

# Defamation Publication Revisited: The Development of the Doctrine of Self-Publication

## I. INTRODUCTION

The importance of one's reputation has been recognized for centuries. Shakespeare once wrote, "[He] [w]ho steals my purse steals trash; . . . [b]ut he that filches from me my good name [r]obs me of that which not enriches him, [a]nd makes me poor indeed."<sup>1</sup> The law of defamation recognizes that "[e]very man's reputation is as sacred as his property,"<sup>2</sup> and a person's reputation is protected by holding a speaker liable for false and defamatory utterances communicated to third persons.<sup>3</sup> The *New York Times Co. v. Sullivan* decision thirty years ago constitutionalized the law of defamation, and as a result, development in the area has focused on the constitutional implications of the tort.<sup>4</sup> However, the evolution of defamation's common-law elements continues;<sup>5</sup> one recent development is the doctrine of compelled self-publication.<sup>6</sup>

Employees bring one-third of all defamation suits against employers.<sup>7</sup> During the litigation frenzy of the last ten years, a number of state and federal courts held that in a given instance, a plaintiff employee may maintain a cause of action for defamation against a defendant employer despite the fact that the plaintiff, rather than the defendant, communicated the allegedly defamatory material to a third party.<sup>8</sup> This cause of action is known as defamation by self-publication.<sup>9</sup>

The typical situation in which a defamation by self-publication claim arises is when an employee is fired for an allegedly false and defamatory reason and the discharged employee is forced to repeat the false and defamatory reason to

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<sup>1</sup> WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* act III, sc. 3, lines 170-74 (David Bevington ed., 1988).

<sup>2</sup> *Foster v. Scripps*, 39 Mich. 376, 381 (1878).

<sup>3</sup> See *infra* notes 13-14 and accompanying text.

<sup>4</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For a discussion of the constitutionalization of the defamation cause of action, see Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273 (1990).

<sup>5</sup> See *infra* Parts III-VII.

<sup>6</sup> *Id.*

<sup>7</sup> Martha Middleton, *Employers Face Upsurge in Suits Over Defamation*, NAT'L L.J., May 4, 1987, at 1, col. 4.

<sup>8</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986).

<sup>9</sup> *Id.*

prospective employers during subsequent job interviews.<sup>10</sup> A compelled self-publication claim is special because the injured party, the plaintiff, rather than the defendant employer, publishes the matter to the third party.

This Comment traces the development of the doctrine of self-publication from its common-law past to its modern treatment by courts and legislatures. From there, the Comment explores the policies supporting a cause of action based on self-publication and the policies working against recognition of the doctrine.<sup>11</sup> The Comment concludes by offering one possible modification of the self-publication doctrine<sup>12</sup> as a means of preserving free speech while sufficiently protecting an individual's interest in his reputation.

## II. DEFAMATION AND THE TRADITIONAL REQUIREMENT OF PUBLICATION

Publication of a false and defamatory statement is an essential element to a successful claim for defamation.<sup>13</sup> Under the traditional approach to the element of publication, the plaintiff must prove that the defendant communicated defamatory matter to a third party. "[T]here is ordinarily 'no publication if the defamatory statement is exposed to a third party by the person

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<sup>10</sup> *Id.*

<sup>11</sup> See *infra* Parts III–VII.

<sup>12</sup> See *infra* Part VIII. For other discussions on the doctrine of self-publication, see generally Arlen W. Langvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication*, 26 DUQ. L. REV. 227 (1988); Charles S. Murray, Jr., *Compelled Self-Publication in the Employment Context: A Consistent Exception to the Defamation Requirement of Publication*, 45 WASH. & LEE L. REV. 295 (1988); S. Olivia Mastry, Minnesota Developments, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation: Lewis v. Equitable Life Assurance Soc'y of the United States*, 71 MINN. L. REV. 1092 (1987); Michael A. Rataj, Note, *The Doctrine of Self-Publication*, 1989 DET. C.L. REV. 197 (1989); Laurance Shore, Comment, *Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege*, 38 EMORY L.J. 871 (1989).

<sup>13</sup> To create liability for defamation there must be:

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

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

This Comment will not focus on the constitutionalization of the law of defamation. For a discussion of defamation's constitutionalization, see Halpern, *supra* note 4.

claiming to be defamed.”<sup>14</sup> Thus, under the common law, a claim for defamation is unavailable to a discharged employee who communicates the defamatory, employer-given reason for termination to a third party during subsequent job interviews.<sup>15</sup>

### III. THE *LEWIS* DECISION

In 1986, the Minnesota Supreme Court recognized an exception to the rigid common-law requirement of publication. In *Lewis v. Equitable Life Assurance Society of the United States*,<sup>16</sup> the Minnesota Supreme Court held that under certain circumstances a communication of a false and defamatory matter by the injured party to a third party will satisfy the element of publication.<sup>17</sup> By allowing the plaintiff publishers' claims, the Supreme Court of Minnesota became the first state supreme court to recognize an exception to the traditional common-law publication requirement.<sup>18</sup>

The plaintiffs in *Lewis* were at-will employees of the defendant. Without any previous business travel experience, the plaintiffs were sent on a business trip with monetary expense advances.<sup>19</sup> When the employees returned from the trip, the employer requested that the plaintiffs submit expense reports itemizing their expenditures.<sup>20</sup> Each plaintiff completed the requisite report according to

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<sup>14</sup> *J. Crew Group, Inc. v. Griffin*, No. 98 Civ. 2663 (KC), 1990 WL 193918 at \*2 (S.D.N.Y. Nov. 27, 1990) (citing *Burger v. Health Ins. Plan*, 684 F. Supp. 46, 52 (S.D.N.Y. 1988)); see also *Murray*, *supra* note 12, at 299, for a discussion of *Shepard v. Lamphier*, 84 Misc. 498 (N.Y. Sup. Ct. 1914) (explaining that defendant is not liable for defamation after the plaintiff communicated to third parties statements that the defendant had communicated only to the plaintiff).

<sup>15</sup> *Id.* This remains the approach taken by the majority of jurisdictions. Most jurisdictions, however, will recognize the claim when a plaintiff is unaware of the contents of a statement because of some type of incapacity and discloses that statement to a third party. See *infra* Part IV.A. A number of other jurisdictions have adopted a self-publication rule based on the likelihood or compulsion of republication. See *infra* Part IV.B.

<sup>16</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986).

<sup>17</sup> *Id.* The plaintiffs also brought successful breach of contract claims against the defendant. *Id.* at 884. For an analysis of a possible modification of the at-will doctrine in Minnesota as an alternative to the compelled self-publication doctrine, see *Mastry*, *supra* note 12, at 1114-17.

<sup>18</sup> Commentators have suggested that this decision was consistent with a slow development of the law away from the rigidity of the traditional publication requirement. *Murray*, *supra* note 12.

<sup>19</sup> *Lewis*, 389 N.W.2d at 881.

<sup>20</sup> *Id.*

the actual expenses that each incurred.<sup>21</sup> The defendant, however, repeatedly asked the plaintiffs to alter these reports and to incur certain expenses.<sup>22</sup>

After altering the reports twice, the plaintiffs refused to change the reports a third time.<sup>23</sup> Each plaintiff asserted that the expenses were accurately documented.<sup>24</sup> The refusal to alter the expense reports resulted in the termination of each plaintiff for "gross insubordination."<sup>25</sup>

After unsuccessfully looking for new jobs, the plaintiffs sued their previous employer for defamation.<sup>26</sup> The plaintiffs claimed that the defendant defamed them by wrongfully terminating each plaintiff for gross insubordination when it was foreseeable that the plaintiffs would be forced to divulge the "false" reasons for their terminations to prospective employers.<sup>27</sup>

Absent from the pleadings were allegations that the defendant directly published the allegedly defamatory matter to a third party.<sup>28</sup> The only evidence of a communication to a third party was the plaintiffs' own communication to prospective employers.<sup>29</sup> Notwithstanding the apparent lack of publication, the court found that the plaintiffs had stated sufficient claims for defamation. The court held that "[i]n an action for defamation, the publication requirement may be satisfied where the plaintiff was compelled to publish a defamatory statement to a third person if it was foreseeable to the defendant that the plaintiff would be so compelled."<sup>30</sup> The court emphasized that the proximate cause of the plaintiffs' harm was the defendant's statement, therefore, it was reasonable to hold the defendant liable.<sup>31</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 886.

<sup>27</sup> *Id.*

<sup>28</sup> The defendant claimed that statements made indicating that the plaintiffs had been terminated for gross insubordination were true. Therefore, the employer argued that the falsity element of defamation could not be satisfied. *Id.* at 888. The court, however, decided that of greatest importance was whether the fair implication of the statement was true instructing that the relevant inquiry on the issue of truth or falsity is whether the plaintiffs engaged in gross insubordination, not whether the actual reason given for termination was gross insubordination. *Id.* at 889.

<sup>29</sup> *Id.* at 886-89.

<sup>30</sup> *Id.* at 888.

<sup>31</sup> *Id.*

#### IV. DOCTRINE AND ITS FOUNDATIONS

The *Lewis* decision was the first state supreme court decision supporting the doctrine of self-publication. Accordingly, it is the most cited decision providing an exception to the rigid rule of publication. However, the *Lewis* decision has its foundation in a number of lower court decisions.<sup>32</sup> Courts have recognized a foreseeable republication exception to the defamation publication requirement for nearly one hundred years.<sup>33</sup> Traditionally, however, courts have not applied the exception to situations in which a discharged employee has disclosed to prospective employers defamatory statements made to the employee at the time of his termination.<sup>34</sup>

##### A. *The Unawareness Exception*

Section 577 of the *Restatement of Torts* sets forth the oldest exception to the general rule that a defamatory remark must be published to someone other than the defamed person in order to state a cause of action. Comment m states:

One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances. If the defamed person's transmission of the communication to the third person was made, however, *without an awareness* of the defamatory nature of the matter and if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred.<sup>35</sup>

Accordingly, courts recognize an "unawareness" exception to the need for publication, which states that publication has occurred when the original speaker of the statement has reason to believe that a third person will hear and understand the defamatory statement, before the defamed party is informed of

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<sup>32</sup> In *Lewis*, the Minnesota Supreme Court cited cases from six other jurisdictions supporting its decision. *Id.* at 886 (citing *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980); *Colonial Stores, Inc. v. Barrett*, 38 S.E.2d 306 (Ga. App. 1946); *Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982); *Grist v. Upjohn Co.*, 168 N.W.2d 389 (Mich. App. 1969); *Bretz v. Mayer*, 203 N.E.2d 665 (Ohio App. 1963); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696 (Tex. Civ. App. 1980)).

<sup>33</sup> *Murray*, *supra* note 12, at 297-98.

<sup>34</sup> *Id.*

<sup>35</sup> RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977) (emphasis added).

the statement's defamatory content.<sup>36</sup> For example, courts have found that when a blind plaintiff asks a third person to read a letter addressed to the blind person, and the contents of the letter are unknown to the blind person, then the publication requirement is satisfied when the letter is read by the third person.<sup>37</sup> In the example, the exception is based on the plaintiff's unawareness of the defamatory nature of the matter as the writer of the letter did not directly publish the defamatory matter to a third person. Traditionally, however, this exception has been limited to nonemployment settings.<sup>38</sup>

### B. *Negligent Publication: The Doctrine of Compelled Self-Publication*

In addition to the unawareness exception, two formulations of self-publication with awareness have eroded the common-law publication requirement.<sup>39</sup> Although interpretations of the comment differ, comment k of the *Restatement of Torts*, section 577, explains the law of those jurisdictions that allow an exception to the common-law publication requirement without a showing of unawareness. The comment states:

It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent

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<sup>36</sup> See *Lane v. Shilling*, 279 P. 267 (Or. 1929) (finding a letter containing defamatory matter about the person to whom it was addressed actionable because, by reason of that addressee's blindness, the writer had reason to believe that the letter the blind person received would be read by the addressee's wife); see also *Bander v. Metropolitan Life Ins. Co.*, 47 N.E.2d 595 (Mass. 1943); *Rumney v. Worthley*, 71 N.E. 316 (Mass. 1904); *Wilcox v. Moon*, 24 A. 244 (Vt. 1892).

<sup>37</sup> See generally *Bander*, 47 N.E.2d at 595; *Rumney*, 71 N.E. at 316; *Shilling*, 279 P. at 267; *Wilcox*, 24 A. at 244.

<sup>38</sup> A federal court sitting in a diversity suit has suggested that a less generous view of the doctrine be applied. *Mandelblatt v. Perelman*, 683 F. Supp. 379 (S.D.N.Y. 1988). The court, finding support in the *Restatement (Second) of Torts* § 577, cmt. m, suggested that the originator of the defamatory material should be liable for compelled republication only where such republication was made without awareness of the defamatory nature of the matter. *Mandelblatt*, 683 F. Supp. at 386. "However, . . . [the *Mandelblatt*] court found that the facts of the case before it did not lend themselves to a self-defamation claim and refrained from deciding whether the emerging doctrine, as [modified] or otherwise, would be consistent with New York law." *Weldy v. Piedmont*, No. 90 Civ. 2663 (KC), 1989 WL 158342, at \*5 (W.D.N.Y. Dec. 22, 1989), *rev'd on other grounds*, 985 F.2d 57 (2d. Cir. 1993).

<sup>39</sup> *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1344 (Colo. 1988) (en banc).

communication amounts to a publication just as effectively as an intentional communication.<sup>40</sup>

The text of comment k explains that conduct which creates an unreasonable risk that the defamatory matter will be conveyed to one other than the defamed person amounts to publication.<sup>41</sup> The comment has been interpreted in two ways. Both interpretations hold the defendant liable for certain foreseeable self-publication.<sup>42</sup> One approach imposes liability if it was foreseeable that the plaintiff was *likely* to repeat the statement.<sup>43</sup> The other approach "imposes liability if the defendant knew or could have foreseen that the plaintiff would be *compelled* to repeat the defamatory statement."<sup>44</sup>

The *Lewis* court chose the "foreseeable compulsion" exception.<sup>45</sup> Under this approach, it is not enough for it to be foreseeable that the allegedly defamatory matter will *likely* be republished by the defamed party; it must be foreseeable that the plaintiff will be under "*strong compulsion*" to republish the statement, and a situation must have arisen in which the plaintiff was actually compelled to republish the statement.<sup>46</sup>

In practice, any distinction between these two exceptions may be trivial. The difference may only be whether a court focuses on the foreseeability

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<sup>40</sup> RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977).

<sup>41</sup> *Churchey*, 759 P.2d at 1344.

<sup>42</sup> *Id.*

<sup>43</sup> See *Weldy v. Piedmont Airlines*, No. 90 Civ. 2663 (KC), 1989 WL 158342, \*5-6 (S.D.N.Y. 1989), *rev'd on other grounds*, 985 F.2d 57 (2d Cir. Dec. 22, 1993); *Elmore v. Shell Oil Co.*, 733 F. Supp 544, 546 (E.D.N.Y. 1988); *Polson v. Davis*, 635 F. Supp. 1130, 1147 (D. Kan. 1986); *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89, 94-95 (Cal. Ct. App. 1980); *Sigmon v. Womack*, 279 S.E.2d 254 (Ga. Ct. App. 1981); *Colonial Stores, Inc. v. Barrett*, 38 S.E.2d 306, 307 (Ga. Ct. App. 1946); *Belcher v. Little*, 315 N.W.2d 734, 738 (Iowa 1982); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 886-88 (Minn. 1986).

<sup>44</sup> See *Grist v. Upjohn Co.*, 168 N.W.2d 389, 406 (Mich. Ct. App. 1969); *Neighbors v. Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822, 824-25 (Mo. Ct. App. 1985); *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 444-45 (Tex. Ct. App. 1985); *First State Bank v. Ake*, 606 S.W.2d 695, 701-02 (Tex. Ct. App. 1980).

<sup>45</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 886-88 (Minn. 1986).

<sup>46</sup> In choosing this approach, the court in *Lewis* relied heavily on the decision in *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980). In *McKinney*, the court held that where "circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed," a cause of action for libel or slander can be maintained. *McKinney*, 168 Cal. Rptr. at 94.

requirement or focuses on the compulsion requirement.<sup>47</sup> What is important, however, is that many courts will recognize a cause of action for foreseeable self-publication.<sup>48</sup>

## V. POLICIES SUPPORTING THE PUBLICATION REQUIREMENT AND THOSE SUPPORTING THE EXCEPTIONS

### A. *Threat of Silence: The Policy Behind a Rigid Publication Requirement*

What factors support a rigid publication requirement? Of course, there is some notion of fairness: "Why should I be liable if you communicated the defamatory matter to someone else and, as a result, suffered injury?" Putting aside any notion of fairness, however, there is a more compelling rationale for a rigid publication requirement. As noted earlier, many defamation actions are brought against employers.<sup>49</sup> While the doctrine of self-publication may have limited application in other settings, its primary application is in the employer-employee context.<sup>50</sup> Those who oppose adoption of the self-publication doctrine fear that the threat of employer liability it poses will discourage communication between employers and employees.<sup>51</sup>

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<sup>47</sup> *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1344 (Colo. 1988) (en banc).

<sup>48</sup> *Supra* notes 39-46 and accompanying text. For courts refusing to recognize the doctrine, see *DeLeone v. Saint Joseph Hosp., Inc.*, 871 F.2d 1229, 1237 (4th Cir.), *cert. denied*, 493 U.S. 825 (1989) (rejecting the self-publication doctrine in hiring circumstances because this theory might visit liability for defamation on every Maryland employer each time a job applicant is rejected); *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257, 1263 (N.D. Ind. 1987) (finding judicial landmarks too unclear to presume that the state of Indiana would adopt the controversial doctrine of self-publication); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022, 1024 (Pa. Super. Ct. 1990) (granting an absolute privilege to employers in their communication with employees and effectively eviscerating the cause of action for compelled self-publication).

<sup>49</sup> Middleton, *supra* note 7, at 1, col. 4.

<sup>50</sup> For examples, see *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1344 (Colo. 1988) (en banc); *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 886-88 (Minn. 1986); *cf. Belcher v. Little*, 315 N.W.2d 734, 738 (Iowa 1982) (pertaining to slander of title).

<sup>51</sup> For courts that have failed to recognize such self-publication doctrines see *supra* note 48. For a discussion of statutory reactions to the threat of such social costs, see *infra* text accompanying Part VII.



### 1. *Reasons for Employer Silence*

The recognition of a new cause of action for self-publication will likely increase the number of defamation suits brought against employers. Even if successful on the merits, employers will be burdened by having to defend against defamation actions based on the doctrine of self-publication. Moreover, the threat of negative publicity accompanies most defamation suits.<sup>52</sup> The risks of litigation and bad publicity may push employers into taking “vows of silence.”<sup>53</sup> In short, recognizing a self-publication cause of action may discourage employer communication with employees. The social costs of such silence outweigh the individual rewards or possible legal reprisals.<sup>54</sup>

### 2. *The Harm to Employees from Employer Silence*

Employer silence may harm an employee’s economic and occupational status by causing employees to lose the advantage of a positive reference in their search for new employment. In fact, it is not hard to imagine situations in which an employer’s refusal to give a reference for a discharged employee would have a negative impact on the employee’s prospective employment chances.<sup>55</sup> A prospective employer may draw a negative inference from the fact that a previous employer refused to give a recommendation for the candidate.

Employees may also be harmed by not being provided with information concerning the employee’s work output as measured against the performance of fellow employees or industry standards. Whether in a present position or in a future job, information enables individuals to improve their own capabilities and work environment.<sup>56</sup> Such improvements are essential to promotions and increased worker productivity, which may result in higher wages for all employees.

Employer silence carries with it certain psychological costs as well. It is recognized that work gives employees psychological satisfaction.<sup>57</sup> Uncertainty surrounding a recent termination may leave terminated employees emotionally distressed with scars affecting the employees’ relationships at home and in

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<sup>52</sup> See Shore, *supra* note 12, at 873.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* “An employer’s unwillingness to provide a recommendation may also imply a negative reference and thus provoke a defamation suit.” *Id.* at 874 n.19 (citing *Tyler v. Macks Stores of S.C., Inc.*, 272 S.E.2d 633 (S.C. 1980)).

<sup>56</sup> Shore, *supra* note 12, at 873.

<sup>57</sup> See David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129–30 (1980).

future employment. Furthermore, employees who continue to work after the employer has discharged fellow employees may work in a paranoid state—distracted, disgruntled, and unable to concentrate because of uncertainty about which behavior warrants termination.

### 3. *The Harm to Employers from Silence*

Employers may also be harmed by the “chilling effect” of recognition of the doctrine of self-publication, at least as it is presently recognized. If employees do not know the cause of their termination, prospective employers probably will not know. As a result, employers may hire those who are ill-suited for a position or refuse to hire those that are well-suited because a previous employer has adopted a policy of refusing to give work references.

Some authority supports the idea that a mere firing is a *statement* which may be actionable.<sup>58</sup> Thus, a potential suit may exist when a person is fired and is not told the reason for the firing. If the termination followed an administrative meeting, disciplinary meeting, or investigation that the plaintiff attended, a claim of compelled self-publication may exist based on the content of such meeting.<sup>59</sup> If the discharged employee was not given a reason for his termination, it is possible that the discharged employee, in his search for new employment, will be compelled to discuss the circumstances surrounding his recent departure or termination. When an employee is forced to disclose statements made at a investigatory hearing or other meeting, the employee may have an actionable self-publication claim.

Thus, in order to avoid the risk of litigation and liability, employers may choose to terminate expendable employees, rather than investigate alleged problems. This protects employers by making the circumstances surrounding a termination too ambiguous to warrant a finding that the plaintiff was likely to or was compelled to disclose the circumstances of his termination. As a consequence, this approach will harm the employer who terminates an “innocent,” productive employee, and it will harm the innocent employee by putting him out of work. The employer’s risk assessment, however, may lead him to conclude that it is more economical to replace an employee rather than risk the potential harm a self-publication claim may present.

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<sup>58</sup> See *Rumpel v. Bank of Buffalo*, No. Civ-88-628E, 1992 WL 50176 (Wis. Ct. App. Jan. 22, 1992).

<sup>59</sup> See *Ritter v. Pepsi Cola Operating Co.*, 785 F. Supp. 61 (M.D. Pa. 1992) (basing a claim for self-publication on circumstances surrounding plaintiff’s resignation).

In light of the apparent threats to employers, universities, realtors, and others to whom the self-publication doctrine may apply, the doctrine of self-publication, in its present form, is too costly for society, to recognize.

### B. *The Rationale for Self-Publication Defamation*

How do the courts defend their acceptance of the doctrine of self-publication? The decision is often grounded on notions of proximate causation.

The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the republication. This causal link is no less strong where the foreseeable republication is made by the person defamed operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.<sup>60</sup>

Undoubtedly there are times, when a person compelled to republish defamatory matter about himself will be injured because of the republication. Whether it is the prospective employee looking for a job, the fired employee likely to or compelled to tell his wife that he was wrongly fired for sexual harassment, or the student wrongly expelled from one school applying to a new institution, a false statement impugning one's character or ability causes harm.<sup>61</sup> Furthermore, courts that recognize an exception to the common-law rule of publication are concerned not only with compensating injury, but also with encouraging truthful communication. Courts adhering to this standard explain that an employee's "only choice would be to [tell the truth] or to lie. Fabrication, however, is an unacceptable alternative."<sup>62</sup>

A student of torts might think that under today's negligence standards a self-publication claim would be available other than under the limited unawareness exception.<sup>63</sup> Ironically, however, very few jurisdictions have recognized another exception.<sup>64</sup> Most courts only recognize the unawareness

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<sup>60</sup> *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1344 (Colo. 1986) (en banc) (citing *McKinney v. County of Santa Clara*, 168 Cal. Rptr. 94-95 (Cal. Ct. App. 1980)).

<sup>61</sup> Outside the context of a previously fired employee interviewing with a prospective employer, it is uncertain how far the doctrine of self-publication can reach.

<sup>62</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 888 (Minn. 1986).

<sup>63</sup> *Id.*

<sup>64</sup> See *supra* notes 43-44 and accompanying text. For jurisdictions choosing not to adopt a doctrine of self-publication, see *supra* note 48.

exception to the rigid publication rule.<sup>65</sup> However, to require unawareness in all circumstances eviscerates the cause of action developed by the *Lewis* and *McKinney* courts.<sup>66</sup>

A predicate requirement that a plaintiff be unaware of the defamatory nature of the statements he is compelled to republish, would completely destroy the *Lewis* cause of action in many situations. The unawareness requirement ignores notions of proximate causation in most situations.<sup>67</sup> A self-publication defamation action based on “unawareness” is not merely a “less generous” cause of action . . . but an effectively eviscerated one . . . [because][a] rule requiring the plaintiff’s ignorance of the veracity of such statements at the time . . . [of publication] ignore[s] practical reality.”<sup>68</sup> In a situation in which a self-publication cause of action appears to be appropriate, the plaintiff, better than anyone, will know the substance and the truth of a statement concerning him.<sup>69</sup> For example, a student applying to a new college knows whether or not his expulsion from a previous school was justified because of alleged cheating.

## VI. JUDICIAL PROTECTIONS FOR THE EMPLOYER EVEN WHEN THE DOCTRINE OF SELF-PUBLICATION IS RECOGNIZED

Given the threat that the self-publication doctrine poses to free communication in the workplace, limits have been placed on the doctrine. The requirements of foreseeability,<sup>70</sup> and compulsion<sup>71</sup> may offer some protection to employers against liability in a self-publication suit.<sup>72</sup>

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<sup>65</sup> *Lane v. Shilling*, 279 P. 267 (Or. 1929).

<sup>66</sup> *Weldy v. Piedmont Airlines*, No. 90 Civ. 2663 (KC), 1989 WL 158342, at \*6 (W.D.N.Y. 1989), *rev'd on other grounds*, 985 F.2d 57 (2d Cir. Dec. 22, 1993).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at \*6. (“Inevitably, in employment discharge cases . . . the plaintiff will be aware of the veracity of any rationales relating to his conduct or non-conduct on the job.”).

<sup>70</sup> In the employment setting, the requirements of foreseeability for likely or compelled publication will be easy to meet because most people are forced to search for employment after being terminated. There are circumstances, however, in which the courts have held that it was not foreseeable that the plaintiff would republish the statements. *J. Crew Group, Inc. v. Griffin*, No. 90 Civ. 2663 (KC), 1990 WL 193918, at \*5 (S.D.N.Y. Nov. 27, 1990) (holding that the defendant could not foresee that the plaintiff would be compelled to republish the defamatory contents of a letter when the defendant instructed the plaintiff to offer an explanation to others that his termination was needed in order to carry out a change in corporate direction). Further, it probably is not foreseeable that the defendant will be compelled or even likely to divulge reasons for being denied employment. *But see DeLeone v. Saint Joseph Hosp., Inc.*, 871 F.2d 1229 (4th Cir.), *cert. denied*, 493 U.S. 825 (1989).

As a means of minimizing the threat of “chilling speech,” a qualified privilege also accompanies the recognition of the self-publication doctrine.

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<sup>71</sup> The compulsion requirement can be difficult to overcome, especially outside the employment setting. See Mastry, *supra* note 12, at 1101 n.46. Mastry compares various levels of compulsion, one of which includes the notion of “likely to republish.”

Those jurisdictions that recognize self-publication defamation . . . have required different levels of compulsion to satisfy the element of the tort. Compare *McKinney*, 110 Cal. App. 3d at 795, 168 Cal. Rptr. at 94 (requiring that plaintiffs show they were acting under *strong compulsion*) with *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439, 445 (Tex. Ct. App. 1985) (Defendant as a reasonably prudent person should have expected that plaintiff would repeat the defamation to others).

Mastry, *supra* note 12, at 1101 n.46.

Critics of this approach have complained that the compulsion element is too easily satisfied, and thus will give rise to numerous claims. *Lewis v. Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876, 896 (Minn. 1986) (Kelly, J., dissenting). There are, however, a number of cases finding the opposite. See *Pfluger v. Southview Chevrolet Co.*, 967 F.2d 1218, 1225 (8th Cir. 1992) (informing coworkers and “anyone who would ask” of reasons for dismissal is not compelled self-publication); *J. Crew*, 1990 WL 193918, at \*4-5 (Plaintiff “cannot have been compelled when, without being dishonest, he could have simply repeated the [non-defamatory] reason proposed by his employer. This alternative obviated [plaintiff’s] need to republish the defamatory statements.”); *Mandelblatt v. Perelman*, 683 F. Supp. 379, 386 (S.D.N.Y. 1988) (explaining that there is no compulsion to tell a job search consultant that a suit challenging defendant’s allegations of termination “for cause” has been instituted); cf. *Bretz v. Mayer*, 203 N.E.2d 665, 670-71 (Ohio 1960) (holding that a pastor had a duty to reveal to church officials imminent dangers and defaming statements made to the plaintiff in a letter addressed to the plaintiff which allegedly defamed the plaintiff).

Foreseeability of likely disclosure or foreseeable compulsion is not enough to warrant recovery of damages. As in any defamation action, there must be communication to a third party. That is, in a self-publication action there must be evidence the plaintiff was actually forced to reveal the alleged defamatory statements to a third party; mere speculation is not enough. *Roles v. Boeing Military Planes*, 1990 WL 110255, at \*6 (D. Kan. 1990), *aff’d*, 951 F.2d 1260 (10th Cir. 1991).

<sup>72</sup> There may be times when the requirement of compulsion is preferred and carries much greater weight than a simple foreseeability test. *Langvardt*, *supra* note 12, at 279-80. As *Langvardt* suggests, “[f]or instance, it may be foreseeable to the defendant that the plaintiff would repeat, to his relatives or friends, the defendant’s statements. It is questionable, however, whether there was any particular compulsion for the repetition to such persons.” *Id.* at 279 n.296; see also *Fieser v. University of Minn.*, No. C5-91-1592, 1992 WL 15582, at \*2, \*3 (Minn. Ct. App. Feb. 4, 1992) (explaining that the doctrine of compelled self-publication was not applicable because there were no allegations that the plaintiff was asked by prospective employers the reason for her discharge).

(requiring verification of the fees by an independent auditor)<sup>73</sup> The originator of the false and defamatory statement will not be liable for damages if the circumstances make the communication conditionally privileged, and the privilege is not abused.<sup>74</sup> The court in *Lewis* explained:

The doctrine of privileged communication rests upon public policy considerations. As other jurisdictions recognize, the existence of a privilege results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory.<sup>75</sup>

Absolute privileges do exist but generally do not arise in the employment termination context,<sup>76</sup> and they are available only in limited numbers of other circumstances.<sup>77</sup>

The *Lewis* court recognized a qualified privilege because it, "seem[ed] to be the only effective means of addressing the concern that every time an employer states the reason for discharging an employee it will subject itself to potential liability . . . . [U]nless a significant privilege is recognized by the courts, employers will decline to inform employees of reasons for discharges."<sup>78</sup> Because the same statements would have been privileged if the employer had directly stated them to the plaintiffs' prospective employers, it was logically consistent to grant an employer a qualified privilege for statements made to the plaintiffs that were then published to a prospective

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<sup>73</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 889 (Minn. 1986); RESTATEMENT (SECOND) OF TORTS § 593 (1977).

<sup>74</sup> *Lewis*, 389 N.W.2d at 889.

<sup>75</sup> *Id.*

[A] communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery.

*Id.*

<sup>76</sup> Langvardt, *supra* note 12, at 238.

<sup>77</sup> *The Restatement of Torts* lists a number of the absolute privileges, sometimes referred to as immunities: judicial officers, section 585; parties to judicial proceedings, section 587; attorneys at law, section 586; and publication required by law, section 592. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 585-92 (1977).

<sup>78</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 890 (Minn. 1986).

employer by the plaintiffs.<sup>79</sup> It is questionable, however, whether such a consistency argument was required. Any discussions with an employee concerning his work or his ability is a proper occasion for the application of a qualified privilege.<sup>80</sup>

### A. *Loss of the Privilege*

By definition, a conditional or qualified privilege does not grant absolute protection.<sup>81</sup> A privilege is lost if it is abused. A qualified privilege can be abused: (1) by excessive publication or by publication of matter that is not necessary to further the interest at stake; (2) by communicating false and defamatory matters to someone whose receipt of the statement is not reasonably necessary for the furtherance of such an interest;<sup>82</sup> or (3) by acting with malice in making a false and defamatory statement.<sup>83</sup>

Courts generally apply two standards when determining whether the defendant acted with the requisite malice needed to abuse a qualified privilege. Courts in most jurisdictions apply the common-law, ill-will malice standard. This standard focuses on the attitude of the defendant in making the false and defamatory statement.<sup>84</sup>

The "actual" or "constitutional" malice standard has also been applied in a few jurisdictions in determining whether or not the defendant has abused a conditional privilege.<sup>85</sup> This standard was established in *New York Times Co. v. Sullivan*<sup>86</sup> as a means of ensuring constitutional protection for speech

<sup>79</sup> *Id.*

<sup>80</sup> For a discussion of common-law privileges for defamatory communications, see Kevin T. Baine & Chad E. Milton, *Common Law Privileges For Defamatory Communications*, in LABEL LITIGATION 1992, at 39 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 338, 1992).

<sup>81</sup> *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022, 1024-26 (Pa. Super. Ct. 1990) (recognizing an absolute privilege for an employer to communicate with employees in Pennsylvania, and thus not allowing a claim for compelled self-publication to arise in Pennsylvania in the employer-employee context).

<sup>82</sup> Langvardt, *supra* note 12, at 240.

<sup>83</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 398 N.W.2d 876, 890 (Minn. 1986).

<sup>84</sup> *Id.* If this is the proper standard, then it is questionable whether the use of the phrase "negligent publication" is the appropriate term in self-publication exceptions. The *Restatement* uses the term negligent publication. See RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977).

<sup>85</sup> See *Dominguez v. Babcock*, 727 P.2d 362, 366 (Colo. 1986) (en banc); *Rumpel v. Bank of Buffalo*, No. Civ-88-628E, 1992 WL 50176 (Wis. Ct. App. Jan. 22, 1992).

<sup>86</sup> 376 U.S. 254, 279-80 (1964).

concerning "public figures." Under the "actual malice" standard, the focus is not on the attitude of the defendant. The relevant focus of the "actual" or "constitutional malice" standard is on the knowledge or subjective awareness of the defendant as to the truth or falsity of the allegedly false and defamatory statement.<sup>87</sup> These are very strict standards for the plaintiff; proving attitude, knowledge, or subjective awareness is difficult.

### B. *Prohibition of Punitive Damages*

Concerned with the problems of mitigation of damage and unreasonable burdens on employers, the *Lewis* court sought to minimize the threat of chilling speech in the employment context, while at the same time recognizing and justifying liability of employers for foreseeable compelled self-publication.<sup>88</sup> Relying on Minnesota's punitive damages statute, which prohibited punitive damages in new causes of action, the court prohibited the granting of punitive damages in compelled self-publication cases by holding that the tort was a "significant new basis for maintaining a cause of action."<sup>89</sup> The prohibition on punitive damages was viewed as a protection for employers against a plaintiff's intentional failure to mitigate damages. However, because the *Lewis* court based the restriction primarily on its interpretation of a statute, the prohibition against the award of punitive damages may be limited to Minnesota and other jurisdictions with similar punitive damage statutes.

## VII. STATUTORY RESPONSES

In Colorado and Minnesota, the only states in which the highest courts have adopted the doctrine of self-publication in the employment setting, the legislatures have responded by banning or restricting its application.<sup>90</sup> It is uncertain whether these responses are due to general societal disfavor or are the result of a strong employer lobby.

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<sup>87</sup> See *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting).

<sup>88</sup> *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876 (Minn. 1986).

<sup>89</sup> *Id.* at 891-92 (recognizing MINN. STAT. section 549.20 (1986) as a piece of legislation designed to limit the use of punitive damages and to codify only existing case law pertaining to punitive damages awards).

<sup>90</sup> COLO. REV. STAT. § 13-25-125.5 (1993); MINN. STAT. § 181.931-.935 (1987).



### A. Colorado

In response to judicial recognition of the doctrine of self-publication by the Colorado Supreme Court in *Churchey v. Adolph Coors Co.*,<sup>91</sup> the Colorado state legislature recently enacted *Colorado Revised Statutes* section 13-25-125.5. The statute states:

No action for libel or slander may be brought or maintained unless the party charged with such defamation has published, either orally or in writing, the defamatory statement to a person other than the person making the allegation of libel or slander. Self-publication, either orally or in writing, of the defamatory statement to a third person by the person making such allegation shall *not* give rise to a claim for libel or slander against the person who originally communicated the defamatory statement.<sup>92</sup>

Thus, a self-publication claim for defamation is unavailable in Colorado without exception.

### B. Minnesota

The legislature in Minnesota reacted in a similar fashion, although it is probable that Minnesota has not completely barred the cause of action for self-publication. The Minnesota statute's effect is to restrict some, but not all, discharged employees from bringing a cause of action based on the doctrine of self-publication.<sup>93</sup>

If an involuntarily discharged employee makes a written request within five working days of the discharge for the reason supporting the discharge, the Minnesota statute requires the employer to provide a discharged employee with a written statement.<sup>94</sup> The written statement must include the "truthful reason" for the termination.<sup>95</sup> Further, the statute states that "[n]o communication of the statement<sup>96</sup> furnished by the employer to the employee . . . may be made

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<sup>91</sup> 79 P.2d 1336, 1344 (Colo. 1988) (en banc).

<sup>92</sup> COLO. REV. STAT. § 13-25-125.5 (1993) (emphasis added).

<sup>93</sup> MINN. STAT. §§ 181.931-.935 (1987). For analysis of the statute see generally Langvardt, *supra* note 12 and text accompanying note 12.

<sup>94</sup> MINN. STAT. § 181.933 (1987).

<sup>95</sup> *Id.*

<sup>96</sup> Statement refers to a truthful written statement. Truthful most likely requires giving the actual reason for discharge, but it is not based upon the merit, validity, or veracity of

the subject of any action for libel, slander, or defamation by the employee against the employer."<sup>97</sup>

Although the Minnesota statute has effectively curtailed the use of the doctrine of self-publication, "it would not be wise to conclude that *Lewis* has been legislatively overruled."<sup>98</sup> Of course, if the requirements of the statute are met, a discharged employee cannot sue for self-publication defamation. Arguably, however, the statute fails to abolish the cause of action completely. For instance, the statute does not address situations in which a nonemployee is compelled to republish a defamatory statement concerning himself or herself, nor does it address slander of title<sup>99</sup> cases nor statements made by educational institutions.

Circumstances still exist in which the statute does not overrule the decision in *Lewis* with respect to the employment setting.<sup>100</sup>

The compelled self-publication doctrine of *Lewis* should remain available for discharged employee[s] [who meet the requirements of defamation and the test for compelled self-publication]. Among such situations would be those involving statements comparable to the following: (1.) a statement by the employer, to the discharged employee, of the reason for the employment termination, without the employee's having requested such statement pursuant to the statute (meaning that the statement was not what hereinafter will be referred to as a "statutory statement"); (2.) a statement by the employer, again to the discharged employee, with such statement being separate and apart from a statutory statement; (3.) a statement that ostensibly was a statutory statement but did not contain the "truthful" reason for the termination; and, (4.) a statutory statement that went beyond such "truthful" reason and mentioned other matters.<sup>101</sup>

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the given truthful reason. See *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 889 (Minn. 1986).

<sup>97</sup> MINN. STAT. § 181.933 (1987).

<sup>98</sup> Langvardt, *supra* note 12, at 251.

<sup>99</sup> Slander of title is defined as: "A false or malicious statement, oral or written, made in disparagement of a person's title to real or personal property, or of some right of his causing him special damage." BLACK'S LAW DICTIONARY 1388 (6th ed. 1990).

<sup>100</sup> Langvardt, *supra* note 12, at 251.

<sup>101</sup> *Id.* at 252.

## VIII. CONCLUSION

A. *Minimizing Liability of Employers*

The requirements of compulsion, privileges, and limitations on punitive damages are attempts to minimize the threat of self-publication claims. These attempts represent the recognition that open communication is beneficial to society and that the threat of liability could chill *all* speech in certain settings, not simply the defamatory speech. Regardless of the malice standard or unavailability of punitive damages, however, ad hoc protections are not enough to minimize the chilled speech effects caused by recognition of defamation by self-publication. Because of the risk of litigation, the best advice an attorney can give to a client employer is that the employer refrain from providing employees with reasons for discharge and work related recommendations. Silence eliminates almost all risks of liability from self-publication defamation for the employer. Furthermore, employers may mitigate the anxiety of the remaining employees by directing managers to assure the remaining employees in the same department that they are properly performing their jobs, and to inform the remaining employees of any improvements that need to be made. Attorneys, acting in the best interest of the client should advocate employer silence. As a result, however, society as a whole may suffer.

B. *A Proposed Modification to the Doctrine of Compelled Self-Publication*1. *A Proposed Statutory Definition*

The doctrine of compelled self-publication has not been adopted everywhere, nor has the question been addressed in every jurisdiction. If the doctrine is to be recognized in the employment setting, the only means of ensuring open communication while protecting an employee's reputation from false and defamatory utterances is to define the cause of action by statute. The statute should *require* a discharging employer to give a requesting employee the truthful reason<sup>102</sup> for the employee's discharge, yet it should also grant the employer or institution a qualified privilege that may be overridden by either ill-will or constitutional malice.<sup>103</sup> To ensure that all employers do not terminate employees suspected of wrongdoing rather than determining the

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<sup>102</sup> Truthful as defined *supra* note 96.

<sup>103</sup> Langvardt offered a similar proposal showing what would be required in order to abuse the privilege. Langvardt, *supra* note 12, at nn.58-64 and accompanying text.

veracity of their suspicions, the statute should require an investigation in certain defined instances.<sup>104</sup> Under this type of statute, an employer failing to conduct a required investigation would be subject to a determinable civil fine payable to the individual employee.

Further, under this statute, employers would retain the power to discharge a person, for any reason or no reason. Yet, the employer should be required to give a reason for the discharge<sup>105</sup> and, in certain defined instances, to conduct a "minimum" investigation<sup>106</sup> to ensure the discharge is reasonably based in fact. This will ensure against unwarranted harm to an employee's reputation, and it will prevent employers, in certain circumstances, from simply firing all employees suspected of any wrongdoing.

Even when the investigation is unreasonable, employers should not be subject to liability for defamation on the basis of negligence. Absent ill-will or constitutional malice, the qualified privilege should still protect the employer. The employer should only be held liable for a statutory civil penalty, paid to the plaintiff, for intentionally or willfully conducting an unreasonable investigation or not conducting one at all. If the penalty is a progressive penalty for repeat offenders, employers will fulfill their minimum required duties. Accordingly, the at-will rule will not be significantly altered by the statute, nor will negligent conduct on the part of the employer be encouraged. An employer will continue to be entitled to terminate an employee for any reason so long as he gives the truthful reason for such termination.<sup>107</sup> A showing of ill-will, malice or constitutional malice would still overcome the privilege because neither a maliciously acting party, nor a knowledgeable or subjectively aware party should escape liability for his actions. Most important, the statute should only remain in effect for a maximum of five years. At the end of five years the legislature should study the impacts of the statute and determine if the statute and the doctrine of self-publication are desirable restrictions on employer speech and conduct.

## 2. *Liability Under the Proposed Statute*

Under the hypothetical statute, liability would only be imposed in the following circumstances: (1) a defendant intentionally acting with ill-will

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<sup>104</sup> Situations lending themselves to an investigation into the veracity of the charge would arise when a person is suspected of stealing, cheating, or sexual harassment.

<sup>105</sup> Even if the reason for discharge is that the employee was fired for no other reason than the employer wanted to fire a random person that day.

<sup>106</sup> No investigation will be required if an employee is fired for a reason other than suspected misconduct.

<sup>107</sup> See *supra* note 105.

toward the plaintiff will lose any privilege and may be held liable for defamation in a court of law; (2) a defendant acting with knowledge or reckless disregard for the truth will lose the protection of the privilege and may be found liable for defamation; (3) a defendant failing to conduct a minimum reasonable investigation may be subject to civil statutory penalties for failure to meet the statute's requirements, but cannot be found liable for *defamation* for simply failing to investigate; and, (4) a defendant failing to give a reason for the termination of an employee would be held liable for a determinable civil fine.<sup>108</sup>

The offered modification is by no means intended to be a rejection of the at-will doctrine or an endorsement of the doctrine of self-publication. Proposals have been made to modify the doctrine of compelled self-publication to ensure recovery for injury while not overly chilling speech.<sup>109</sup> However, these proposals have failed to recognize that the slightest threat of liability for defamation will cause employers to hesitate to give a reason for a termination, regardless of the degree of protection offered by the elements or privileges. Recognition of the doctrine of self-publication is yet another judicial attack on freedom of speech. The erosion of our constitutional right to free speech has become an unfortunate reality. If the doctrine of self-publication is accepted by an intolerant society, steps must be taken to limit the elected judiciary's exercise of power. Therefore, if the doctrine is to be accepted, the legislature must step in and establish the boundaries. As one other author has warned:

Taking stock of the legal system's own limitations, we must realize that judges, being human, will not only make mistakes but will sometimes succumb to the pressures exerted by the government to allow restraints [on speech] that ought not to be allowed. To guard against these possibilities we must give judges as little room to maneuver as possible, and again, extend the boundary of the realm of protected speech into the hinterlands of speech in order to minimize the potential harm from judicial miscalculation and misdeeds.<sup>110</sup>

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<sup>108</sup> Thus, employers who remain apprehensive would not run the risk of large jury awards for defamation, but they would be subject to some statutory fine.

<sup>109</sup> For one alternative, see Langvardt, *supra* note 12, at 279-92.

<sup>110</sup> LEE C. BOLLINGER, *THE INTOLERANT SOCIETY* 78 (1986).

While the doctrine of self-publication appears to be potentially useful in a number of contexts, the doctrine infrequently arises in situations outside the employment context.<sup>111</sup> Therefore, freedom of speech should reign supreme over the limited quantum of harm that results in other compelled self-publication situations.

*Geoffrey J. Moul*

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<sup>111</sup> Case law on other fact situations is sparse.