 931, 940, 118 Cal. Rptr. 280, 286 (1974) ("This being a case of slander which is libelous per se . . ."). For a discussion of the various rules that evolved, see PROSSER, *supra* note 13, § 112.

31. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.2, at 511 (1973).

32. RESTATEMENT (SECOND) OF TORTS § 568(1) (1977).

33. *Id.* at § 568(3).

34. The "special damages" in defamation law refers to "actual pecuniary loss." See RESTATEMENT (SECOND) OF TORTS § 575 comment b (1977).

35. SMOLLA, *supra* note 7, § 1.04[5]; see also PROSSER, *supra* note 13, § 112 at 788-93.

36. See *Morris v. Evans*, 22 Ga. App. 11, 95 S.E. 385 (1918); *Walker v. Tucker*, 220 Ky. 363, 295 S.W. 138 (1927); RESTATEMENT (SECOND) OF TORTS § 571 (1977).

37. This exception was originally limited to cases involving venereal diseases. See, e.g., *McDonald v. Nugent*, 122 Iowa 651, 98 N.W. 506 (1904); *Sally v. Brown*, 220 Ky. 576, 295 S.W. 890 (1927). With scientific advances and the ability to cure such diseases which were in the past thought to be permanent, this exception has been extremely limited. Today accusations of insanity, tuberculosis or other communicable diseases are not included within this exception. PROSSER, *supra* note 13, § 112, at 790.

38. See, e.g., *Nolan v. Standard Publishing Co.*, 67 Mont. 212, 216 P. 571 (1923); *Dietrich v. Hauser*, 45 Misc. 2d 805, 257 N.Y.S.2d 716 (1965); RESTATEMENT (SECOND) OF TORTS § 573 (1977).

prove slander, outside of these four categories, one would be required to prove special damages.⁴⁰ Similarly, the rule developed that libel, in which the defamatory meaning was clear from the face of the words, was actionable "per se" without proof of special damages, while libel, requiring proof of extrinsic facts⁴¹ to support the defamatory meaning, did require proof of special damages.⁴² The significance of these rules remains intact in most jurisdictions because "much of the law of defamation remains the creature of state tort law."⁴³ However, the evolution of the first amendment restrictions upon the law of defamation has muted this significance to some degree.⁴⁴

The modern "constitutionalization"⁴⁵ of the law of defamation began in 1964. During that year, the United States Supreme Court rendered its decision in *New York Times Co. v. Sullivan*.⁴⁶ This decision "constitutionalized" a substantial portion of the law of defamation, holding that the first amendment⁴⁷ places limitations on the defamation rules created by the state.⁴⁸ The Court stated that actions by public official plaintiffs must be supported by a showing of "actual malice," a constitutional term of art defined as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."⁴⁹ In 1967, the United States Supreme Court further extended the actual malice requirement to

39. See *Hollman v. Brady*, 233 F.2d 877 (9th Cir. 1956); *Gnapinsky v. Goldyn*, 23 N.J. 243, 128 A.2d 697 (1957).

40. Slanders not falling within the four special categories of "slander per se" are referred to as slanders "per quod." SMOLLA, *supra* note 7, at § 1.04[5].

41. Libels which were not actionable "per se" were considered "per quod." "A libel not defamatory on its face, but which becomes defamatory when its meaning is illuminated by proof of extrinsic facts is actionable per quod." *Eaton*, *supra* note 14, at 1354-55; see, e.g., *Sauerhoff v. Hearst Corp.*, 388 F. Supp. 117 (D. Md. 1974) (The plaintiff's wife left him following the defendant newspaper's publication of an article which reported a legal dispute between the plaintiff and his "girlfriend.").

42. *Eaton*, *supra* note 14, at 1355.

43. See SMOLLA, *supra* note 7, at § 1.01.

44. *Id.* at § 1.04[5].

45. The "constitutionalization" refers to the struggle of the United States Supreme Court to outline the boundaries of constitutionally protected speech through the balancing of interests. The Supreme Court has "alternatively favored first amendment press and speech rights and individual rights to redress reputational harm. The balance currently appears to weigh more favorably on the side of individual reputational interests." Comment, *The "Public Interest or Concern" Test — Have We Resurrected a Standard That Should Have Remained in the Defamation Graveyard?*, 70 MARQ. L. REV. 647, 647-48 (1987) (footnotes omitted).

46. 376 U.S. 254 (1964).

47. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

48. SMOLLA, *supra* note 7, at § 1.01.

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

plaintiffs who were "public figures"⁵⁰ in order to protect free speech. These decisions provided the foundation for the evolution of first amendment constraints on the development of defamation law within the states.

B. *Developments of Defamation Law From 1974*

Most of the framework for the modern law of defamation emanates from the United States Supreme Court decision in *Gertz v. Robert Welch, Inc.*,⁵¹ which established the principal dichotomy of contemporary defamation law; that is, the distinction between public official and public figure plaintiffs on the one hand, and private figure plaintiffs on the other. The Supreme Court in *Gertz* reaffirmed its prior cases by holding that a showing of actual malice was required for public figures and public officials to recover.⁵² However, the Court held that for private figures, states could establish their own standards of liability, "so long as they did not impose liability without fault."⁵³ In effect, the Court required a showing of negligence in all private actions.⁵⁴ Moreover, the Court in *Gertz* held that states could not permit recovery of punitive damages in any case without proof of "actual malice" and that, in all cases in which actual malice was not demonstrated, proof of "actual injury" was required.⁵⁵

In 1985 the United States Supreme Court, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁵⁶ ruled that the *Gertz* rule restricting awards of presumed and punitive damages to cases in which actual malice is shown does not apply to defamatory statements which "do not involve matters of public concern."⁵⁷ "The Court thus created a major revision of *Gertz*, returning at least a portion of the law of defamation . . . back to its common

50. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The term "public figure" was used by the Court to define a party who commanded the "public interest." *Id.* at 154. Additionally, the Court noted, both "public figures" had sufficient media access to countermand defamatory statements. *Id.*

51. 418 U.S. 323 (1974).

52. SMOLLA, *supra* note 7, at § 1.05[3].

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

54. "This holding has been construed to mean that the medium must have published with either knowledge of the falsity of the statement or recklessly or negligently with respect to the truth or falsity of the statement in any case." PROSSER, *supra* note 13, § 113, at 807. For a discussion of the fault issues in defamation law, see *id.* at 802-12.

55. *Gertz*, 418 U.S. at 349-50. It should be noted that the term "actual harm" is a term not limited to "special" or pecuniary loss, but includes general damage to reputation and personal anguish, humiliation and suffering.

56. 472 U.S. 749 (1985) (Brennan, Marshall, Blackmun and Stevens, J.J., dissenting).

57. *Id.* at 763.

law status."⁵⁸ The precise scope of *Greenmoss Builders* remains unclear, and it will take years for its implications to evolve fully.⁵⁹

Although the decision of the Supreme Court in *Greenmoss Builders* was based upon first amendment doctrine, the Court's decision will undoubtedly have some collateral impact on how future lower courts analyze the conditional privilege protection for credit reports.⁶⁰ The Court held, after examining the content, form and context of the defamatory credit report,⁶¹ that such a credit report was "speech solely in the individual interest of the speaker and its specific business audience."⁶² Therefore, the Court concluded the credit report was "not [a matter] of public concern."⁶³ The Court reasoned "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in providing effective remedies for defamation] adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice.'"⁶⁴ Therefore, the Court concluded that there was no credible argument that this type of credit reporting was entitled to special protection under the first amendment.⁶⁵

58. See SMOLLA, *supra* note 7, at § 1.05[4].

59. *Id.* The two principal questions the decision leaves unaddressed are the following: [(1)] . . . whether *all* the *Gertz* rules, including the no liability without fault rule, are completely outside of the First Amendment restrictions when the speech is not of "public concern," or whether the case is limited to the presumed and punitive damage issues; and (2) how courts are to define what types of speech fall within the definition of "matters of public concern."

Id.

60. *Id.* at § 8.08[2][c]. In *Greenmoss Builders*, a construction contractor brought a defamation action against a credit reporting agency which issued a false credit report to that contractor's creditors. The report was false and grossly misrepresented the contractor's assets and liabilities. This false credit report contained information that the contractor had filed for bankruptcy, an error which was found to have resulted from the mistaken attribution of a bankruptcy petition filed by a former employee of the contractor. 472 U.S. at 751-52.

61. *Greenmoss Builders*, 472 U.S. at 761-62. The Court concluded based upon the record that the speech at issue warranted no special protection, especially since the credit report was wholly false and clearly damaging to the contractor's business reputation. *Id.* at 762. Additionally, the Court noted that the credit report was only sent to five subscribers who could not disseminate the information further and consequently the report did not involve any "strong interest in the free flow of commercial information." *Id.* Moreover, the Court emphasized that the publication of the report was solely motivated by the desire for profit and that, as such, the market provides the powerful incentive to credit reporting agencies to circulate only accurate reports. *Id.* at 762-63. Thus, the Court concluded that "any incremental 'chilling' effect of libel suits would be of decreased significance." *Id.* at 763.

62. *Greenmoss Builders*, 472 U.S. at 762.

63. *Id.* at 762-63.

64. *Id.* at 761.

65. *Id.* at 762.

C. *Applicability of Defamation in the Employment Context*

The decision of the Supreme Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁶⁶ indicates a propensity to protect an individual's reputational interests rather than first amendment values,⁶⁷ and signifies an elevation of individual reputational interests. In particular, the decision denotes a general denigration of the social importance of credit reporting information, and it is likely that "credit reports will receive less favorable common law conditional privilege protection as well."⁶⁸ The significance of this potential influence is that, given the similarity of the nature of credit reports and reports on employees,⁶⁹ it is reasonable to surmise that protection afforded to employers will likewise be diminished. Therefore, in light of the Supreme Court's decision, lower courts may favor a weaker conditional privilege⁷⁰ that will allow a defamed person recovery on a showing of mere negligence. Alternatively, lower courts may even eliminate the use of this privilege because such reports are not a matter of public concern. Thus, the potential influence of the decision in *Greenmoss Builders* creates uncertainty in the area of reports on employees as it is unknown what protections will be afforded employers.⁷¹

The uncertainty in the law created by the *Greenmoss Builders* decision has been further intensified due to the fact that in the last decade there has been a renewed fascination with defamation.⁷² In the past, Americans were reluctant to pursue defamation suits,⁷³ however, "the [legal] landscape in

66. 472 U.S. 749 (1985).

67. See *supra* note 45 and accompanying text.

68. SMOLLA, *supra* note 7, at § 8.08[2][c][ii].

69. The similarity between credit reports and reports on employees stems from the fact that both are statements made in furtherance of the interests of others. See SMOLLA, *supra* note 7, § 8.08[2][a]. For an interesting comparison of both employer references and credit reports, see Comment, *supra* note 12, at 143-53.

70. See *infra* notes 216-28 and accompanying text.

71. See Middleton, *supra* note 4, at 31, col. 2 ("With fewer or no constitutional limitations in private defamation suits . . . states will be free to re-examine their libel laws and to impose any standards they wish — even returning to a strict liability standard of fault.").

72. SMOLLA, *supra* note 7, at § 1.02[3].

73. Prior to the last decade Americans have been reluctant to pursue defamation claims: Libel litigation was perceived to be un-American. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 17 (1983). In 1942, David Riesman supported the assumption that protection of reputation was relatively unimportant in the American capitalist culture:

[T]he American attitude towards reputation is unique. In Europe, where pre-capitalist concepts of honor, family and privacy survive, reputation is a weighty matter not only for the remnants of the nobility who still fight duels to protect it, but for all the middle groups who flood the courts with petty slander litigations as we flood ours with automobile and other negligence actions. But where tradition is capitalistic rather than feudalistic, reputa-

recent years has changed dramatically."⁷⁴ Despite the imposition of new first amendment barriers to recovery, more suits are being brought and juries have, on the whole, proved to be sympathetic to plaintiffs both in terms of their propensity to decide in their favor and in their propensity to award sizable damages.⁷⁵ These changes "indicate that the law of defamation is and probably will remain an area of substantial litigation activity."⁷⁶

The modern defamation explosion is clearly evident in the workplace; defamation suits against employers by former and current employees are increasing at a significant rate.⁷⁷ Traditionally, such suits involve employees who have been discharged or employees who have left the organization under difficult circumstances.⁷⁸ However, in light of the "workplace revolution,"⁷⁹ and in light of the increased interest in defamation claims, "employers increasingly are facing liability for defamation arising in a variety of workplace contexts."⁸⁰

D. Areas Giving Rise to Defamation Claims

Employers' liability for defamation arises from a variety of contexts involving employer communications. The principal employment actions giving rise to potential defamatory statements are terminations, references, dissemination of confidential information, evaluations, and internal discipline and criticism.⁸¹ It is critical to note that these claims not only arise out of the discharge of an employee, but they also arise from "standard" procedures necessary to maintain a safe and efficient workplace.⁸²

tion is only an asset, "good will," not an attribute to be sought after for its intrinsic value. And in the United States these business attitudes have colored social relations. The law of libel is consequently unimportant.

Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 730 (1942).

74. SMOLLA, *supra* note 7, at § 1.02[3].

75. *Id.* See generally Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455.

76. SMOLLA, *supra* note 7, at § 1.02[3].

77. See *supra* notes 1-8 and accompanying text.

78. See Martin & Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE REL. L.J. 43 (1987).

79. See *supra* note 1.

80. See *Defamation Emerging*, *supra* note 2, at A-3.

81. See *Claim Dangers Assessed*, *supra* note 7, at A-3.

82. Moon, *supra* note 3, at 119 ("[E]mployers are beginning to wake up to the fact that many of their 'standard' employment practices could now cost them a large punitive damage award.").

1. Employee References

A traditional area of concern for employers is providing employee references. Over the last two centuries the number of employer references has increased substantially; they are now written by the millions.⁸³ Surveys indicate that fifty to ninety percent of employers demand and check previous records of job applicants.⁸⁴ Despite claims that employer references provide little useful information, an employer typically must rely on the applicant's previous employers and other references to aid in the assessment of the prospective employee's suitability for employment.⁸⁵ In addition, the failure to consider employer references before hiring a new employee may lead to liability under the negligent-hiring doctrine. In assessing such claims, courts frequently focus on the pre-employment inquiry in determining negligence.⁸⁶

Due to the widespread use of employer references, many claims arise from former employees suing former employers for an unfavorable reference. In *Frank B. Hall & Co. v. Buck*,⁸⁷ a former employee was found to be entitled to nearly two million dollars in damages for defamation of character. The claim arose from statements made by executives of the former employer to a private investigator posing as a prospective employer.⁸⁸ Among the statements made by the executives were claims that Buck was untrustworthy, disruptive, paranoid and was guilty of padding his expense account.⁸⁹ In addition, statements were made that Buck had not "reach[ed] his production goals."⁹⁰ These accusations were found to be false and derogatory statements.⁹¹ Consequently, Buck was entitled to compensation

83. Comment, *supra* note 12, at 146.

84. *Id.*; see also Stevens, *The Letter of Recommendation as a Privileged Communication*, 16 AM. BUS. L.J. 1, 1 (1978). But see Middleton, *supra* note 4, at 30, col. 2 ("A recent survey by a Chicago-based outplacement consulting firm found that prospective employers did not check the references of nearly seventy-five percent of their job candidates . . . because the former employers are not expected to cooperate . . ."). For discussions of the use of employer references, see M. MANDELL, *THE SELECTION PROCESS: CHOOSING THE RIGHT MAN FOR THE JOB* 256 (1964) (75% of companies studied check references of prospective employees); Nash & Carroll, *A Hard Look at the Reference Check*, 13 BUS. HORIZONS 43 (1970).

85. Stevens, *supra* note 84, at 1.

86. See *Claim Dangers Assessed*, *supra* note 7, at A-3.

87. 678 S.W.2d 612 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985).

88. *Id.* at 617. The statements were made to an investigator who posed as a prospective employer; the investigator was hired to discover Hall's true reasons for terminating Buck's employment. Despite the fact Buck hired the investigator, the court did not find that he had consented to these statements. *Id.*

89. *Id.*

90. *Id.* at 618.

91. *Id.* at 616.

for the derogatory statements made about him reflecting on his integrity and his ability to produce business.⁹²

In light of the "chilling effect" on employer communications in recent years, new concerns regarding employer references have emerged. As many former employers are commonly advised to provide prospective employers with only an employee's name and the dates of his or her service, new claims have been filed alleging that such references are defamatory because such references appear tantamount to giving a bad reference. Although such claims have not proved to be successful,⁹³ in light of the increasing liability of employers, the courts may adopt such a view.

In *Buffolino v. Long Island Savings Bank*,⁹⁴ a former employee claimed that a letter of reference sent by a former employer to a prospective employer was defamatory.⁹⁵ The reference merely provided dates of the plaintiff's employment and stated that it was company policy to provide no other information to potential employers.⁹⁶ In addition, the letter specifically stated that the "failure to comment on an individual's character does not reflect on the individual."⁹⁷ The court found that this letter was not of a defamatory nature.⁹⁸ However, it must be noted that a reference which merely provides the "name, rank and serial number" [of an employee may lead to liability] particularly in view of an employer's potential liability for failure to disclose critical information that it is certain is accurate."⁹⁹

2. Internal Communications

Internal communications are a growing area of concern for employers. Within this context, defamation liability can arise from a number of em-

92. *Id.* at 630.

93. *Austin v. Torrington Co.*, 810 F.2d 416, 424 (4th Cir. 1987) (former employer's statement that he was not able to recommend plaintiff for employment was not defamatory), *cert. denied*, 108 S. Ct. 489 (1987); *McKinney v. Armco Steel Corp.*, 270 F. Supp. 360, 363 (W.D. Pa. 1967) (former employer's designation of reason for discharge was false, but employee not entitled to recover because reasons were not communicated to a prospective employer). *But see Herberholt v. DePaul Comm. Health Center*, 625 S.W.2d 617, 622 (Mo. 1981) (Missouri allows recovery when plaintiff loses a potential job by absence or adequacy of a service letter under state service letter statute.).

94. 126 A.D.2d 508, 510 N.Y.S.2d 628 (N.Y. App. Div. 1987).

95. *Id.* at ___, 510 N.Y.S.2d at 631.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Defamation Emerging*, *supra* note 2, at A-4. The potential liability for an employer's failure to disclose critical information refers to the "negligent reference theory" that is expected to emerge. *See infra* notes 280-83 and accompanying text. This negligent reference theory would hold a former employer liable for failing to disclose to a prospective employer the known unfitness, incompetence or dangerousness of a former employee.

ployer actions: in-house communications, dissemination of information to clients or customers, and statements made at a discharge meeting. In *Frankson v. Design Space International*,¹⁰⁰ a former employee brought an action against his former employer for the preparation of a termination letter that was distributed "in-house." The employer, however, was found not liable as there was no evidence of malice.¹⁰¹ The court concluded that "neither the language used, 'failure to increase sales,' nor the mode and extent of publication, communication to those involved in the decision making process and deposit of a copy in Frankson's personnel file, allowed the conclusion that the statement was malicious."¹⁰² In addition to formal "in-house" communications, statements made among corporate executives have given rise to defamation claims. In *Robison v. Lescrenier*,¹⁰³ a corporate president made a statement to the corporation's personnel and management consultant. The remark claimed the vice president of sales, Robison, was fired from his last job and "has an ability to run all his companies out of money."¹⁰⁴ The Court of Appeals for the Seventh Circuit found that this statement was made with reckless disregard of the former employee's rights.¹⁰⁵ Thus, the employer was liable for a \$10,000 award of punitive damages.¹⁰⁶

Moreover, an employer can be liable for communications made to its clients regarding a discharge of a former employee. In *Griffith v. Electrolux Corp.*,¹⁰⁷ a former employee maintained a claim for libel and slander based upon false statements published by the employer. The employee alleged that the employer published false statements that claimed the former employee had been discharged because he was "a thief, was selling stolen property and had cheated customers."¹⁰⁸ Additionally, an employer may also become liable for communicating the reasons for a former employee's discharge to other employees. These defamation claims typically arise out of meetings in which employers express reasons for discharging a former employee. In *Gonzalez v. Avon Products, Inc.*,¹⁰⁹ eight employees who were discharged for theft claimed that their former employer defamed them by communicating to co-employees the reasons for their discharge. The court

100. 394 N.W.2d 140 (Minn. 1986).

101. *Id.* at 144.

102. *Id.*

103. 721 F.2d 1101 (7th Cir. 1983).

104. *Id.* at 1111.

105. *Id.*

106. *Id.* at 1111-13.

107. 454 F. Supp. 29 (E.D. Va. 1978).

108. *Id.* at 32.

109. 648 F. Supp. 1404 (Del. 1986), *aff'd*, 822 F.2d 53 (3d Cir. 1987).

noted that the speech was delivered "in order to quell employee fears about the . . . plant's future . . . [and] the speech only concerned the plaintiffs as far as the plaintiffs' termination related to the job security of the remaining . . . employees."¹¹⁰ While it is established that co-employees have a legitimate interest in the reasons why a fellow employee was discharged,¹¹¹ it is critical to note that the employer cannot excessively publish this information.¹¹²

3. Substance Abuse Testing

Substance abuse testing is emerging as a new area of concern for employers. Due to the costs and dangers associated with drug and alcohol abuse in the work force, employers need to test employees for such abuse.¹¹³ An employer who tests employees for drug and alcohol use may face tort actions for defamation by employees who resist testing or who face discipline for positive test results.¹¹⁴ Because of the particularly intrusive nature of drug testing and an employer's interest in assuring a safe and productive workplace, an employer must implement drug testing programs which yield

110. *Id.* at 1408.

111. *See, e.g.*, *Knight v. Baker*, 173 Ind. App. 314, 317, 363 N.E.2d 1048, 1051 (1977) (all employees have common interest in operation and atmosphere of work place); *Hall v. Rice*, 117 Neb. 813, 814, 223 N.W. 4, 5 (1929) (communication to all clerks in store informing them another clerk was charged for embezzlement was privileged); *Kroger Co. v. Young*, 210 Va. 564, 172 S.E.2d 720, 723 (1970) (employee had interest in discharge of co-employee and handling of company funds).

112. *See, e.g.*, *Zinda v. Louisiana-Pacific Corp.*, No. 86-0737 (Wis. Sup. Ct. May 31, 1989) (Excessive publication found to be proper factual question for injury where an employer publicized defamatory reasons for discharge in company newspaper that its employees routinely removed from the premises without employer indicating that the information was to be kept confidential.). The excessive publication of allegedly defamatory information beyond persons who are not reasonably believed necessary to obtain such information may result in a loss of a conditional privilege. This conditional privilege allows employers to publish defamatory material if the publication of that material furthers a legitimate business interest. For a discussion of the scope and abuses of the conditional privileges, see *infra* notes 216-28 and accompanying text. Thus, excessive publication may result in liability if the employer can provide no other defense for publishing defamatory material.

113. *See NYU Conference Speakers Discuss Tension Between Privacy Rights and Drug Testing*, [Current Developments] Daily Lab. Rep. (BNA) No. 112, at A-13 (June 12, 1987) [hereinafter *Privacy Rights and Drug Testing*] ("[C]osts of drug abuse for employers, while difficult to quantify, are substantial because workers with drug problems are more likely to cause industrial accidents, are absent more often than other workers, and have higher medical costs than other employees [It is] estimated that employers lose \$25 billion dollars a year because of drug abuse."). *See generally* Comment, *At Work While "Under the Influence": The Employer's Response to a Hazardous Condition*, 70 MARQ. L. REV. 88 (1986).

114. *Conference Panelists Say Testing Programs Should Be Crafted to Protect Employee Privacy*, Daily Lab. Rep. (BNA) No. 205, at A-9 to -10 (Oct. 23, 1986) [hereinafter *Testing Programs*].

reliability and provide for a "chain of custody" in handling test results.¹¹⁵ Consequently, the failure to provide confidentiality for test results could potentially result in a defamation claim.¹¹⁶

In *Houston Belt & Terminal Railway v. Wherry*,¹¹⁷ the employer, after the employee submitted to an initial drug test, filed an accident report indicating that methadone was in the employee's system. This report was sent to seven company officials.¹¹⁸ The report contained the following: "Laboratory results of the urine specimen was [sic] positive for methadone, which is a synthetic drug commonly used in the withdrawal treatment of heroin addicts."¹¹⁹ The court held that such statements were libelous, because they implied that the former employee was using methadone and was a heroin addict.¹²⁰

4. AIDS Testing

A more recent concern involves AIDS testing.¹²¹ Testing employees for AIDS presents a greater potential for invasion of privacy than substance abuse testing because the employer's interest is diminished. This is so because the AIDS virus does not normally impair job performance, and AIDS is not spread through workplace contacts.¹²² In AIDS testing programs, as in substance abuse testing, confidentiality must be ensured. Employers failing to provide confidentiality are most vulnerable to a defamation claim. In 1986, for example, an Ohio man who was named in an anonymous note as having AIDS, sued his former employer for defamation of character after the contents of the note were disclosed.¹²³

5. Inaccurate Personnel Files

Although test results are kept confidential, the employer may still be liable for a defamation claim if these results are made part of an employee's personnel file. A personnel file contains the information that an employer uses to make employment-related decisions including hiring, promotions,

115. *Privacy Rights and Drug Testing*, *supra* note 113, at A-12.

116. *See Drug Testing Here to Stay*, Daily Lab. Rep. (BNA) No. 107, at A-13 (June 5, 1987).

117. 548 S.W.2d 743 (Tex. Ct. App. 1976), *appeal dismissed*, 434 U.S. 962 (1977).

118. *Id.* at 746.

119. *Id.* at 747.

120. *Id.* at 748.

121. "AIDS" stands for acquired immune deficiency syndrome. This disease is caused by a virus most recently referred to as HIV, or human immunodeficiency virus. *See* U.S. DEP'T. OF HEALTH & HUMAN SERVICES, SURGEON GENERAL'S REP. ON ACQUIRED IMMUNE DEFICIENCY SYNDROME, (1987).

122. *Testing Programs*, *supra* note 114, at A-10.

123. *AIDS*, Individual Employee Rts. Manual (BNA) 509:206 (Jan. 1, 1987).

transfers, discipline and termination.¹²⁴ A defamation claim may be made by an employee who, upon examining his personnel file, finds the notation "drug user" when he merely tested positive for drugs.¹²⁵ Such a notation "comes too close to calling the employee a drug addict . . . [and] . . . [i]t would be safer to enter in the file only that the employee had tested positive for a controlled substance, with no comment as to whether the employee is a drug user."¹²⁶

In recent years, the maintenance of an accurate personnel file has become particularly important because of the increasing information that employers have concerning their employees. Also, with the great advantages of sophisticated, electronic technology, employers are able to gather, control and communicate vast amounts of information about their employees.¹²⁷ Under common law, an employee did not have a right of access to his or her personnel files. However, as more states require that employees be given the right of access to their personnel files, the potential for an employer's liability likewise increases. As a result of this change in common law, it is anticipated that employees will in fact examine their files and thus detect potential defamation claims. Consequently, employers may be subject to a defamation claim if such information is disclosed.¹²⁸

6. Performance Evaluations and Conduct Investigations

A growing area of concern to employers regarding defamation claims is the evaluation of employees. Such evaluations frequently involve investigations of employees suspected of theft or dishonesty, as well as routine performance evaluations. It must be noted that such evaluations are essential to maintaining a safe and efficient workplace, and, if neglected, may give rise to tort liability under the theory of negligent hiring of an employee.¹²⁹

The investigation and awareness of employees' conduct are essential to the maintenance of a safe and efficient work place. In *Tellez v. Pacific Gas & Electric Co.*,¹³⁰ a station manager observed what he thought was an em-

124. *BNA Conference Speaker Stresses Need for Accurate Personnel Files*, Daily Lab. Rep. (BNA) No. 216, at A-1 (Nov. 10, 1987).

125. *Id.*

126. *Id.* at A-1 to -2.

127. See Castagnera-Cain, *Defamation and Invasion of Privacy Actions in Typical Employee Relations Situations*, 13 LINCOLN L. REV. 1, 1-5 (1982).

128. *Workplace Privacy*, *supra* note 1, at 83; *cf. Emergence of State Employment Rights Issues*, 127 Lab. Rel. Rep. (BNA) 212, 212 (Feb. 15, 1988) ("Arizona, Arkansas, Connecticut, Florida, Louisiana, Massachusetts, Rhode Island and Texas have made it unlawful to disclose any information contained in employee personnel files.").

129. See generally Gregory, *supra* note 10.

130. 817 F.2d 536 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 251 (1987).

ployee buying cocaine on the job.¹³¹ The security department was informed of the observation and, after the employee denied the allegation, the station manager sent a letter to eleven other managers containing a conclusion that the employee had bought cocaine on the job.¹³² The court held that the employee had maintained a cause of action for defamation based upon these facts.¹³³ In a similar case, *Chapman v. Atlantic Zayre, Inc.*,¹³⁴ an employee was accused of theft. After the employer was notified that the employee was stealing money from a snack bar, the employer began to investigate the theft charges. While the investigation gave rise to a defamation claim, the employer was not liable for defamatory statements made to police officers because the employee consented to the presence of the officers.¹³⁵

Routine performance evaluations have also formed the basis of defamation claims. In *Turner v. International Business Machines Corp.*,¹³⁶ an employee sued his employer charging that his performance evaluation was defamatory. This report contained the deficiencies of the employee's performance. The court held that the communication of this report to other supervisors, managers, secretaries and attorneys was invited by the employee. The court noted: "So long as an unfavorable report by a supervisor is communicated only to those persons who have a duty to review employees, or to make and investigate personnel decisions, there is no publication [of defamatory material]."¹³⁷

II. ANALYSIS OF A CLAIM: EXAMINING THE ESSENTIAL ELEMENTS

A. *The Defamation Claim*

Defamation¹³⁸ is the unprivileged publication of a false¹³⁹ statement intending¹⁴⁰ to harm¹⁴¹ the reputation of another person.¹⁴² In the popular

131. *Id.* at 536-37.

132. *Id.* at 537.

133. *Id.* at 539.

134. 2 I.E.R. Cases (BNA) 1255 (Ga. Super. Ct. 1987).

135. *Id.* at 1259.

136. 115 L.R.R.M. (BNA) 4887 (S.D. Ind. 1981), *aff'd*, 681 F.2d 820 (7th Cir. 1982).

137. *Id.* at 4889.

138. At common law defamation was classified into libel and slander. Libel consisted of defamatory matter published by printed or written words. Slander consisted of defamatory matter published by spoken words or transitory gestures. See RESTATEMENT (SECOND) OF TORTS § 568 (1977); see also *supra* notes 21-41 and accompanying text. See generally D. DOBBS, *supra* note 31.

139. A statement cannot be defamatory if it is true. See, e.g., *Wright v. Southern Mono Hosp. Dist.*, 631 F. Supp. 1294 (E.D. Cal. 1986) (statements alleged were not defamatory because they were true).

140. The defamatory character of the statement depends upon its general tendency to cause harm to another's reputation or deter third parties from associating with him/her. It should be

sense, defamation is that which tends to injure one's reputation.¹⁴³ However, the tort of defamation has specific applicability within the employment context.¹⁴⁴ Defamation within this context arises from the communication of a false statement which imputes that a person lacks the ability to perform employment duties in a respective business, trade or profession.¹⁴⁵ A claim within this context is actionable without the proof of actual damage, provided that the defamatory statement is incompatible with the proper conduct of that business, trade or profession.¹⁴⁶

B. Examining the Elements

To create liability for defamation, the following elements must be proven: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.¹⁴⁷ Essentially, the elements for a claim include a false and defamatory statement that is communicated by speech, conduct or in writing to a third person.¹⁴⁸ It must be noted that a complaint setting

emphasized that actual harm does not have to result for a statement to be considered defamatory. See RESTATEMENT (SECOND) OF TORTS § 559 comment d (1977).

141. The nature of the harm should be clarified. Because a communication is defamatory does not mean harm will automatically result. Such a communication may not cause harm because the other's reputation is so hopelessly bad or so unassailable that no words can affect that reputation harmfully or because of lack of credibility of the defamer. *Id.*

142. *Personal Rights: Defamation*, Individual Employee Rts. Manual (BNA) 515:100 (Jan. 1, 1987).

143. Defamatory statements which are said to injure reputation are those that tend to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against the plaintiff. See PROSSER, *supra* note 13, § 111, at 773.

144. *Id.*

145. See *Erickson v. Transatlantic Reinsurance Co.*, 119 L.R.R.M. (BNA) 3621, 3623 (N.D. Ill. 1984); *Cartwright v. Garrison*, 113 Ill. App. 3d 536, 542, 447 N.E.2d 446, 449 (1983); *Makis v. Area Publications Corp.*, 77 Ill. App. 3d 452, 456, 395 N.E.2d 1185, 1188 (1979); see also *Castagnera-Cain*, *supra* note 127, at 6.

146. PROSSER, *supra* note 13, § 112, at 791. The statements must refer to the nature of the ability of the plaintiff to perform employment duties as opposed to a more general reflection upon the plaintiff's character or qualities. Compare *Kraushaar v. LaVin*, 181 Misc. 508, 42 N.Y.S.2d 857 (N.Y. Sup. Ct. 1943) (statement that an attorney is "unethical") with *Weidberg v. La Guardia*, 170 Misc. 374, 10 N.Y.S.2d 445 (N.Y. Sup. Ct. 1939) (statement that attorney is "a bum in a gin mill" was not actionable since it did not attack the ability of the attorney to perform his duties satisfactorily).

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

148. See, e.g., *Stoll v. Adriansen*, 122 Wis. 2d 503, 517, 362 N.W.2d 182, 190 (Ct. App. 1984), *appeal denied*, 122 Wis. 2d 782, 367 N.W.2d 222 (1985).

forth these elements must do so with specificity,¹⁴⁹ the complaint must specifically state the defamatory words,¹⁵⁰ the connection of these words to the plaintiff, and the scope of publication¹⁵¹ of these words.¹⁵²

1. A False Statement

The requirement that a claim for defamation is based upon a false statement involves two inquiries. The first is whether the statement is true and the second is whether the communication is a statement of fact, not merely an expression of opinion. In most jurisdictions it is presumed that all defamation is false, and the defendant has the burden of pleading and proving

149. See, e.g., *Johnson v. Int'l Minerals & Chem. Corp.*, 122 L.R.R.M. (BNA) 2652 (S.D. 1986) (mere conclusory statements that plaintiffs have been damaged in their reputations and hindered from obtaining and holding permanent employment is not sufficient to support a claim for defamation); cf. *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160, 1167 (1985) (O'Connor, J., concurring in part, dissenting in part) (complaint that sets out detailed statements of facts as *the facts* followed by numerous claims of injury resulting from, *inter alia*, various torts referring only to "aforementioned conduct" will not support a claim for relief; facts and cause of action must be specifically stated to give rise to a claim for which relief may be granted).

150. See *McCarthy v. Cycare Sys., Inc.*, 2 I.E.R. Cases (BNA) 680 (N.D. Ill. 1986) (claim for defamation failed on account of a failure to allege the utterance of any defamatory statements or the publication of such statements).

151. See *Perry v. Hartz Mountain Corp.*, 537 F. Supp. 1387 (S.D. Ind. 1982) (allegation that the employer defamed the employee by stating that he was "fired for stealing" falls short of stating a claim where there is no indication of where, when or to whom the statement was made); see also *Crocker v. Chamber of Commerce*, 115 L.R.R.M. (BNA) 4067 (D.C. Cir. 1983) (employee fails to state publication of defamatory statements to a third party); *Lekich v. International Business Machs. Corp.*, 469 F. Supp. 485 (E.D. Pa. 1979) (claim for defamation failed because plaintiff made no allegation that allegedly defamatory remarks were published); *Williams v. Delta Haven, Inc.*, 416 So. 2d 637 (La. Ct. App. 1982) (employee fails to state that any defamatory remarks were published).

152. *Ledl v. Quik Pik Food Stores, Inc.*, 133 Mich. App. 583, 349 N.W.2d 529 (1984) (citing *Pursell v. Wolverine-Petronix, Inc.*, 44 Mich. App. 416, 421, 205 N.W.2d 504 (1973) (quoting 11 CALLAGHAN'S MICHIGAN PLEADING & PRACTICE § 78.09, at 256-57 (2d ed.))). In this case, the plaintiff's complaint alleged the following:

That on various occasions subsequent to the wrongful termination of plaintiff's employment, defendant, by and through its agents and employees, communicated to various persons including, but not limited to, the Michigan Employment Security Commission and prospective employers that the reason for plaintiff's discharge was due to inventory control shortages.

Ledl, 133 Mich. App. at 587, 349 N.W.2d at 532. The court dismissed the complaint for summary judgment because defendant did not specifically set forth (1) the defamatory words, (2) the connection of the defamatory words with plaintiff, and (3) the publication of the alleged defamatory words. *Id.*

its truth.¹⁵³ Therefore, truth is an absolute defense to a defamation action.¹⁵⁴

At common law an expression of opinion could be defamatory, although certain opinions on matters of public concern could qualify as forms of privileged criticism protected by the first amendment.¹⁵⁵ According to the Restatement (Second) of Torts, there are two types of opinion — a pure type and a mixed type.¹⁵⁶ The pure type occurs when the maker of the comment either states the facts upon which that opinion is based or, if unexpressed, both parties to the communication know the facts or assume their existence prior to the making of such a statement. This pure type of opinion may not be the basis of a defamation action because it offends the first amendment guarantee of freedom of speech.¹⁵⁷ In contrast, the mixed type of opinion is based upon facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties prior to the communication. In the mixed type of opinion, the expression of the opinion gives rise to an inference that there are undisclosed facts that justify the forming of the opinion expressed by the speaker.¹⁵⁸ Thus, because this inference is drawn from undisclosed facts, this mixed type of expression of opinion may be the basis for a defamation.

The determination of whether a statement is a pure or mixed type of opinion is considered similar to the determination of whether a statement is a fact or opinion.¹⁵⁹ Thus, courts have applied a four-factor analysis to determine whether statements are constitutionally protected expressions of opinion or actionable statements of fact.¹⁶⁰ This four-factor analysis examines the statement in light of the totality of the circumstances in which that statement is made.¹⁶¹ The four factors which courts consider are: (1) the common usage of the statement; (2) whether that statement can be verified;

153. PROSSER, *supra* note 13, § 116, at 841. Since "truth" is customarily a defense to a defamation claim, this Comment will include its discussion of the element of truth as a defense in Part III. See *infra* notes 208-15 and accompanying text.

154. See, e.g., Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 573 (Minn. 1987) (citing Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980)); Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888-89 (Minn. 1986); Williams v. Journal Co., 211 Wis. 362, 370, 247 N.W. 435, 439 (1933).

155. RESTATEMENT (SECOND) OF TORTS § 566 comment a (1977).

156. *Id.* at comment b.

157. See Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

158. RESTATEMENT (SECOND) OF TORTS § 566, at 172 (1977).

159. Ollman v. Evans, 750 F.2d 970, 985 n.29 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

160. *Id.* at 979.

161. *Id.*

(3) the context of the statement; and (4) the broader context of events surrounding the making of the statement.¹⁶²

In the employment context, since an employer must assess an employee's performance and, if necessary, discipline or terminate the employee on the basis of that assessment, the distinction between a statement of fact and an expression of opinion is critical. The need for employers to conduct frank and honest appraisals was evident in *MacFarlane v. Turner Broadcasting Systems, Inc.*¹⁶³ In *MacFarlane*, the employee, who was denied a promotion, claimed that a letter sent to her indicating that her performance had been disappointing was defamatory.¹⁶⁴ The court examined the totality of the circumstances to determine whether the letter contained statements of fact or opinion. In its analysis, the court suggested that, since the employer has the ability through access to work records, statements such as performance evaluations are based on undisclosed facts.¹⁶⁵ This case implies that it will be difficult for employers to prove employee evaluations are opinions.

Similarly, in *Falls v. Sporting News Publishing Co.*,¹⁶⁶ the Court of Appeals for the Sixth Circuit found that the statement of a president of a sports magazine claiming that a columnist who had been discharged was "on the downswing," could be regarded as defamatory.¹⁶⁷ The court drew this conclusion since such statements might imply that the president knew undisclosed facts that would justify such an opinion. Such undisclosed facts, the court reasoned, could include that the writing and reasoning ability of the columnist had deteriorated or that the quality of his work had declined to the point that others had to rewrite or cover for him.¹⁶⁸

In contrast, the court in *Schnelting v. Coors Distributing Co.*,¹⁶⁹ found that a statement made by a general manager in explaining the reason for an employee's discharge was an opinion.¹⁷⁰ The statement was made that the employee "was fired for stealing, [the employee] actually was giving a case of beer away; and that's stealing company property."¹⁷¹ As an opinion, the court stated the statement was absolutely privileged under the first amend-

162. *Id.* at 979-85; see also *MacFarlane v. Turner Broadcasting Sys., Inc.*, 120 L.R.R.M. (BNA) 3203, 3206 (D.C. Cir. 1985).

163. *MacFarlane*, 120 L.R.R.M. (BNA) 3203.

164. *Id.* at 3204.

165. *Id.* at 3206.

166. 834 F.2d 611 (6th Cir. 1987).

167. *Id.* at 616.

168. *Id.*

169. 729 S.W.2d 212 (Mo. Ct. App. 1987).

170. *Id.* at 217.

171. *Id.* at 215.

ment of the Constitution.¹⁷² The court held that the statement was an opinion because the employer, in communicating the reasons for the employee's discharge, allowed the listeners to draw their own conclusions about whether those acts amounted to stealing.¹⁷³ Also, the court noted that the statement was made in the arena of labor relations and, because the employer was apparently having problems with its inventory, such an expression stressing the importance of complying with company policy would be privileged.¹⁷⁴ Thus, it appears that an employer's statements in order to be protected under the first amendment must expressly state reasons for such an evaluation of an employee's conduct.

2. Publication

Publication is an essential element of a defamation claim¹⁷⁵ and is defined as the communication of the defamatory statement to any third party.¹⁷⁶ To establish publication, it must be shown that the statement was understood in its defamatory sense,¹⁷⁷ and that such publication was not made with consent.¹⁷⁸ In general, a defamatory writing is not published if it

172. *Id.* at 217.

173. *Id.*

174. *Id.*

175. *United States Steel Corp. v. Darby*, 516 F.2d 961, 963 (5th Cir. 1975) (citing *Burney v. Southern Ry.*, 276 Ala. 637, 165 So. 2d 726 (1964)); *Lekich v. International Business Machs. Corp.*, 469 F. Supp. 485, 487 (E.D. Pa. 1979); *Weir v. Brotherhood of R.R. Trainmen*, 221 Ala. 494, 496, 129 So. 267, 270 (1930); *see also supra* note 14. *See generally* PROSSER, *supra* note 13, § 113.

It is important to note that the term "publication" does not mean the statement must be printed or written; it may be oral, or conveyed by means of gestures, or the exhibition of a picture, statute or sign. PROSSER, *supra* note 13, § 113, at 797.

176. PROSSER, *supra* note 13, § 113, at 798.

177. *Id. E.g.*, *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984) (the fact that people outside the faculty knew the contents of allegedly defamatory report does not establish plaintiff was defamed).

178. *See, e.g.*, *Chapman v. Atlantic Zayre, Inc.*, 2 I.E.R. Cases (BNA) 1255, 1259 (Ga. Super. Ct. 1987) (employee accused of theft who requested police to be present during interrogation by employer held not to have been defamed by employer's publication of accusation to police, where she invited such publication to police); *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561, 298 N.W.2d 915 (1980) (discharged corporate officer may not maintain claim for slander against superior for remarks made at a meeting called by plaintiff in order to discuss superior's dissatisfaction with her performance).

is read by no one but the defamed person;¹⁷⁹ however, it is published as soon as it is read by someone else.¹⁸⁰

This general rule has been the subject of controversy when applied by the courts to intra-corporate communications.¹⁸¹ This controversy is largely due to a tendency to confuse the question of publication with that of privilege.¹⁸² A majority of the courts hold that circulations of libel within a corporation can amount to actionable publication, despite the fact that communications were between employees or officers of the same corporation.¹⁸³ However, some courts hold that publication cannot occur between officers, agents and employees of a corporation.¹⁸⁴ The majority position, consonant with the positions taken by the Restatement (Second) of Torts¹⁸⁵ and Professor Prosser,¹⁸⁶ relies upon the distinction between publication and privilege.¹⁸⁷ Publication is any communication to a third party, while a privilege provides protection for the legitimate interest of promoting free communications involving business-related matters. The rationale for the minority view is that these officers are engaging in the same business transaction; therefore, these officers are participating in the publication, and as such, should not be considered third parties.¹⁸⁸

179. See, e.g., *Madsen v. Erwin*, 395 Mass. 715, —, 481 N.E.2d 1160, 1171 (1985) (O'Connor, J., concurring in part, dissenting in part) (statements made privately to plaintiff not actionable); *Crocker v. Chamber of Commerce*, 115 L.R.R.M. (BNA) 4067 (D.C. Cir. 1983) (employee fails to state claim for slander where employer did not communicate reasons for employee's discharge to anyone other than employee).

180. *Pirre v. Printing Devs., Inc.*, 468 F. Supp. 1028, 1041 (S.D. N.Y. 1979) (quoting *Ostrowe v. Lee*, 256 N.Y. 36, 38, 175 N.E. 505, 505 (1931)), *aff'd*, 614 F.2d 1290 (2d Cir. 1979).

181. PROSSER, *supra* note 13, § 113, at 798-99.

182. *Id.*

183. E.g., *Pirre*, 468 F. Supp. at 1041; see also *Luttrell v. United Tel. Sys., Inc.*, 236 Kan. 710, 711, 695 P.2d 1279, 1279 (1985) (inter-office communication among supervisory personnel was publication); *Rickbeil v. Grafton Deaconess Hosp.*, 74 N.D. 525, 542, 23 N.W.2d 247, 257 (1946) (dictation to stenographer was publication).

184. See, e.g., *Turner v. International Business Machs. Corp.*, 115 L.R.R.M. (BNA) 4887, 4889 (S.D. Ind. 1981); see also *Ellis v. Jewish Hosp. of St. Louis*, 581 S.W.2d 850, 851 (Mo. Ct. App. 1979) (no publication found when communication made only to supervisory personnel within corporation); *Prins v. Holland-N. Am. Mortgage Co.*, 107 Wash. 206, 208, 181 P. 680, 680-81 (1919) (corporation communicating within itself does not publish a libel). See generally Comment, *Intra-Corporate Communications: Sufficient Publication for Defamation or Mere Corporate Blabbing?*, 7 COMM./ENT. L.J. 647 (1985).

185. RESTATEMENT (SECOND) OF TORTS § 577 comment i (1977).

186. PROSSER, *supra* note 13, § 113, at 799 n.17.

187. See *infra* notes 216-28 and accompanying text.

188. A strong argument against this position is presented in *Pirre*, 468 F. Supp. at 1041, and is as follows:

While corporate officers may be . . . the embodiment of the corporation, they remain individuals with distinct personalities and opinions, which opinions may be affected just as surely as those of other employees by the spread of injurious falsehoods. It is this evil that

While defamation usually requires written or verbal publication to a third party,¹⁸⁹ courts have become more receptive to creative approaches made by plaintiffs to fulfill the requirement of publication. The satisfaction of the publication requirement in the employment context has, in recent years, extended to cover silence, conduct and even inaction. The result of this extension has been the expansion of the definition of publication and the creation of a disturbing trend for employers.

3. Defamatory Meaning

The most fundamental element of a defamation claim is a defamatory communication. A communication is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹⁹⁰ Moreover, an allegedly defamatory statement must be more than unpleasant or offensive; the language used must make the plaintiff appear odious, infamous or ridiculous.¹⁹¹ The burden of proving the defamatory nature of the statement rests on the plaintiff.¹⁹² Since "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express,"¹⁹³ the plaintiff must prove what the recipient understood was the meaning intended to be expressed.¹⁹⁴ Unless there is no reasonable doubt, the jury must determine the meaning and the construction of the alleged defamatory language.¹⁹⁵

the law of defamation is designed to remedy. To find no inter-personal communication when a corporate employee speaks to a corporate officer would be to ignore the distinct personalities of the human beings involved.

189. Middleton, *supra* note 4, at 30, col. 3.

190. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

191. Howard Univ. v. Best, 484 A.2d 958, 989 (D.C. Cir. 1984) (citing Johnson v. Johnson Publishing Co., 271 A.2d 696, 697 (D.C. Cir. 1970)).

192. Howard Univ., 484 A.2d at 992; Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 572 (Minn. 1987).

193. RESTATEMENT (SECOND) OF TORTS § 563 (1977).

194. *Id.* at comment e.

195. *Id.*; see Falls v. Sporting News Publishing Co., 834 F.2d 611, 615-16 (6th Cir. 1987) ("It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct, and the function of the jury to determine whether that meaning was attributed to it by the recipient of the communication."); Klages v. Sperry Corp., 118 L.R.R.M. (BNA) 2463, 2470 (E.D. Pa. 1984) ("When there is any doubt regarding whether a communication can carry a defamatory meaning, the Court must dissolve that doubt in favor of sustaining the sufficiency of the complaint."). *But see* Ericksen v. Transatlantic Reinsurance Co., 119 L.R.R.M. (BNA) 3621, 3624 (N.D. Ill. 1984) ("The question of whether a statement may reasonably be innocently construed is initially a mat-

The test for determining whether a communication is defamatory is whether the communication is obviously defamatory in the eyes of the community.¹⁹⁶ In making this determination, courts consider the obvious and natural meaning of the statement,¹⁹⁷ the context¹⁹⁸ and the extrinsic circumstances¹⁹⁹ under which this statement was made. This is necessary because the context of the statement may be used to infer a defamatory meaning into an apparently non-defamatory statement.²⁰⁰ However, it must be recognized that this flexibility allows the courts to expand the potential for liability.

Illustrative of the flexibility afforded the courts is *Klages v. Sperry Corp.*²⁰¹ In this case, a discharged corporate attorney stated a claim for defamation alleging that a press release published by the corporation carried with it the implication that the attorney had resigned under the veil of suspicion or scandal.²⁰² The press release was published at the time the attorney was terminated stating that the attorney had "suddenly resigned."²⁰³ The court added that the statement contained the following implication to prospective employers: "[I]n hearing an attorney 'suddenly resigned,' the prospective client or employee might infer that the attorney did not properly attend to former clients' affairs before resigning."²⁰⁴ Another example of this flexibility is *Phipps v. Clark Oil & Refining Corp.*²⁰⁵ The defamation claim arose when a former employer told a state agency

ter of law; *only if* it is not capable of being so construed may the question be given to the finder of fact for a determination of whether it actually was so understood.") (emphasis added).

In *Erickson*, the court noted that Illinois actions for libel and slander are controlled by the innocent construction rule: That is, statements must be innocently construed where reasonable. In effect, such a rule creates a rebuttable presumption that the statement alleged is not defamatory. While the applicability of such a rule is limited, it tends to operate in raising the level of proof required by the plaintiff. Under such a construction the plaintiff must show that it would be unreasonable to construe the statement as nondefamatory instead of raising a doubt as to whether the statement has a defamatory meaning. *Id.*

196. RESTATEMENT (SECOND) OF TORTS § 559 comment e (1977).

197. *Phipps*, 408 N.W.2d at 573 (citing Church of Scientology v. Minnesota State Medical Ass'n Found., 264 N.W.2d 152, 155 (Minn. 1978)).

198. RESTATEMENT (SECOND) OF TORTS § 563 comment d (1977).

199. *Id.* at comment e.

200. *Falls*, 834 F.2d at 615; *see also* Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 554 (E.D. Mich. 1979); *cf.* Schnelting v. Coors Distrib. Co., 729 S.W.2d 212, 217 (Mo. Ct. App. 1987) (quoting Henry v. Halliburton, 690 S.W.2d 775, 789 (Mo. 1985) ("The importance of the totality of the circumstances test is that it looks to all relevant circumstances to determine whether a given statement is actionable.")).

201. 118 L.R.R.M. (BNA) 2463 (E.D. Pa. 1984).

202. *Id.* at 2470.

203. *Id.* at 2465.

204. *Id.* at 2470.

205. 408 N.W.2d 569 (Minn. 1987).

that the employee had been terminated because he had been rude to customers and "had refused to provide full service to a handicapped customer."²⁰⁶ The plaintiff argued that this statement implied that he discriminated against the customer because the customer was handicapped.²⁰⁷ These cases illustrate the wide latitude used by courts when determining whether the implication of a statement is defamatory.

IV. DECREASING AVAILABILITY OF EMPLOYERS' DEFENSES

A. Truth

For employers, the availability of truth as an absolute defense to a defamation action has become limited.²⁰⁸ Although truth was never a favored defense,²⁰⁹ in recent years it has become much more difficult for an employer to assert. The prominent view toward the assertion of truth is that the truth must go to the underlying implication of the statement, not to its verbal accuracy.²¹⁰ Hence, if an employee is told that he is being fired for gross insubordination, the defendant must prove that the employee was in fact insubordinate, not merely that he was fired for gross insubordination.²¹¹

A new concern for employers has been brought to the surface in the case of *Zinda v. Louisiana-Pacific Corp.*²¹² In this case, an employer terminated an employee who allegedly "falsified employment forms."²¹³ The Wisconsin Court of Appeals held that the employment forms were of an ambiguous nature and that such ambiguity is to be construed against the drafter.²¹⁴ Thus, since the form was not specific as to the time (present or future) to which the questions were referring, there was no basis upon which the employer could conclude that the employee had in fact "falsified employment forms."²¹⁵ Therefore, the employer failed to show the substantial truth of the statement that the employee did in fact falsify employment forms. The significance of this decision is that standard employer practices, such as

206. *Id.* at 570.

207. *Id.* at 573.

208. RESTATEMENT (SECOND) OF TORTS § 581A comment e (1977).

209. See PROSSER, *supra* note 13, § 116.

210. See, e.g., *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 889 (Minn. 1986).

211. *Id.* In *Lewis* the court, in response to employer's assertion of truth as a defense, found that the company's charges went beyond accusations and were conclusory statements that plaintiffs had engaged in gross insubordination. *Id.*

212. 140 Wis. 2d 277, 409 N.W.2d 436 (Wis. Ct. App. 1987), *rev'd on other grounds*, No. 86-0737 (Wis. Sup. Ct. May 31, 1989).

213. *Id.* at 278, 409 N.W.2d at 438.

214. *Id.* at 279, 409 N.W.2d at 440.

215. *Id.*

employment inquiry forms, can give rise to defamation liability. More importantly, however, this case indicates that, even if employers have documentation as to their reasons for terminating an employee, such documentation may not prove useful in withstanding a lawsuit.

B. *The Conditional Privilege*

1. Scope of the Privilege

To encourage the free flow of communications between employers and employees, the law has recognized a qualified privilege "to publish defamatory material if the publication is reasonably necessary to the protection or furtherance of a legitimate business interest."²¹⁶ The standard that controls the operation and scope of the privilege is as follows:

A communication made in good faith and on a subject-matter in which the person making it has an interest, or in reference to which he has a duty, is privileged if made to a person or persons having a corresponding interest or duty, even though it contains matter which without this privilege would be slanderous, provided the statement is made without malice and in good faith.²¹⁷

The conditional privilege arises when a communication is made between two parties with a common interest.²¹⁸ Within the employment context, the employer's interests in protecting its property investment and in maintaining employee morale have allowed the employer to engage in communications with employees who have an interest in continuing that employment.²¹⁹ For example, an employer is protected in criticizing his employees' performance in periodic evaluations so long as it is made to further serve the parties' legitimate interests.

The inquiry a court utilizes in determining whether a communication is qualifiedly privileged consists of a two-step process.²²⁰ First, the court determines whether an occasion for the privilege arises. If such a determination is found, the jury must evaluate whether that privilege was abused.²²¹

216. *Foley v. Polaroid Corp.*, 400 Mass. 82, 95, 508 N.E.2d 72, 79 (1987) (citing *Bratt v. International Business Machs. Corp.*, 392 Mass. 508, 512-13, 467 N.E.2d 126, 131 (1984)).

217. *Garziano v. E.I. DuPont De Nemours & Co.*, 818 F.2d 380, 385 (5th Cir. 1987) (citing *Louisiana Oil Corp. v. Renno*, 173 Miss. 609, ___, 157 So. 705, 708 (1934)).

218. See SMOLLA, *supra* note 7, § 8.08[2][a].

219. See *Garziano*, 818 F.2d at 387.

220. *Id.* at 386.

221. See RESTATEMENT (SECOND) OF TORTS § 619 (1977) (The court determines whether the occasion gives rise to a privilege. The jury determines whether the privilege is overcome or abused.).

It is critical to the analysis to distinguish between the occasion of the privilege and the abuse of the privilege. An occasion of privilege arises when the evidence establishes certain circumstances

There are numerous circumstances which give rise to the privilege. However, although the application of this privilege is quite broad, the scope of its applicability depends upon the jury's determination of whether it was abused.

2. Abuse of the Privilege

An employer can abuse its privilege in a number of ways. The five occasions giving rise to abuse of the conditional privilege, as stated in the Restatement (Second) of Torts²²² are as follows:

- (1) The defendant knew the matter to be false or acted in reckless disregard as to the truth or falsity.
- (2) The defamatory matter is published for some purpose other than that for which the privilege is given.
- (3) The publication is to some person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege.
- (4) The publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given.
- (5) The publication includes unprivileged matter as well as privileged matter.

The standard used to determine whether the conditional privilege is abused is different in each jurisdiction. Traditionally, the courts have required that malice, or ill will, be shown in order to prove an abuse of the privilege. Because this is a jury question, most juries find malice in situations where an employer cannot prove the truth of the statement.²²³ Due to the decreasing strength of the truth defense, it will be difficult for employers to bring forth such evidence.²²⁴ The loss of this conditional privilege will be devastating to many employers as it will hinder their ability to discipline employees.

Illustrative of the potential danger of the loss of the conditional privilege is the case of *Garziano v. E.I. Du Pont De Nemours Co.*²²⁵ In this case, Garziano, an employee, was fired for allegedly sexually harassing a co-employee. After his termination, co-employees expressed fears and concerns

which support a duty recognized by law to make an honest statement of fact: Thus, a determination of whether an occasion for a privilege arises is arrived at through an examination of the circumstances under which the statement was made. Essentially, the question becomes whether the recipient had a "need to know" the information.

222. RESTATEMENT (SECOND) OF TORTS §§ 600, 603-05A (1977).

223. *Workplace Privacy*, *supra* note 1, at 101 ("Juries tend to infer malice when an employer cannot prove that the statement is true.")

224. See *supra* notes 208-15 and accompanying text.

225. 818 F.2d 380 (5th Cir. 1987).

about job security to management. To address these concerns, the employer issued a restrictive bulletin to their 140 supervisors.²²⁶ This bulletin described the incident with the intention of informing its employees what conduct constitutes sexual harassment and to explain the company's policy toward such action.²²⁷ Although the court found that the publication of the bulletin was issued on an occasion of privilege, the issue was submitted to the jury for a determination as to whether the privilege was abused by excessive publication. The court's concern regarding the excessive publication issue was that the information may have been communicated to independent contractors working on the premises who may not have been parties of interest and, therefore, are not "privileged" to receive the information.²²⁸

C. Preemption

Employers subject to a collective bargaining agreement may be able to assert the defense that the state law tort claim of defamation is preempted by the exclusive jurisdiction of the Labor Management Relations Act.²²⁹ Section 301 of the Labor Management Relations Act rests jurisdiction in the federal courts to hear claims for violation of labor contracts.²³⁰ In 1966, the United States Supreme Court in *Linn v. United Plant Guard Workers*,²³¹ held that courts could hear defamation claims only upon satisfaction of the following two limitations: (1) that the plaintiff would be required to prove an intentional or reckless misstatement; and (2) the plaintiff would have to

226. *Id.* at 276. The court notes that the employer, DuPont Company, utilizes a number of different means to communicate with its employees. The company on this occasion issued a Management Information Bulletin. This bulletin is distributed in envelopes only to the supervisors and is the most restrictive form of communication in place at the DuPont plant. *Id.* at 276 n.6.

227. The introductory paragraph to the bulletin stated:

The recent sexual harassment incident which resulted in an employee's termination has raised supervisory and employee questions about the subject. This particular incident was determined to be a serious act of employee misconduct, but in deference to the employees involved cannot be discussed in detail. However, deliberate, repeated and unsolicited physical contact as well as significant verbal abuse was involved in this case.

Id. at 276.

228. *See id.* at 285; *cf. Rouly v. Enserch Corp.*, 835 F.2d 1127, 1132 (5th Cir. 1988) (Employers are liable only for an employee's actions within the course and scope of employment: Salesman's gossip was verbal equivalent to a "frolic and detour.")

229. 29 U.S.C. §§ 141-87 (1985); *see, e.g., Willis v. Reynolds Metals Co.*, 840 F.2d 254 (4th Cir. 1988) (Section 301 of Labor Management Relations Act preempted state law claim of defamation because employer's alleged wrong was in exercise of rights pursuant to labor contract.)

230. Section 301 of the Labor Management Relations Act states: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . ." 29 U.S.C. § 185(a).

231. 383 U.S. 53 (1966).

prove that it caused him or her damage.²³² In 1985, however, the Court held that parties cannot escape the preemptive effect of Section 301 by casting their claims as tort claims rather than contract claims.²³³

To determine the scope of the preemption, the question which must be addressed is whether the claims can be resolved only by referring to the terms of the collective bargaining agreement.²³⁴ The test specifically for tort claims is "whether an evaluation of the tort claim is inextricably intertwined with the consideration of the terms of the labor contract."²³⁵ Of increasing importance is the presence of the actual malice standard and also the state's interest in protecting the reputations of its citizens: "[T]he preemption doctrine should not be used as a shield to protect malicious falsehoods where the state has an overriding interest in protecting its citizens from the damage which those falsehoods inevitably cause."²³⁶ Thus, this "state interest" caveat provides courts with considerable flexibility in determining whether a claim is preempted.

Illustrative of this flexibility is *Krasinski v. United Parcel Service, Inc.*²³⁷ In *Krasinski*, the Illinois Supreme Court affirmed an appellate court decision which overturned a lower court's finding that a defamation claim was preempted.²³⁸ In this case, the employee claimed he was defamed by a notice sent to his union and co-workers stating that he was discharged for theft of company property.²³⁹ The employer claimed that its actions were within the scope of the labor contract and were consistent with the management-union process for handling disputes over employee misconduct pursuant to the labor contract.²⁴⁰ While this contention was granted by the trial court, the contention was reversed at the appellate level.²⁴¹ By invoking the state interest caveat, the appellate court asserted that an "action will stand regardless of whether resolution of the action will ultimately be determinative of issues to be decided by an arbitrator."²⁴² The court's decision stressed that "where the complaint alleges actual malice . . . the action is

232. D. DOBBS, *supra* note 31, at 521.

233. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-10 (1985).

234. *Id.* at 213.

235. *Id.*

236. *Krasinski v. United Parcel Serv.*, 135 Ill. App. 3d 831, ___, 508 N.E.2d 1105, 1108 (1987) (citing *Fisher v. Illinois Office Supply Co.*, 130 Ill. App. 3d 996, 1001, 474 N.E.2d 1263, 1267 (1985)).

237. 124 Ill.2d 483, 530 N.E.2d 468 (1988).

238. 135 Ill. App. 3d 831, 508 N.E.2d 1105 (1987).

239. *Id.*

240. *Id.* at ___, 508 N.E.2d at 1110.

241. *Id.* at ___, 508 N.E.2d at 1111.

242. *Id.* at ___, 508 N.E.2d at 1110.

not preempted by section 301 of the [Labor Management Relations Act]."²⁴³ The court in *Krasinski* relied heavily upon the allegation of malice in rendering its decision.²⁴⁴ Thus, the actual malice standard is critical in asserting the defense of preemption, since this standard is closely akin to the determination of whether the statement alleged to be defamatory is true. Therefore, it is critical for an employer to examine its ability to prove the truth before establishing a defense.

D. Absolute Privilege

The defense of absolute privilege, if established, serves as a complete defense.²⁴⁵ Thus, there is no liability established, even if the defamatory statement is maliciously stated. Within the employment context, certain situations are said to give rise to the assertion of an absolute defense.²⁴⁶ The most common situations are those statements that are consented to, those statements that are part of a quasi-judicial administrative proceeding, or those statements that arise in grievance procedures.

Consent provides the basis for an absolute privilege.²⁴⁷ For example, an employee that requests the employer discuss dissatisfaction with work performance has consented to such statements of criticism and is therefore prohibited from claiming slander as a result of that discussion.²⁴⁸ In addition, statements made as part of a quasi-judicial administrative hearing are absolutely privileged. Therefore, a claim for defamation cannot be maintained against a former employer who listed reasons for an employee's suspension and subsequent discharge as "willful misconduct" and "dereliction" on forms submitted by the employee to the state Employment Security Division in an application for unemployment compensation.²⁴⁹ The rationale for adopting and including administrative agencies as a "judicial proceeding" according to the Restatement (Second) of Torts²⁵⁰ rests on sound pub-

243. *Id.* at ___, 508 N.E.2d at 1111.

244. *Id.* ("We believe . . . Illinois state law also gives each and every one of its citizens the right to not be maliciously defamed by others regardless of whether that person is an employee subject to a collective bargaining agreement. *A cause of action for malicious defamation exists independently of the collective-bargaining agreement.*") (emphasis added).

245. *See, e.g.,* *Watts v. Grand Union Co.*, 114 L.R.R.M. (BNA) 3158, 3160 (N.D. Ga. 1983).

246. *See* PROSSER, *supra* note 13, § 114.

247. *See, e.g.,* *Hollowell v. Career Decisions, Inc.*, 100 Mich. App. 561, ___, 298 N.W.2d 915, 922 (1980).

248. *Id.*

249. *See, e.g.,* *Magnan v. Anaconda Indus., Inc.*, 37 Conn. Supp. 38, 429 A.2d 492 (Conn. Super. Ct. 1980).

250. RESTATEMENT (SECOND) OF TORTS § 587 comment a (1977); *see also* PROSSER, *supra* note 13, § 114, at 818-20.

lic policy. Due to complexities in modern society, the role of administrative law both in its rule-making and adjudicative aspects has expanded. "With that expansion has come a concomitant recognition by many courts that certain attributes of the judicial process have equal relevance to those administrative bodies that utilize a quasi-judicial process in the determination of individual rights, privileges or obligations."²⁵¹

Of perhaps greater applicability, statements arising in grievance procedures are absolutely privileged. Simply stated, the rationale for the applicability of an absolute privilege in a grievance procedure is that "damage suits predicated on statements made in the grievance procedures would tend to interfere with frank and strong statements of positions in such proceedings."²⁵² The core of this rationale is the promotion of industrial peace in allowing an employer and employee to settle issues of concern through a process of conferences and collective bargaining. To assert the privilege under this circumstance, the statements must satisfy two requirements: (1) the statement must be made during a conference or session having for its purpose the adjustment of a grievance procedure or other peaceful disposition of such a grievance; and (2) the defense of an absolute privilege should be applied to a statement made at such a proceeding, that is, the privilege is necessary to promote an activity encouraged by federal law.²⁵³

While the absolute privilege is not subject to defeasance as are conditional privileges, it must be noted that circumstances in which absolute privileges may be asserted are extremely limited.²⁵⁴ Such absolute privilege accommodates situations only toward the identity of the speaker or to the forum in which the speech takes place. Thus, the applicability of the absolute privileges is much more limited than those of conditional privilege, where the establishment of its use depends upon the relationship between the speaker, the audience and the subject of speech.²⁵⁵

251. *Magnan*, 37 Conn. Supp. at ___, 429 A.2d at 495-96; *cf.* *Citizens State Bank v. Libertelli*, 2 I.E.R. Cases (BNA) 116 (N.J. Super. Ct. 1987) (Bank's distribution of unfiled complaint not protected because its publication was not a part of judicial process.).

252. *Brooks v. Solomon Co.*, 116 L.R.R.M. (BNA) 3003, 3006 (N.D. Ala. 1982).

253. *Id.* at 3305-06.

254. *See* SMOLLA, *supra* note 7, § 8.07[2].

255. *Id.*

V. EMERGING THEORIES OF LIABILITY AND THEIR IMPLICATIONS TO EMPLOYERS

A. *Compelled Self-Publication*

The doctrine of compelled self-publication holds that a defendant is responsible for a plaintiff's publication where: (1) the defendant could foresee that the communication would take place; and (2) the plaintiff was under a strong compulsion to publish the statement.²⁵⁶ This theory is said to have given rise to the "no comment" trend of employers and is the exception to the general rule that in order to satisfy the publication requirement of a defamation claim, the communication must be made to a third party.²⁵⁷ The implication of this theory is that it allows discharged employees to, in effect, sue for the tort of wrongful discharge, whether recognized by the appropriate state or not.²⁵⁸

In recent years, a substantial line of cases applying the doctrine of compelled self-publication within the employment context has emerged. The most noteworthy case is *Lewis v. Equitable Life Assurance Society*.²⁵⁹ In this case, four employees were discharged for the stated reason of "gross insubordination."²⁶⁰ The facts giving rise to this discharge stem from the employees' refusal to revise expense reports to reflect a lower figure in order to comport with company policy.²⁶¹ The basis of the established liability was the fact that the employer told these employees they were being fired for engaging in "gross insubordination," which was defamatory. This defamatory statement was then communicated to prospective employers of the employees; however, the communications were made by the employees themselves.²⁶² The issue thus raised is whether the employer can ever be liable for defamation where the statement in question was published to a third party only by the employee. The court answered this question in the affirmative.²⁶³

The court rejected the company's contentions that recognition of the doctrine of self-publication (1) amounts to creating tort liability for wrong-

256. See Prentice & Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 210 (1987).

257. See Blodgett, *New Twist to Defamation Suits*, 73 A.B.A. J. 17 (May 1987); Middleton, *supra* note 4, at 30, col. 1.

258. See Comment, *Employment Defamation Expands Employer Liability in the At-Will Context*, 13 WM. MITCHELL L. REV. 585 (1987).

259. 389 N.W.2d 876 (Minn. 1986).

260. *Id.* at 880.

261. *Id.* at 881.

262. *Id.* at 886.

263. *Id.* at 888.

ful discharge; and (2) would discourage employees similarly situated from mitigating damages.²⁶⁴ In addressing the first contention, the court claimed that rejecting tort liability for wrongful discharge did not preclude a tort claim for harm resulting from a bad faith termination of a contract.²⁶⁵ In resolving this issue, the court defined the cause of action for defamation as an independent tort.²⁶⁶ The second contention was dismissed by the court by concluding that in this case the employees could not have mitigated their damages.²⁶⁷

In recognizing compelled self-publication, the court stated:

We acknowledge that recognition of this doctrine provides a significant new basis for maintaining a cause of action for defamation and, as such, it should be cautiously applied. However, when properly applied, it need not substantially broaden the scope of liability for defamation. The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of this statement or avoiding the resulting damages; in other words, in cases where the defamed person was compelled to publish this statement. In such circumstances, the damages are fairly viewed as the direct result of the originator's actions.²⁶⁸

While it is claimed that the adoption of such a theory does not discourage employers from giving feedback and references or create undue increase in employer liability, this has not been the case.²⁶⁹ Due to the fear of potential litigation, the acceptance of new theories of liability and the increased jury sympathy in conjunction with the diminished effect of the employer defenses, employers have reduced such communications. Although it may be suggested that a reduction in communications will reduce discipline and deterrents to misconduct and, because of this factor employers would not reduce communications, it is essential to recognize that the practical employer does fear the threat of a lawsuit. Two advocates of the adoption of this compelled self-publication theory claim that undue increase in employer's liability is unlikely "if attorneys do their job and explain to clients

264. *Id.* at 887-88.

265. *Id.*

266. *Id.*

267. *Id.* at 888 ("Their only choice would be to tell them 'gross misconduct' or to lie. Fabrication, however, is an unacceptable alternative.").

268. *Id.*

269. *See Comment, supra* note 258, at 628-29.

the realities of defamation litigation."²⁷⁰ This assessment fails to take into account, however, employers' practical considerations as well as their natural reactions. These factors cannot be ignored as such an assessment should focus on an employer's perspective, not on the role of third parties.

B. Negative Inferences

A disturbing trend in defamation law is that of liability based upon inferences resulting from a negative implication given from silence or inaction on behalf of the employer.²⁷¹ In *Tyler v. Macks Stores, Inc.*,²⁷² a former employee brought a lawsuit against his former employer claiming that his discharge, following the giving of a polygraph test and the immediate firing of the manager thereafter, gave fellow employees and others the feeling and belief that he had been discharged for some wrongful activity.²⁷³ The employee contended that this "insinuation and inference of wrongdoing can amount to the publication of defamatory matter."²⁷⁴ The Supreme Court of South Carolina adopted this contention.²⁷⁵ Another court adopted the contention that a defamatory meaning was conveyed by the method which an employer packed and removed documents from a discharged employee's office after a termination and responded to co-workers' inquiries into the process and basis for those actions by saying that "they didn't want to

270. Prentice & Winslett, *supra* note 256, at 235 (emphasis added).

271. This trend is most disturbing to the employer because liability is based upon the employer's silence or inaction. This basis of liability creates uncertainty as to whether the employer has an affirmative duty to prevent, for example, co-employees from drawing inferences of an employee's wrongdoing. This would be a most difficult or perhaps impossible task, especially considering the employer's need to maintain a safe and efficient workplace.

272. 275 S.C. 456, 272 S.E.2d 633 (1980).

273. *Id.* at 457, 272 S.E.2d at 634.

274. *Id.* Compare *Gay v. William Hill Manor, Inc.*, 74 Md. App. 51, 536 A.2d 690 (1988) (mere act of employer escorting an employee from the building after termination of employment, without more, does not constitute a defamatory publication), *cert. denied*, 312 Md. 601, 541 A.2d 964 (1988) with *Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 261 A.2d 731 (1970) (accusations and conduct of employer under circumstances such that a reasonable person would interpret remarks to be defamatory satisfied publication requirement).

275. *Tyler*, 275 S.C. at ___, 272 S.E.2d at 634. The court concluded that such "[a] novel issue such as here presented is best decided in light of the testimony to be adduced at trial." *Id.* (citing *Williams v. Streb*, 270 S.C. 650, 243 S.E.2d 926 (1978)).

The court also suggested that "management's silence after discharging an employee" may be the basis for a finding of defamation. *Personal Rights: Defamation*, Individual Employee Rts. Manual (BNA) 515:101 (Jan. 1, 1987). The court in *Tyler* noted: "A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." 275 S.C. at 457, 272 S.E.2d at 634 (quoting *Timmons v. News & Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958)).

know."²⁷⁶ Moreover, another court accepted the contention that an employer who "intentionally and unreasonably failed to remove" a small sign thereby published its contents.²⁷⁷ The cumulative effect of these cases clearly indicates that courts are expanding the elements of defamation and allowing new interpretations to be entertained by juries resulting in expanding liability for employers. In light of the fact that juries are more sympathetic to defamation claims and are awarding higher verdicts,²⁷⁸ this impact is devastating for employers.

The impact of such increasing exposure to liability suggests that an employer has an affirmative duty to prevent co-employees from deriving such inferences. Additionally, this liability also serves to promote the fear of employers that disciplining or discharging an employee may give rise to liability for defamation. However, the devastating impact of these decisions is the courts' failure to recognize employers are without any mechanisms to prevent inferences being drawn from their conduct. For example, the employer may be liable for defamation if it published a bulletin explaining an incident if persons receiving it would be outside the "need to know" group.²⁷⁹ This would result in the loss of protection of the qualified business privilege for such a communication. In light of this trend and the increasing trend of juries to find abuses of the qualified business privilege, it appears employers are uncertain whether to disseminate such information concerning the discharge or discipline of an employee. Both these trends indicate that the employer is placed in a precarious position.

C. *Negligent References*

Due to the "chilling effect" of employer communications, most former employers are providing the prospective employer with merely the name

276. *Coleman v. American Broadcasting Co.*, 119 L.R.R.M. (BNA) 3324, 3332 (D.C. Cir. 1985).

277. *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir. 1987). The court in this case further concluded:

Tacket has an unenviable task, because even if he persuades the jury that General Motors published the small sign by inaction, that he took appropriate steps to deal with the sign, and that the sign defamed him, he still must trace injury to that sign. The consequences of the incident itself and the ensuing suspension, the rumors within the plant and community, the meetings to pass the word about his suspension, and the large sign are not G.M.'s responsibility. It will be hard, perhaps impossible, to attribute damages to the small sign alone. But if Tacket wants to attempt this feat, he is entitled to try.

Id. at 1047. This statement clearly represents both the attitudes of plaintiffs in bringing creative claims alleging new theories of defamation and the courts' increasing willingness to accept new creative theories as a basis of defamation liability.

278. *See supra* note 1.

279. *See, e.g., Garziano v. E.I. DuPont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987).

and dates of service of the former employee.²⁸⁰ As a result of these practices, it is predicted the negligent reference theory will continue to develop.²⁸¹ The negligent reference theory attaches liability to the writer of a reference under the rules governing the tort of negligence. This liability provides the main basis for compensating losses inadvertently caused outside a contractual relationship. The negligent reference theory is said to have developed in response to the "no comment" practices of most employers when requested to provide a reference because such practices are contrary to public policy. This practice does not serve to benefit either the employee seeking employment or the employer seeking to screen applicants. In addition, it has been claimed that the negligent reference theory can also give rise to a third party claim "against the former employer for any misrepresentation that occurred when a prospective employer makes a reference inquiry."²⁸²

While there are no cases supporting this assertion, it is logical that the former employer has a duty of care to the prospective employer. While the development of this theory would appear to encourage employers to provide references to prospective employers, it also may contribute to an undue increase in litigation. To avoid this theory of liability, attorneys are strongly urging employers to seek releases from their former employees as well as from their prospective employees before seeking or giving references.²⁸³ This practice would seem the better approach; however, problems may still arise.

VI. THE IMPACT OF EXPANDING LIABILITY

A. *The Chilling Effect*

The threat of defamation liability undoubtedly has had a crippling effect on employers. The principal employment actions giving rise to statements that can be defamatory are terminations, references, evaluations, the dissemination of confidential information beyond the "need to know" group, and internal discipline or criticism. Since employers are more hesitant to discipline, terminate and supply useful information to other employers, the cumulative effect of this hesitation is contrary to public policy. As public policy in the past has called for the protection of legitimate business interests, courts today are not enforcing these policies. "[C]ourts are faced with a powerful conflict between protecting the substantial social interest in can-

280. *Claim Dangers Assessed*, *supra* note 7, at A-4.

281. *Id.* at A-5.

282. *Id.*

283. *Id.* at A-4.

did and honest appraisals of an employee's competence and the equally substantial interest in safeguarding the individual employee from undeserved injury."²⁸⁴ In response to this conflict, courts increasingly have been choosing to protect individual interests over the protection of business interests.

The results of the court's favoring the individual reputational interest are devastating. Employers no longer enjoy the scope of protection as traditionally afforded; accordingly, they are less likely to discipline, evaluate and provide information. As a result, employers, as a group, will be stripped of the very mechanisms that aid them in providing a safe and productive workplace.

B. Negligent Hiring/Negligent Retention: Creation of the Obvious Dilemma

The increase of negligent hiring and negligent retention claims is an evident result of the increasing danger of the "chilling effect." Negligent hiring is a breach of the employer's duty to make an adequate investigation of an employee's fitness before hiring him.²⁸⁵ The chilling effect on communications seriously impedes an employer's inquiry into an applicant's job performance for a former employer. Moreover, the increase in negligent retention is also affected. Negligent retention is the breach of an employer's duty to be aware of an employee's unfitness and to take corrective action through retraining, reassignment or discharge.²⁸⁶ Because employers are more reticent in approaching employees for fear of liability, the potential for claims rises. Due to the "chilling effect," the retraction of the protection traditionally afforded to employer communications deprives employers of the devices that in the past protected employers from negligent retention and negligent hiring claims. Ultimately, employers are left in a precarious position as they are subject to defamation liability; failure to provide such employer communication contributes to potential liability for negligent hiring and negligent retention.

C. Resolution of the Obvious Dilemma

In light of the growing need for employers to communicate useful information to other employers and their employees, the need to address employer concerns has risen sharply. The obvious dilemma created that must

284. SMOLLA, *supra* note 7, § 8.08[2][d].

285. See Note, *Negligent Hiring: Employer's Liability for Acts of an Employee*, 7 AM. J. TRIAL ADVOC. 603 (1984); Note, *Recognition of Negligent Hiring Expands Employer Liability*, 10 WM. MITCHELL L. REV. 361 (1984).

286. See Silver, *supra* note 11, at 73.

be addressed by courts and legislatures is the uncertainty of the applicability of defamation law within the employment context.

Although courts have been less inclined to protect employer communications in recent years, the resulting dangers presented call for a greater recognition of the protection of useful communications. Thus, courts will be forced to provide certainty on the issue of how much protection will be afforded employers after the *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*²⁸⁷ decision. Due to the safety concerns involved, courts must distinguish the differences between credit reporting and reports evaluating employees. Such distinctions will compel the courts to conclude that employers need to be afforded greater protection. Moreover, legislatures may have to take the lead to provide certainty for employer communications. For example, some legislatures have responded to increasing liability stemming from inaccurate references and have adopted "service letter" statutes.²⁸⁸ These statutes require all employers to provide, at the former employee's request, a letter that describes the nature and duration of services rendered by the employee and a true statement of the reason for the employee's discharge or resignation. In some states, an employer that willfully or negligently fails to furnish the required information is subject to both a fine and imprisonment.²⁸⁹ Such laws will most likely be enacted in response to increasing employer liability.

CONCLUSION

Within the employment context, defamation liability has posed serious concerns to employers. The pervasive nature of this liability has impeded the furtherance of an employer's legitimate interest in providing a safe and efficient workplace which benefits both employers and employees as well as the public. In order to maintain a safe and efficient workplace, however, an employer must be afforded a means to do so. Employer communications provide the essential means by which safety and efficiency in the workplace can be advanced and, as such, employers must be protected from liability arising from such communications.

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287. 472 U.S. 749 (1985).

288. See, e.g., MO. ANN. STAT. § 36.470 (Vernon Supp. 1989); NEB. REV. STAT. § 48-211 (1984).

289. *Workplace Privacy*, supra note 1, at 84.

