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# NOTES

## ADDRESSING THE CLOUD OVER EMPLOYEE REFERENCES: A SURVEY OF RECENTLY ENACTED STATE LEGISLATION

A recent survey by the Society for Human Resource Management found that sixty-three percent of personnel managers refused to provide reference information about former employees to prospective employers.<sup>1</sup> Prompted by fear of lawsuits from disgruntled employees, many employers have adopted a "name, rank and serial number" approach to references, confirming only employees' dates of employment and job titles.<sup>2</sup> Several problems are inherent in this approach. Without complete references, prospective employers are forced either to hire prospective employees without the information necessary to make informed selections or reject employees and select other, potentially less desirable candidates. In the process, good candidates may be unable to secure jobs as a result of their past employers' reference policies.

This problem has not gone unnoticed by state legislatures. The threat of increased legal action and the current inability of employers to obtain references on prospective employees prompted employer groups and human resource professionals to call on state legislatures to "lift the cloud that hangs over reference-checking."<sup>3</sup> In an effort to increase the free exchange of references, at least twenty-six states now provide some type of statutory immunity for employers when they provide a reference.<sup>4</sup>

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1. See Frances A. McMorris, *Some Firms Less Guarded in Sharing Job References*, ARIZ. REPUBLIC/PHOENIX GAZETTE, July 15, 1996, at E4.

2. See D. Scott Landry & Randy Hoffman, *Walking the Fine Line on Employee Job Reference Information*, 43 LA. BAR J. 457, 457 (1996).

3. Michael R. Losey, *Reference-Checking Protocols Leave Everyone in the Dark*, MANAGING OFF. TECH., Nov. 1, 1995, at 34.

4. The states with employment reference statutes are Alaska, Arizona, California,

Prior to 1995, only five states had such laws.<sup>5</sup> This Note examines the nationwide trend towards employer immunity.

Numerous factors influence employers' decisions to provide references. Traditionally, employers were concerned about defamation suits.<sup>6</sup> The common law affords employers a conditional privilege for the disclosure of information concerning employees;<sup>7</sup> however, many employers view this protection as inade-

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Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming. See ALASKA STAT. § 09.65.160 (Michie 1996); ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); CAL. CIV. CODE § 47(c) (West Supp. 1997); COLO. REV. STAT. § 8-2-114 (Supp. 1996); DEL. CODE ANN. tit. 19, § 708 (Supp. 1996); FLA. STAT. ANN. § 768.095 (West Supp. 1997); GA. CODE ANN. § 34-1-4 (Supp. 1996); IDAHO CODE § 44-201 (Supp. 1996); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1 (Michie 1997); KAN. STAT. ANN. § 44-119a (Supp. 1996); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1996); MD. CODE ANN., CTS. & JUD. PROC. § 5-399.7 (Supp. 1996); MICH. COMP. LAWS ANN. § 423.452 (West Supp. 1997); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); OHIO REV. CODE ANN. § 4113.71 (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61 (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1 (Supp. 1996); S.C. CODE ANN. § 41-1-65 (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); UTAH CODE ANN. § 34-42-1 (Supp. 1996); WIS. STAT. ANN. § 895.487 (West 1997); WYO. STAT. ANN. § 27-1-113 (Michie Supp. 1996); see also Julie Forster, 25 *States Adopt 'Good Faith' Job Reference Laws to Shield Businesses From Liability*, WEST'S LEGAL NEWS, July 2, 1996, available in 1996 WL 363324.

While this Note was being prepared for publication, a twenty-seventh state, North Dakota, passed its own employer reference law. See N.D. CENT. CODE § 34-02-18 (Supp. 1997). Due to its recent enactment, North Dakota's employer reference statute is not discussed.

5. See Forster, *supra* note 4 (noting that only Alaska, California, Colorado, Florida, and Georgia had employer-immunity laws prior to 1995).

6. See generally John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797 (1989); Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992); O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305 (1988); Ann M. Barry, Comment, *Defamation in the Workplace: The Impact of Increasing Employer Liability*, 72 MARQ. L. REV. 264 (1989); Deborah Daniloff, Note, *Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace*, 40 HASTINGS L.J. 687 (1989).

7. See RODNEY A. SMOLLA, LAW OF DEFAMATION § 15.07[2][a][ii] (1986 & Supp. 1996).

quate.<sup>8</sup> Negligent hiring suits, whereby employers can be held liable for damages resulting from their failure to adequately investigate employees' backgrounds,<sup>9</sup> combined with increasing concern over negligent referral or negligent misrepresentation claims, have compounded employers' legal concerns in recent years.<sup>10</sup> Under this latter cause of action, employers can be held liable for not disclosing potentially dangerous characteristics of former employees or for misrepresenting the actual reasons for an employee's termination.<sup>11</sup>

The legal relationship between employers and employees also has changed in recent years. Statutory measures, such as Title VII of the Civil Rights Act of 1964,<sup>12</sup> have created additional remedies for employees suffering defamatory references.<sup>13</sup> Perhaps the greatest single cause of the current reference gridlock is employers' apparent misconception concerning the likelihood of a lawsuit based on a reference. According to a group representing employers' interests, many companies have adopted a "no comment" policy toward requests for references, despite the fact that their fear of lawsuits outweighs the actual number of such suits.<sup>14</sup> The recent statutory reforms are an attempt by state legislatures to address some of these concerns.

The first section of this Note briefly examines the causes of action that can stem from employee references. The second section discusses the current environment employers face as they weigh the potential costs and benefits of providing references. The Note also addresses the policy concerns that are inherent in any attempt to encourage the exchange of references. The next

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8. See Forster, *supra* note 4.

9. See Carol Kleiman, *Negligent Hiring Law Ensures a Safer Workplace*, CHI. TRIB., Aug. 18, 1996, at 1; McMorris, *supra* note 1.

10. See Forster, *supra* note 4.

11. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997) (holding that a school district could be held liable for negligently misrepresenting qualifications of a former employee who sexually assaulted a student); see also McMorris, *supra* note 1 (noting that a Florida court held that an employer could be held liable for failing to disclose the violent nature of a former employee).

12. 42 U.S.C. § 2000e-3(a) (1994).

13. See *infra* text accompanying notes 82-83.

14. See Forster, *supra* note 4 (citing Sharon Horrigan, state legislative affairs manager for the Society for Human Resource Management).

section surveys the various laws state legislatures have passed recently in an effort to address these problems. It analyzes the different approaches utilized by the states, how they alter common law doctrines, and, most importantly, how effective they are likely to be in promoting the exchange of employee references. This Note proposes a model statute that incorporates some of the features of these new statutes as well as some of the proposed reforms offered by academics. Specifically, the proposed statute would require that in safety sensitive employment settings, employers should be required by statute to disclose relevant information about potentially dangerous employees. The Note concludes that despite the state legislatures' efforts, the majority of statutes will ultimately prove ineffective in encouraging cautious employers to freely exchange referrals. Indeed, it argues that legislative action alone is incapable of adequately achieving the goal of facilitating the exchange of references. Finally, this Note addresses the root cause of the current reference gridlock—employers' fears over lawsuits. In order for individual employers to make a reasoned assessment about providing a reference, they need documented evidence about the potential risks they face. Associations representing employers should, therefore, assess the true risks of defamation suits.

#### POTENTIAL CAUSES OF ACTION

Acts of hiring or providing references potentially can expose employers to several forms of liability. Perhaps the most obvious is a defamation claim. In a defamation claim, the harm of a negative or untrue reference is borne by the employee through damaged reputation or loss of a job opportunity.<sup>15</sup> Claims of negligent hiring and negligent misrepresentation are also becoming increasingly important. In contrast to defamation claims, the damages resulting from these actions are borne by third parties who were harmed as a result of hiring an individual.<sup>16</sup>

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15. See SMOLLA, *supra* note 7, at § 15.01.

16. See *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983) (stating that in negligent misrepresentation claims, negative or untrue references injure third parties).

To understand fully the aims of the newly enacted statutes, an overview of each cause of action is required.

### *Defamation*

At common law, the elements of a defamation claim are:

- (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.<sup>17</sup>

A communication is defamatory if it tends to harm the reputation of another in a way that lowers that person in the estimation of the community or deters others from associating with that person.<sup>18</sup>

Numerous authors have discussed at length the claim of defamation as it relates to employee references.<sup>19</sup> A particularly vexing concern for employers is that any statement, even one expressed as an opinion, can amount to actionable defamation if it reasonably implies a false assertion of fact.<sup>20</sup> Statements that negatively represent an employee's abilities, criminal history, honesty, or integrity can be bases for a defamation claim.<sup>21</sup>

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

18. *See id.* § 559.

19. *See supra* note 6.

20. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990); W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 113, at 814 (5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 566 (1977) (stating that a defamatory communication in the form of an opinion can be actionable if it implies the allegation of undisclosed defamatory facts as the basis for an opinion). An opinion can be regarded as false if either the speaker did not entertain the opinion expressed or if a reasonable person would not have that opinion based on the facts. *See KEETON ET AL.* § 113a, at 816.

21. *See* RONALD M. GREEN & RICHARD J. REIBSTEIN, EMPLOYER'S GUIDE TO WORKPLACE TORTS 63 (1992).

Truth is an absolute defense to a defamation claim.<sup>22</sup> Another defense to a defamation claim is privilege.<sup>23</sup> A publication may be privileged if "there is information that affects a sufficiently important interest of the recipient or a third person" and "the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct."<sup>24</sup> An absolute privilege exists for statements made in judicial proceedings, legislative proceedings, and executive communications.<sup>25</sup> In instances in which public policy favors the free exchange of information over an individual's interest in his or her privacy, a qualified privilege exists.<sup>26</sup> As a general rule, statements made in the employer reference context are considered conditionally privileged due to the important interest at stake.<sup>27</sup>

Once the defendant establishes the existence of a privilege, the plaintiff bears the burden of proving its abuse.<sup>28</sup> Under common law, the privilege can be abused by knowledge of falsity or reckless disregard as to the falsity of the defamatory matter, publication for an improper purpose, publication to persons other than those to whom the communication is important, or publication not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged.<sup>29</sup> Although the term "malice" is not listed in the Restatement, it is often cited as a condition required to defeat common law qualified privilege.<sup>30</sup>

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22. See RESTATEMENT (SECOND) OF TORTS § 581A.

23. See *Turner v. Halliburton Co.*, 722 P.2d 1106, 1112 (Kan. 1986).

24. RESTATEMENT (SECOND) OF TORTS § 595(1).

25. See KEETON ET AL., *supra* note 20, § 114, at 815-23. An absolute privilege also applies when the plaintiff consents to the defamatory publication in the marital relationship and in political broadcasts. See *id.* at 823-24.

26. See *Halliburton*, 722 P.2d at 1112.

27. See RESTATEMENT (SECOND) OF TORTS § 595, cmt. i; see also *Reed & Henkel*, *supra* note 6, at 312 (stating that in a typical employer defamation case, the requisites for qualified privilege exist).

28. See KEETON ET AL., *supra* note 20, § 115, at 835.

29. See RESTATEMENT (SECOND) OF TORTS § 600-605A (1977).

30. See *Reed & Henkel*, *supra* note 6, at 312.

### *Negligent Hiring*

The tort of negligent hiring is now recognized in almost every state.<sup>31</sup> Under this theory, "an employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public."<sup>32</sup> Because an employer can be held liable for acts of its employees which occur outside the scope of the employees' duties, negligent hiring is an exception to the doctrine of respondeat superior.<sup>33</sup>

To succeed on a claim of negligent hiring, a plaintiff must prove:

1. "[T]he employee who caused the injury was unfit for hiring or retention, or was fit only if properly supervised."<sup>34</sup>
2. "[T]he employer's hiring or retention of the unfit employee, or the failure to properly supervise the employee, was the proximate cause of the plaintiff's injuries."<sup>35</sup>
3. "[T]he employer knew or should have known of the employee's lack of fitness."<sup>36</sup>

The "prototype example of a negligent hiring claim"<sup>37</sup> is *Ponticas v. K.M.S. Investments*.<sup>38</sup> In *Ponticas*, prior to hiring the employee as resident manager of an apartment complex, the employer failed to make any inquiry into the employee's background other than performing a credit check and having him complete a standard application form.<sup>39</sup> The employer was therefore, unaware of the employee's convictions for burglary,

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31. See GREEN & REIBSTEIN, *supra* note 21, at 5.

32. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983).

33. See RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (stating the elements of a traditional respondeat superior claim).

34. GREEN & REIBSTEIN, *supra* note 21, at 5.

35. *Id.*

36. *Id.*

37. Paul S. Swedlund, *Negligent Hiring and Apportionment of Fault Between Negligent and Intentional Tortfeasors: A Consideration of Two Unanswered Questions in South Dakota Tort Law*, 41 S.D. L. REV. 45, 61 (1996).

38. 331 N.W.2d 907 (Minn. 1983).

39. See *id.* at 909-10.



receiving stolen property, and armed robbery.<sup>40</sup> As resident manager, the employee had access to all of the apartments in the complex through use of a passkey.<sup>41</sup> Soon after being hired, the employee entered a tenant's apartment through use of the passkey and sexually assaulted the tenant at knifepoint.<sup>42</sup>

The court in *Ponticas* concluded that the scope of the employer's duty to investigate a prospective employee is "directly related to the severity of risk third parties are subjected to by an incompetent employee."<sup>43</sup> An employer's responsibility to investigate might be limited in situations where the risk of injury to others is slight; however, in situations where there is a risk of substantial harm to third parties, "the employer has the duty to use reasonable care to investigate his competency and reliability prior to employment."<sup>44</sup>

The rise of negligent hiring claims illustrates the important role that references play in the hiring process. Because employers are responsible in certain situations for investigating the background of prospective employees, the need to obtain complete information on those individuals takes on greater urgency. Former employers may have legal concerns over providing references, but potential employers may have equally pressing legal needs to obtain such references.

### *Negligent Referral*

In a 1991 law review Note, Janet Swerdlow spoke of negligent referral as a potential theory of recovery for plaintiffs.<sup>45</sup> Swerdlow argued that a legal basis exists for imposing upon employers an affirmative duty to provide employee references.<sup>46</sup> No such duty currently exists.<sup>47</sup> Two recent cases, however,

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40. See *id.* at 909.

41. See *id.*

42. See *id.*

43. *Id.* at 913.

44. *Id.*

45. See Janet Swerdlow, Comment, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645, 1667-71 (1991).

46. See *id.* at 1660-71.

47. See generally *Moore v. St. Joseph Nursing Home*, 459 N.W.2d 100, 102 (Mich.

suggest that when employers choose to provide references, they can be held liable for the harms that result if the references misrepresent or omit relevant facts about employees' dangerous propensities.

*Randi W. v. Muroc Joint Unified School District*,<sup>48</sup> involved a series of recommendation letters written by former employers of a school vice principal accused of sexually assaulting a thirteen-year-old female student.<sup>49</sup> The student's complaint alleged that the former employers provided detailed recommendation letters to the prospective school employer despite knowledge of prior sexual misconduct with female students.<sup>50</sup> The letters described the vice principal in glowing terms and unconditionally recommended him for an administrative position, despite his forced resignation under pressure due to his past behavior with female students.<sup>51</sup> Although the letters did not affirmatively state that the vice principal was never accused of sexual misconduct, the California Supreme Court ruled the omission of such accusations, coupled with the unqualified recommendations, rendered the letters affirmative misrepresentations.<sup>52</sup>

More importantly, the court held that the former employers owed a duty to the student to refrain from misrepresenting the qualifications of their former employee.<sup>53</sup> In so doing, the court relied on sections 310 and 311 of the *Restatement (Second) of Torts*.<sup>54</sup> Section 310 states:

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

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or

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Ct. App. 1990) (referring to the duty to disclose information about a past employee as merely "an imperfect obligation of a moral or social character").

48. 929 P.2d 582 (Cal. 1997).

49. *See id.* at 584-85.

50. *See id.* at 585.

51. *See id.*

52. *See id.* at 592-93.

53. *See id.* at 591.

54. *See id.*

a third person, which involves an unreasonable risk of physical harm to the other, and

(b) knows

(i) that the statement is false, or

(ii) that he has not the knowledge which he professes.<sup>55</sup>

Section 311 states in part:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.<sup>56</sup>

The defendants argued that holding employers liable in these types of situations would inhibit employers from providing reference information.<sup>57</sup> Once employers decided to provide references, the defendants argued, they would be forced to include all negative information, including unproven rumors about employees, thus exposing themselves to potential defamation suits.<sup>58</sup> Rather than taking this risk, employers would simply adopt "no comment" policies or confirm only employees' positions, salaries, and dates of employment.<sup>59</sup> The plaintiff responded that an employer's qualified privilege would be sufficient to protect employers from such suits and to encourage the exchange of references in the typical situation.<sup>60</sup> Despite the defendants' policy concerns, the California Supreme Court agreed with the court of appeals' conclusion that there was "no compelling reason to reject section 311 subdivision (1)(b)."<sup>61</sup> The court attempted to limit its holding, however, by restricting the

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55. RESTATEMENT (SECOND) OF TORTS § 310 (1977).

56. *Id.* § 311.

57. *See Randi W.*, 929 P.2d at 589-90.

58. *See id.* at 590.

59. *See id.*

60. *See id.* at 590-91.

61. *Randi W. v. Livingston Union Sch. Dist.*, 49 Cal. Rptr. 2d 471, 483 (Cal. Ct. App. 1995).

duty not to misrepresent to situations in which the making of representations "would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons."<sup>62</sup> In the absence of resulting physical injury or some special relationship between the parties, however, the court ruled that no such duty exists with regard to third persons, and that the policy of favoring the free exchange of references should prevail.<sup>63</sup>

Another alarming decision for employers involved similar facts. In *Allstate Insurance Co. v. Jerner*,<sup>64</sup> a Florida court of appeals upheld a lower court ruling that found a former employer liable for concealing the violent nature of Paul Calden, a former employee.<sup>65</sup> After being fired by his new employer, Calden returned to the employer's office building and shot five people.<sup>66</sup> The widows of three men killed in the attack sued Calden's former employer, Allstate Insurance Company, for providing a misleading reference that contributed to their husbands' deaths.<sup>67</sup> Despite its policy of not giving recommendation letters, Allstate had provided a reference to Calden's new employer, Fireman's Fund Insurance Company, stating that Calden had resigned voluntarily due to corporate restructuring.<sup>68</sup> In reality, Allstate had induced Calden's resignation because he came to work with a gun, threatened other employees, and generally acted in a bizarre fashion.<sup>69</sup>

Both *Jerner* and *Randi W.* created potential concern for employers considering whether to provide a reference. Neither case establishes an affirmative duty to respond to a request for a reference, but the cases do stand for the proposition that if for-

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62. *Randi W.*, 929 P.2d at 591.

63. *See id.*

64. 650 So.2d 997 (Fla. Dist. Ct. App. 1995) (denying certiorari).

65. *See* McMorris, *supra* note 1, at E4.

66. *See* Martie Ross, *Employee References: No Longer Damned If You Do, but Possibly Damned If You Don't*, KAN. EMPLOYMENT L. LETTER, Feb. 1996, at 1-2, available in LEXIS, Employ Library, Emplaw File.

67. *See* Kleiman, *supra* note 9.

68. *See* Ross, *supra* note 66, at 2.

69. Some of Calden's more bizarre behavior involved his claim that he was from another planet and that his image could not be captured in a photograph. *See id.* Calden's employer was so concerned about his behavior that he contacted the FBI and the local sheriff's office and inquired whether they were investigating Calden. *See id.*

mer employers provide references, they may be held liable to third parties for misrepresenting or intentionally omitting relevant information.<sup>70</sup> By disclosing negative information, employers potentially expose themselves to defamation claims.<sup>71</sup> By *intentionally failing* to include negative information, employers face possible negligent referral claims.<sup>72</sup> These rulings have helped to create a "damned if you do, damned if you don't" fear among employers that discourages the exchange of references.<sup>73</sup> Although these two cases appear isolated, the wide publicity they received helped to trigger a campaign to create some form of statutory immunity for employers and placed the issue of references before state legislatures.<sup>74</sup>

#### OTHER FACTORS EXPLAINING EMPLOYER UNWILLINGNESS TO PROVIDE REFERENCES

In addition to potential defamation, negligent hiring, and negligent referral suits, employers today must contend with an increasing number of statutory and judicial restrictions on their actions. The decline of the "at will presumption" is one such restrictive force.<sup>75</sup> Ironically, growing concern over the issue of violence in the workplace has both increased prospective employers' need for references and decreased the willingness of employers to provide references.<sup>76</sup> Finally, the burden of defending suits based on references creates an additional disincentive for employers to provide references.<sup>77</sup>

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70. See *Randi W. v. Muroc Union Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997).

71. See Kleiman, *supra* note 9.

72. See *id.*

73. See *id.*; see also, Maura Dolan & Stuart Silverstein, *Court Broadens Liability for Job References*, L.A. TIMES, Jan. 28, 1997, at A1 (quoting a lawyer as saying that *Randi W.* "tells employers, 'Do not give references'").

74. See McMorris, *supra* note 1.

75. See *infra* text accompanying notes 80-81.

76. See *infra* text accompanying notes 91-99.

77. See *infra* text accompanying notes 100-04.

*The Decline of the At Will Presumption*

At common law, the at will presumption governs the employment relationship.<sup>78</sup> This doctrine assumes that both employers and employees are free to terminate their relationship at any time for any reason.<sup>79</sup> In recent years, judicial and legislative actions have weakened this presumption.<sup>80</sup> While this trend arguably has benefited employees, it has caused employers to be particularly cautious when they terminate employees.<sup>81</sup>

In addition to limiting employers' rights to fire for discriminatory reasons, the Supreme Court recently has interpreted section 704(a) of Title VII of the Civil Rights Act of 1964<sup>82</sup> to create a private right of action for former employees who have received discriminatory, negative referrals from past employers.<sup>83</sup> Many states have antiblacklisting statutes that prohibit employers from seeking to prevent former employees from obtaining other employment.<sup>84</sup> The Americans With Disabilities Act's (ADA's)<sup>85</sup> recognition of mental illness as a disability<sup>86</sup> creates a potential Catch-22 for employers.<sup>87</sup> While employers could be held liable

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78. See 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 12-15 (1994).

79. See *id.* at 13.

80. Many courts recognize the tort claim of wrongful discharge in violation of public policy, whereby an employer's motive for discharging an employee harms an important interest of the community. See, e.g., *Nees v. Hocks*, 536 P.2d 512, 515 (Or. 1975). Other courts have recognized an implied covenant of good faith and fair dealing in the employment setting, whereby neither party may do anything that has the effect of injuring the right of another to receive the fruits of the contract. See generally Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233 (1992) (comparing different conceptions of the covenant among the states).

81. See Lillard, *supra* note 80, at 1242.

82. 42 U.S.C. § 2000e-3(a) (1994).

83. See *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (holding that the term "employees" as used in Title VII § 704(a) includes former employees).

84. For a discussion of these statutes, see Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 54-57 (1995).

85. 42 U.S.C. § 12,101-12,213 (1994).

86. See 42 U.S.C. § 12,102(2).

87. See Edward Felsenthal, *Potentially Violent Employees Present Bosses with A Catch-22*, WALL ST. J., Apr. 5, 1995, at B1 (discussing a lawsuit brought against an employer for firing an employee whose mental instability qualified as a disability under the ADA).

under a negligent retention theory for retaining dangerous workers, they could also be subject to liability under the ADA for firing mentally unstable and potentially dangerous workers.<sup>88</sup>

The decline of the at will presumption has, therefore, provided employees with more potential causes of action in the event of dismissal. As a result, employees may sue under more than one theory if they believe they were terminated wrongfully.<sup>89</sup> According to one estimate, employment litigation and civil rights complaints associated with employment have increased by 2,166% over the last twenty years.<sup>90</sup>

### *Workplace Violence*

Another concern affecting employers in their decisions regarding references is the highly publicized issue of workplace violence.<sup>91</sup> Employers cannot help but be alarmed when they read the horror stories that are reported routinely in the news. One of the more infamous examples is that of Gian Luigi Ferri, the gunman who opened fire in the offices of the San Francisco law firm Pettit & Martin in 1993, killing eight people.<sup>92</sup>

According to the U.S. Labor Department, homicides were the second leading cause of workplace death in 1995.<sup>93</sup> On average, twenty workers are slain and 18,000 assaulted at work each week according to the National Institute for Occupational Safety and Health (NIOSH).<sup>94</sup> According to one survey, nearly half of

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88. See *id.*

89. See Paetzold & Willborn, *supra* note 6, at 139 (noting that from 1965 to 1969, only six of twenty-five employment-related defamation suits involved wrongful discharge or constitutional claims, whereas from 1985 to 1986, 64 of 118 suits included such claims).

90. See *Catch 22: Informed Employees Sue More*, CORP. LEGAL TIMES, June 1995, at 34.

91. See Kleiman, *supra* note 9 (discussing a management consulting firm addressing problems of negligent hiring and workplace violence).

92. See *Shooting Fields Are Everywhere, San Francisco Horror Reveals Problem Anew*, L.A. TIMES, July 3, 1993, at B7; Jenifer Warren & Patt Morrison, *Roving Gunman Kills 8, Self in S.F. High-Rise*, L.A. TIMES, July 2, 1993, at A1.

93. See Rochelle Sharpe, *Work Week*, WALL ST. J., Aug. 27, 1996, at A1.

94. See *NIOSH Study Shows 20 Workers Slain Each Week; Florida Cities Implement Violence Prevention Programs*, WEST'S LEGAL NEWS, Aug. 8, 1996, available in 1996 WL 443253 [hereinafter *NIOSH Study*].

1,000 human resource managers surveyed reported that one or more violent incidents had occurred at work since January 1, 1994.<sup>95</sup>

Some basis exists, however, to conclude that the problem of workplace violence has been dramatically overstated. According to one federal study, only fifty-nine employees out of a national workforce of 120.8 million, or approximately one in two million, were killed by co-workers or former co-workers during 1993.<sup>96</sup> The odds of getting struck by lightning are higher.<sup>97</sup> Not surprisingly, the NIOSH study indicates that the greatest threat of workplace homicide stems, not from other employees, but from violence incident to robberies, especially for retail workers and taxi cab drivers.<sup>98</sup>

Regardless of the reality, the perception that workplace violence is on the rise clearly exists.<sup>99</sup> This perception helps explain the importance of complete and accurate references to employers. Alarmed by workplace violence statistics, employers understandably may refuse to hire employees who lack references for fear of exposing their companies to potential negligent hiring charges.

### *Cost As a Deterrent*

The evidence indicates that employers win the majority of defamation suits brought against them.<sup>100</sup> Logically, employers should have little to fear about facing such suits. The cost of defending such suits, however, is by itself a deterrent to employ-

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95. See Lindsey Novak, *Danger Zone; Workplace Violence Is on the Rise*, CHI. TRIB., Aug. 25, 1996, at 1 (citing a survey by the Society for Human Resource Management).

96. See Erik Larson, *Trigger Happy: A False Crisis: How Workplace Violence Became a Hot Issue*, WALL ST. J., Oct. 13, 1994, at A1.

97. See *id.* (citing National Weather Service statistics of one in 600,000 odds of being struck by lightning).

98. See NIOSH Study, *supra* note 94.

99. See, e.g., *id.* (referring to disgruntled workers as a stereotypical source of workplace violence).

100. See Reed & Henkel, *supra* note 6, at 318; see also Paetzold & Willborn, *supra* note 6, at 136-37 (relating results of a survey showing that plaintiffs won only 25% of cases involving employment references from 1985 to 1989).



ers who are considering whether to provide references.<sup>101</sup> Abuse of the conditional privilege to defame is generally a question of fact for a jury.<sup>102</sup> Unless employers are able to obtain summary judgments, they most likely will spend substantial time and money defending against defamation claims. This expense is particularly burdensome on smaller companies.<sup>103</sup> A number of employers may simply elect not to provide references and thereby avoid the burden of having to face defamation claims.<sup>104</sup>

### *Employer Groups Strike Back*

Given the factors discussed above, many employers choose not to supply references. In response to these concerns, employer groups have mobilized in recent years to lobby state legislatures in an attempt to provide reluctant employers some type of statutory immunity when they provide a reference.<sup>105</sup> Groups such as the Society for Human Resource Management and the National Federation of Independent Businesses (NFIB) began a national campaign to convince state legislatures that the common law protections afforded employers were insufficient to allow employers to exchange references freely.<sup>106</sup> According to the NFIB, ninety percent of its members indicated on an association survey that they needed legislative protection when giving references.<sup>107</sup>

Organized labor and trial lawyers' associations in many states opposed the campaign.<sup>108</sup> Opponents argued that the proposed legislation would prevent employees from having legal recourse

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101. See Reed & Henkel, *supra* note 6, at 318.

102. See *id.*

103. See Forster, *supra* note 4, at 2 (quoting a Society for Human Resource Management representative as saying that attorney fees in defamation cases "can literally shut down a small employer").

104. See *id.*

105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

in the event of defamatory references.<sup>109</sup> Furthermore, opponents complained that the entire employer reference problem had been exaggerated and that the statutory reforms were unnecessary.<sup>110</sup>

Apparently, legislators were sympathetic to the concerns of employers, because the number of employer immunity statutes increased dramatically.<sup>111</sup> The trend toward legislation is likely to continue. At least sixteen state legislatures have considered, but failed to pass, employer reference legislation.<sup>112</sup> According to Sherman Joyce, president of the American Tort Reform Association: "If there's any one issue that's really popped up on the [state legislature] screen, it's the employer reference issue."<sup>113</sup>

### COMPETING POLICY INTERESTS

Before the merits and faults of the various pieces of legislation are considered, a framework for analysis is needed. Although employers understandably are concerned about the situation at present, the laws will also affect the interests of employees. The interests of the two sides sometimes overlap,<sup>114</sup> but

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109. *See id.*

110. *See* Patrick Graham, *Bill Would Grant Immunity for Employer References*, MEMPHIS BUS. J., Feb. 26, 1996, at 15, available in 1996 WL 8428940.

111. *See supra* text accompanying notes 4-5.

112. To date, those states that have considered, but failed to pass, such legislation include Arkansas, Connecticut, Hawaii, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Carolina, Pennsylvania, Tennessee, Vermont, Virginia, and Washington. *See* H.B. 5797, 1997 Reg. Sess. (Conn. 1997), available in LEXIS, Conn. Library, Cttrck File; H.B. 1206, 1997 Reg. Sess. (Miss. 1997), available in LEXIS, Legis Library, Sttrck File; H.B. 538, Sess. of 1997 (N.C. 1997), available in LEXIS, Legis Library, Sttrck File; H.B. 166, 64th Biennial Sess. (Vt. 1997), available in LEXIS, VT Library, Vttrck File; Peter Callaghan et al., *Legislature 1997: Seahawk Stadium Bill Almost Snuffed; Legislation Survives Its First Deadline But Without Any Plan For How It Will Be Funded*, NEWS TRIB., Mar. 6, 1997, at B1, available in LEXIS, News Library, Curnws File (discussing Washington's proposed employer reference statute); Forester, *supra* note 4 (listing Hawaii, Iowa, Kentucky, Minnesota, Missouri, Nebraska, Pennsylvania, Tennessee, and Virginia); Amy Zuber, *States Mull Reference Protections for Employers*, NATION'S RESTAURANT NEWS, Apr. 21, 1997, at 3, available in LEXIS, News Library, Curnws File (listing, *inter alia*, Arkansas and New Hampshire).

113. Mark A. Hofmann, *State Wrap-Up 1996: Drive to Change Tort Laws Slows*, BUS. INS., June 17, 1996, at 1.

114. *See* Forster, *supra* note 4 (noting that legislation that promotes the circulation

often they are at odds.<sup>115</sup> Presumably, state legislators weighed several competing policy factors when voting on these statutes.

### *Societal Interest in the Free Exchange of References*

The analysis of the statutes must begin with the assumption that it is in society's best interest if employers exchange references. By having as much relevant information as possible, employers are better able to make informed selections when filling vacant positions.<sup>116</sup> This access to information, in turn, helps to ensure a safer and more efficient workplace. In many cases, employer reference exchange is also in the best interest of employees.<sup>117</sup> Given the current situation, some good employees are harmed by employers' unwillingness to provide references, while bad employees potentially are shielded from receiving the negative references they deserve.<sup>118</sup>

### *The Societal Interest in Reducing Employer Liability*

Society also is served by limiting employers' liability for providing references and by limiting the legal requirements employers must meet in order to exchange references. If employers are forced to clear numerous legal hurdles before they are afforded immunity for providing references, then they will be less likely to exchange references.<sup>119</sup> Limiting the requirements on employers before they attain immunity will enable employers to make more efficient use of time and resources in their day to day operations.<sup>120</sup> Furthermore, it would reduce the potential

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of references helps employers get good information and prospective employees get jobs).

115. See McMorris, *supra* note 1 (noting concerns of employees regarding unfavorable references).

116. See generally Paetzold & Willborn, *supra* note 6, at 124-25 (discussing the benefits of reference information).

117. See *supra* note 114.

118. See Forster, *supra* note 4 (quoting an NFIB spokesman as saying that the current situation hinders good employees and benefits bad employees).

119. See Reed & Henkel, *supra* note 6, at 315-18 (describing the negative impact of the litigation hurdles employers must overcome under current qualified privilege standards).

120. See Paetzold & Willborn, *supra* note 6, at 126-27 (noting the effect of defama-

for litigation premised solely upon the alleged failure to comply with a technical prerequisite creating immunity. Similarly, limiting employers' exposure to lawsuits would help reduce employers' expenditures on such suits and would encourage a more efficient use of resources.

### *The Societal Interest in Employee Privacy Rights*

Counterbalancing the above interests is the desire of society to protect employees' privacy rights. Reasonable public policy dictates that employers should not be able to disclose irrelevant or false information or to maliciously seek to hinder employees' employment prospects.<sup>121</sup> Although it would be a simple matter to grant employers blanket immunity even when they provide false references,<sup>122</sup> such a policy would obviously hinder the interests of those employees who have legitimate grievances. Similarly, society does not wish to see minor negative incidents permanently affect employees' employment prospects. As one attorney framed the issue, "[Should] somebody [be] unemployed for the rest of their life for getting into a fist fight?"<sup>123</sup>

### SURVEY OF THE STATUTES

Recent employer reference statutes share many common characteristics, but classifying any one statute as the "typical" employer reference law is difficult. This section is divided into two areas of analysis. The first area examines some of the characteristics the statutes share, such as the creation of a good faith presumption and conditional privilege on the part of employers,<sup>124</sup> the proscription of disclosures in violation of civil rights on non-disclosure agreements,<sup>125</sup> the types of information that

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tion liability on the costs of reference information); Reed & Henkel, *supra* note 6, at 318 (noting the cost and inefficiency of resolution through litigation).

121. See SMOLLA, *supra* note 7, § 15.07[2][a][ii].

122. See generally Reed & Henkel, *supra* note 6, at 311-12 (describing circumstances under which absolute privilege to defame is appropriate).

123. See McMorris, *supra* note 1 (quoting Garry Mathiason, a partner in the firm of Littler, Mendleson, Fastiff, Tichy & Mathiason).

124. See *infra* notes 133-64 and accompanying text.

125. See *infra* notes 165-67 and accompanying text.

may be disclosed in references,<sup>126</sup> and the issue of whether employers must wait for requests from prospective employers before providing references.<sup>127</sup> The second portion looks at some of the unusual provisions of the statutes, including the grant of an absolute privilege,<sup>128</sup> attorney fee shifting provisions,<sup>129</sup> protection from negligent hiring claims,<sup>130</sup> and the requirement that employees approve any release of information prior to its actual release.<sup>131</sup> Within each category, the changes, if any, the statutes have made to the common law are analyzed. Finally, each category analyzes the effectiveness of the provisions in balancing competing policy interests.<sup>132</sup>

### *The Good Faith Presumption and Its Abuses*

The most common feature of the new employer reference statutes is the creation of a rebuttable good faith presumption when employers publish references. Twenty-four of the twenty-six statutes either explicitly state or imply that employers who provide references according to all other statutory requirements are presumed to be acting in good faith.<sup>133</sup> Statutes that im-

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126. See *infra* notes 168-82 and accompanying text.

127. See *infra* notes 183-91 and accompanying text.

128. See *infra* notes 192-96 and accompanying text.

129. See *infra* notes 197-205 and accompanying text.

130. See *infra* notes 206-08 and accompanying text.

131. See *infra* notes 209-10 and accompanying text.

132. For an interesting discussion of the various policy considerations that would be embodied in a model employer reference law, see Saxton, *supra* note 84, at 78-79. Professor Saxton's article greatly influenced some of the ideas contained in this Note.

133. See ALASKA STAT. § 09.65.160 (Michie 1996); ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); COLO. REV. STAT. § 8-2-114 (Supp. 1996); DEL. CODE ANN. tit. 19, § 708 (Supp. 1996); FLA. STAT. ANN. § 768.095 (West Supp. 1997); GA. CODE ANN. § 34-1-4 (Supp. 1996); IDAHO CODE § 44-201 (Supp. 1996); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1 (Michie 1997); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1996); MD. CODE ANN., CTS. & JUD. PROC. § 5-399.7 (Supp. 1996); MICH. COMP. LAWS ANN. § 423.452 (West Supp. 1997); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); OHIO REV. CODE ANN. § 4113.71 (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61 (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1 (Supp. 1996); S.C. CODE ANN. § 41-1-65 (Law Cop. Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); TENN. CODE

pliedly create a good faith presumption often do so by stating that employers are immune from liability unless employees are able to show that the immunity was abused.<sup>134</sup> To rebut the presumption, employees must demonstrate through either a preponderance of the evidence or through clear and convincing evidence that employers abused the privilege.<sup>135</sup> Thirteen states chose the preponderance standard while seven utilize the more demanding clear and convincing standard.<sup>136</sup> Four states make no mention of what standard is to be applied, presumably relying on the common law of that state.<sup>137</sup>

The presumption of good faith created by the statutes parallels the conditional privilege afforded employers at common law.<sup>138</sup> It simply removes the slight burden on employers of establishing a privilege. As at common law, plaintiffs must demonstrate that employers have abused the privilege.<sup>139</sup>

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ANN. § 50-1-105 (Supp. 1996); UTAH CODE ANN. § 34-42-1 (Supp. 1996); WIS. STAT. ANN. § 895.487 (West 1997); WYO. STAT. ANN. § 27-1-113 (Michie Supp. 1996).

134. See, e.g., IND. CODE ANN. § 22-5-3-1 (Michie 1997).

135. See, e.g., COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996) (establishing a preponderance of the evidence standard); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1996) (establishing a clear and convincing evidence standard).

136. Those states adopting a preponderance of the evidence standard include Alaska, Colorado, Georgia, Illinois, Indiana, Louisiana, Michigan, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, and Wyoming. See ALASKA STAT. § 09.65.160 (Michie 1996); COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996); GA. CODE ANN. § 34-1-4(b) (Supp. 1996); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1(b) (Michie 1997); LA. REV. STAT. ANN. § 23:291(A) (West Supp. 1997); MICH. COMP. LAWS ANN. § 423.452 (West Supp. 1997); OHIO REV. CODE ANN. § 4113.71(B) (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61(A) (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1(c) (Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); WYO. STAT. ANN. § 27-1-113(a) (Michie Supp. 1996). Those states adopting the clear and convincing standard include Florida, Idaho, Maine, Maryland, South Dakota, Utah, and Wisconsin. See FLA. STAT. ANN. § 768.095 (West Supp. 1997); IDAHO CODE § 44-201(2) (Supp. 1996); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1996); MD. CODE ANN., CTS. & JUD. PROC. § 5-399.7(b) (Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); UTAH CODE ANN. § 34-42-1(3) (Supp. 1996); WIS. STAT. ANN. § 895.487(2) (West 1997).

137. Those states remaining silent include Arizona, Delaware, New Mexico, and South Carolina. See ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); DEL. CODE ANN. tit. 19, § 708; N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); S.C. CODE ANN. § 41-1-65 (Law Co-op. Supp. 1996).

138. Compare, e.g., COLO. REV. STAT. § 8-2-114(1) (Supp. 1996) with *supra* text accompanying note 27.

139. Compare, e.g., COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996) with *supra* text

There is great disparity between the statutes regarding how employers lose the conditional privilege. Traditionally, public figures and private figures were distinguished by the degree of fault required to demonstrate that publishers have acted in a defamatory manner.<sup>140</sup> Public official and public figure plaintiffs must establish the existence of actual malice.<sup>141</sup> In *New York Times Co. v. Sullivan*,<sup>142</sup> the Supreme Court defined a statement made with actual malice as being one made "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>143</sup> This language essentially parallels the Restatement's abuse of privilege standard.<sup>144</sup> Although not explicitly listed in the Restatement, in private figure cases, "[i]t is frequently held that a conditional privilege is forfeited if the publication is made with 'malice' in the traditional common law sense of actual spite or ill will."<sup>145</sup> The plaintiff's burden of proof also varies depending on whether actual malice or common law malice is required. Traditionally, common law malice need only be demonstrated by a preponderance of the evidence, whereas actual malice must be demonstrated with convincing clarity.<sup>146</sup>

The reason for the distinction between the burdens of proof stems from the focus on the important issue at stake in the publication. If, as in the case of public officials, a speaker could be held liable for speech motivated by ill will, then the speaker would be discouraged from voicing opinions on matters of public concern.<sup>147</sup> The same type of fear may motivate employers in the reference context. While information about employees is

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accompanying notes 28-29.

140. See SMOLLA, *supra* note 7, § 3.01[1].

141. See *id.* § 3.01[2].

142. 376 U.S. 254 (1964).

143. *Id.* at 280; see also SMOLLA, *supra* note 7, § 3.01[2].

144. See *supra* notes 28-29 and accompanying text.

145. SMOLLA, *supra* note 7, § 8.09[3][a]; see also Reed & Henkel, *supra* note 6, at 313 n.43.

146. See *New York Times*, 376 U.S. at 285-86; SMOLLA, *supra* note 7, § 3.07.

147. See *New York Times*, 376 U.S. at 279 (stating that such cases require actual malice because, to do otherwise, would be to "dampen[] the vigor and limit[] the variety of public debate").

rarely a matter of public concern, in the case of potentially dangerous employees, the interest at stake—public safety—may be just as important. The important interest at stake in employment references therefore, seems sufficiently analogous to matters of public concern that the requirement of “actual malice” in such cases seems appropriate.

In recent years, a growing number of jurisdictions have placed conditional common law privileges on par with the more rigid public figure malice standard, “holding that such privileges are lost only if the defendant acted with knowledge of falsity or recklessness . . . .”<sup>148</sup> The recent statutory enactments seem to reflect this trend. Some of the states do not state explicitly the actual malice requirement, but at least six of the statutes clearly employ this standard.<sup>149</sup> Idaho, for example, explicitly states only a showing that “the employer disclosed the information with actual malice or deliberate intent to mislead”<sup>150</sup> will rebut the presumption of good faith. Although not using the term “actual malice,” Michigan requires the employer to have knowingly disclosed false information or to have disclosed information “with a reckless disregard for the truth.”<sup>151</sup>

A handful of statutes use a standard that is somewhat more difficult to categorize neatly.<sup>152</sup> Maine’s statute, for example, requires the good faith presumption to be rebutted through “the knowing disclosure, with malicious intent, of false or deliberately misleading information.”<sup>153</sup> Although the “knowing disclo-

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148. SMOLLA, *supra* note 7, § 8.09[5].

149. Arizona, Idaho, Maryland, Michigan, South Carolina, and Utah use this approach. See ARIZ. REV. STAT. ANN. § 23-1361(D) (West Supp. 1996); IDAHO CODE § 44-201(2) (Supp. 1996); MD. CODE ANN., CTS. & JUD. PROC. § 5-399.7(b)(1) (Supp. 1996); MICH. COMP. LAWS ANN. § 423.452(a),(b) (West Supp. 1997); S.C. CODE ANN. § 41-1-65(D) (Law Co-op. Supp. 1996); UTAH CODE ANN. § 34-42-1(3) (Supp. 1996).

150. § 44-201(2).

151. § 423.452(2)(a),(b). Michigan’s statute is unusual in that, although it employs an actual malice standard, it requires the plaintiff to prove malice only by a preponderance of the evidence. See *id.* § 423-452. A possible explanation for this approach is that the statute also requires the presumption of good faith to be rebutted by demonstrating that “the disclosure was specifically prohibited by a state or federal statute.” *Id.* § 423-452(c).

152. See 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1996).

153. Tit. 26, § 598.



sure" language seems akin to "actual malice," the "with malicious intent" portion seems more in keeping with the common law definition of malice.

Indeed, a majority of the new statutes appear to retain the common law form of malice. Under these statutes, a showing of something akin to either actual malice or common law malice rebuts the good faith presumption. A typical example is Alaska's statute which states an employer may be liable if it "recklessly, knowingly, or with a malicious purpose disclose[s] false or deliberately misleading information."<sup>154</sup> Delaware requires the information to be knowingly false, deliberately misleading, or rendered with malicious purpose.<sup>155</sup> Under these statutes, the plaintiff may be able to succeed upon a claim by proving the defendant engaged in the less rigid common law form of malice. These types of statutes, therefore, do not alter the common law unless the statutory definition of malice differs from the common law definition of that particular state.

Of those states that use a combination of actual and common law malice, the majority retain the traditional preponderance of the evidence standard.<sup>156</sup> Only a handful of states utilize the stricter clear and convincing standard.<sup>157</sup> Again, unless the common law of the state requires something greater than a preponderance, the statutes do not alter the traditional burden of proof.

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154. ALASKA STAT. § 09.65.160(1) (Michie 1996).

155. See DEL. CODE ANN. tit. 19, § 708(a) (Supp. 1996). Interestingly, and perhaps regrettably, at least two states, California and Georgia, make no mention at all of falsity. See CAL. CIV. CODE § 47(c) (West Supp. 1997); GA. CODE ANN. § 34-1-4 (Supp. 1996).

156. States that employ the preponderance standard include Alaska, Colorado, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, and Wyoming. See ALASKA STAT. § 09.65.160 (Michie 1996); COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996); OHIO REV. CODE ANN. § 4113.71 (B)(1) (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61(A) (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1(c) (Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); WYO. STAT. ANN. § 27-1-113(a) (Michie Supp. 1996).

157. States that employ the "clear and convincing" standard include Florida, South Dakota, and Wisconsin. See FLA. STAT. ANN. § 768.095 (West Supp. 1997); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); WIS. STAT. ANN. § 895.487(2) (West 1997).

Several commentators have suggested eliminating the common law malice standard in employer reference cases.<sup>158</sup> Professor Bradley Saxton, for example, has argued that because the employment relationship sometimes ends acrimoniously, employees can claim easily that negative references were motivated by malice.<sup>159</sup> Although "the majority view is that when a spiteful or vengeful motive coexists with a legitimate . . . interest in publishing the defamatory communication, the privilege will be lost only if the malicious motive predominates," the persistence of the common law malice standard still causes potential problems.<sup>160</sup> The question of whether an improper motive predominates would ultimately be a jury question.<sup>161</sup> If employees establish that references were motivated at least in part by feelings of ill will, employers must invest substantial resources in attempting to disprove that ill will was their main motivation.

Furthermore, how juries apply the somewhat vague concept of malice in a particular case is often an issue. Although spite or ill will are the usual synonyms for malice, other common terms include evil intent, wanton conduct, wrongful motive, culpable recklessness, and evil mindedness.<sup>162</sup> O. Lee Reed and Jan W. Henkel state: "For a jury receiving such an amalgam of instruction, unreasonableness of conduct and ill will must merge into some confusing quality of 'badness' about defendant's statements concerning plaintiff."<sup>163</sup> It would not be unrealistic, for example, for a sympathetic jury to conclude from just a hint of ill will that an unsympathetic employer acted in such a way that he deserves to suffer some negative consequences. Juries might potentially "disregard ambiguous instructions and render 'community' judgment, deciding cases upon some ad hoc notion of what is fair."<sup>164</sup>

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158. See Daniloff, *supra* note 6, at 708-11; Lewis et al., *supra* note 6, at 861-62; Reed & Henkel, *supra* note 6, at 318-21; Saxton, *supra* note 84, at 79-82.

159. See Saxton, *supra* note 84, at 79-82 (arguing that employers' decisions to provide negative references may be motivated both by a desire to protect the interests of prospective employers and by feelings of ill will toward employees).

160. SMOLLA, *supra* note 7, § 8.09[3][b].

161. See generally Reed & Henkel, *supra* note 6, at 317 (discussing the role of juries in defamation cases).

162. See *id.* at 314.

163. *Id.*

164. *Id.* at 319; see also O'Brien v. Papa Gino's of Am., 780 F.2d 1067 (1st Cir.

Eliminating the common law forms of malice from the statutes is advisable from a policy standpoint. First, it might encourage employers who, for whatever reason, do harbor ill will toward their former employees to provide references. Currently, employers in such situations may fear, with at least some justification, that traces of malice on the employers' part may be sufficient to land them in court at the mercy of unsympathetic juries. By requiring a knowingly false disclosure or one made with reckless disregard for the truth of the statement, employers will not have to be as concerned that circumstances of terminations may lead to inferences of malice sufficient to hold them liable. Because the societal interest in employer references is so strong, the benefits from eliminating the common law malice standard outweigh the privacy concerns of employees.

### *Violation of Civil Rights*

Another common characteristic of many statutes is another abuse of the conditional privilege—disclosure in violation of plaintiffs' civil rights or in violation of nondisclosure agreements. Ten states specifically mention that disclosures in violation of employees' civil rights can open employers to liability.<sup>165</sup> In three states, statutory immunity does not apply if information was disclosed in violation of nondisclosure agreements or was otherwise confidential.<sup>166</sup> Nearly all these statutes state that these

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1986) (affirming jury verdict holding an employer who fired employee for cocaine use liable due to employer's personal grudge against employee).

165. These states are Alaska, Colorado, Florida, Illinois, New Mexico, Ohio, Oregon, Rhode Island, Tennessee, and Wisconsin. See ALASKA STAT. § 09.65.160(2) (Michie 1996); COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996); FLA. STAT. ANN. § 768.095 (West Supp. 1997); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); OHIO REV. CODE ANN. § 4113.71(B)(2) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1(c)(4) (Supp. 1996); TENN. CODE ANN. § 50-1-105(5) (Supp. 1996); WIS. STAT. ANN. § 895.487(2) (West 1997). In addition, the statute of Michigan states that a disclosure in violation of any state or federal statute is grounds for liability. See MICH. COMP. LAWS ANN. § 423.452(2)(c) (West Supp. 1997).

166. Those states are Delaware, Georgia, and South Dakota. See DEL. CODE ANN. tit. 19, § 708 (a) (Supp. 1996); GA. CODE ANN. § 34-1-4(b) (Supp. 1996); S.D. CODIFIED LAWS § 60-4-12(2) (Michie Supp. 1996).

types of abuses must be proven by a preponderance standard.<sup>167</sup>

### *What Types of Information May Be Disclosed*

Of the twenty-six statutes at issue, only three fail to include job performance among the types of information that may be released under the good faith presumption.<sup>168</sup> Twelve of the statutes say that the statute covers *only* information concerning job performance or information about the employee, but fail to define the term "job performance."<sup>169</sup> Indeed, most statutes do not provide any definition of the ambiguous term job performance.<sup>170</sup> An exception to this pattern is Louisiana's statute, which defines job performance as including, but not limited to, "attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions."<sup>171</sup>

In several states, including Georgia, employee actions that constitute a violation of law may be disclosed.<sup>172</sup> Some states,

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167. These states include Alaska, Colorado, Georgia, Illinois, Ohio, Oregon, Rhode Island, and Tennessee. See ALASKA STAT. § 09.65.160 (Michie 1996); COLO. REV. STAT. § 8-2-114 (2)(a) (Supp. 1996); GA. CODE ANN. § 34-1-4 (b) (Supp. 1996); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); OHIO REV. CODE ANN. § 4113.71 (B)(1) (Banks-Baldwin Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1(c) (Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996).

168. These states include Indiana, Kansas, and New Mexico. See IND. CODE ANN. § 22-5-3-1(b) (Michie 1997); KAN. STAT. ANN. § 44-119a (Supp. 1996); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996).

169. These states are Alaska, Colorado, Florida, Illinois, Indiana, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. See ALASKA STAT. § 09.65.160 (Michie 1996); COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996); FLA. STAT. ANN. § 768.095 (West Supp. 1997); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1 (Michie 1997); OHIO REV. CODE ANN. 4113.71(B) (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61(A) (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS § 28-6.4-1(c) (Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); UTAH CODE ANN. § 34-42-1(1) (Supp. 1996); WYO. STAT. ANN. § 27-1-113(a) (Michie Supp. 1996).

170. See, e.g., CAL. CIV. CODE § 47(c) (West Supp. 1997).

171. LA. REV. STAT. ANN. § 23:291(C)(5) (West Supp. 1997). South Carolina similarly defines job performance. See S.C. CODE ANN. § 41-1-65(A)(5) (Law Co-op. Supp. 1996).

172. See GA. CODE ANN. 34-1-4(b) (Supp. 1996) (stating that an employer may disclose "any act committed by such employee which would constitute a violation of the laws of this state if such act occurred in this state"); see also DEL. CODE ANN.

Louisiana, for example, state that employers may disclose the reason for employees' terminations.<sup>173</sup> Other types of information that may be released by employers include evaluations of the employees' ability to carry out their duties,<sup>174</sup> evaluations of employees' professional conduct,<sup>175</sup> and employees' pay levels and wage histories.<sup>176</sup>

In evaluating what types of information should be included in a statute, it is important to remember that the conditional privilege applies only when the value of exchanging information outweighs the individual's interest in his or her reputation.<sup>177</sup> At common law, inclusion of irrelevant information is sufficient to constitute abuse of privilege.<sup>178</sup> The free exchange of information that is irrelevant in determining the suitability of an employee for particular employment cannot be said to outweigh the individual's interest. The statutes, therefore, should extend the privilege only to information that relates to the employer's ability to make a reasonable assessment in the hiring process.

Fact-specific analysis determines, in large part, whether information contained in a reference was not reasonably believed to be necessary to accomplish the privileged purpose. Those statutes that describe protected information in detail help eliminate the potential for courts to interpret the amorphous job perfor-

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tit. 19, § 708(b)(2) (Supp. 1996) (including in the definition of information that an employer may disclose about a current or former employee's job performance "[a]ny act committed by such employee which would constitute a violation of federal, state or local law").

173. See LA. REV. STAT. ANN. § 23:291(A) (West Supp. 1997) (stating that an employer who provides "reasons for separation" concerning a former employee to a prospective employer "shall be immune from civil liability and other consequences of such disclosure provided such employer is not acting in bad faith"); see also MD. CODE ANN., CTS. & JUD. PROC. § 5-399.7(a) (Supp. 1996) (discussing liability of an employer for disclosing "the reason for termination of employment of an employee or former employee of the employer").

174. See GA. CODE ANN. § 34-1-4(b) (Supp. 1996); DEL. CODE ANN. tit. 19, § 708(b)(3) (Supp. 1996).

175. See ARIZ. REV. STAT. ANN. § 23-1361(C) (West Supp. 1996); UTAH CODE ANN. § 34-42-1(1) (Supp. 1996).

176. See KAN. STAT. ANN. § 44-119a(b) (Supp. 1996); S.C. CODE ANN. § 41-1-65(B) (Law Co-op. Supp. 1996).

177. See *supra* text accompanying note 27.

178. See *supra* text accompanying note 29.

mance description in a manner inconsistent with what the legislators had in mind.<sup>179</sup> Arguably, the broad term job performance might be advantageous for employers because it would provide courts with greater flexibility to draw upon prior cases to determine whether a particular disclosure falls outside of the privilege.

A detailed definition, however, seems more desirable because an exhaustive list of protected information probably would discourage plaintiffs from bringing lawsuits in the first place. It also would provide a greater measure of predictability than the common law. As the Supreme Court said in a different context in *Upjohn Co. v. United States*,<sup>180</sup> "[a]n uncertain privilege . . . is little better than no privilege at all."<sup>181</sup> A specific definition of job performance would discourage plaintiffs from arguing that publications fall outside the scope of the definition and therefore would reduce the likelihood of suits surviving summary judgment. If legislatures do not expand the definition so far as to cover information irrelevant to decision-making in the hiring process, then a specific listing of what types of information are afforded a conditional privilege is desirable.<sup>182</sup>

In addition, an exhaustive list of the types of information that may be disclosed could better protect employees. A specific listing would discourage employers who have included irrelevant information, not listed in the statute, from arguing that the disclosures were somehow related to employees' job performances. A specific listing, therefore, might prevent employers from including information that is irrelevant to the decision-making process, in other words, the interest that makes the information privileged.

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179. See, e.g., DEL. CODE ANN. tit. 19, § 708(b) (Supp. 1996).

180. 449 U.S. 383 (1981).

181. *Id.* at 393.

182. Louisiana's statute demonstrates this type of desirable statute. See LA. REV. STAT. ANN. § 23:291 (West Supp. 1997). All of the information listed in the definition of job performance seems geared toward helping employers make hiring decisions and none seems particularly intrusive upon employees' privacy interests, such as religious faith. See *id.* § 23:291(C)(5); see also *supra* text accompanying note 171.

### *Requests*

Another common characteristic of the statutes is the requirement that current or former employers must await requests before they can publish information concerning an employee. At least twenty states require that in order to receive the good faith presumption, employers must be responding to requests from either prospective employers or former or current employees.<sup>183</sup> At least two statutes require that requests be in writing.<sup>184</sup>

Under the Restatement, an important factor in determining whether a publication is privileged is the consideration of wheth-

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183. These are Alaska, Arizona (only requests from prospective employers), Colorado, Florida, Georgia, Idaho, Illinois (only requests from prospective employers), Louisiana, Maryland, Michigan, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina (only requests from prospective employers), South Dakota, Tennessee, Utah (only requests from prospective employers), and Wisconsin. See ALASKA STAT. § 09.65.160 (Michie 1996); ARIZ. REV. STAT. ANN. § 23-1361(C) (West Supp. 1996); COLO. REV. STAT. § 8-2-114(2)(a) (Supp. 1996); FLA. STAT. ANN. § 768.095 (West Supp. 1997); GA. CODE ANN. § 34-1-4(b) (Supp. 1996); IDAHO CODE § 44-201(2) (Supp. 1996); 745 ILL. COMP. STAT. ANN. 46/10 (West Supp. 1997); LA. REV. STAT. ANN. § 23:291(A) (West Supp. 1997); MD. CODE ANN., CTS. & JUD. PROC. § 5-399.7(a)(1) (Supp. 1996); MICH. COMP. LAWS ANN. § 423.452 (West Supp. 1997); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); OHIO REV. CODE ANN. § 4113.71(B) (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61(A) (West Supp. 1997); OR. REV. STAT. § 30.178 (Supp. 1996); R.I. GEN. LAWS 28-6.4-1(c) (Supp. 1996); S.C. CODE ANN. § 41-1-65(C) (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); UTAH CODE ANN. 34-42-1(1) (Supp. 1996); WIS. STAT. ANN. § 895.487(2) (West 1997). California's statute also arguably falls into this category. Its statute defines a privileged communication as one made, "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." CAL. CIV. CODE § 47(c) (West Supp. 1997). The statute specifically mentions that this subdivision "applies to and includes a communication concerning the job performance or qualifications of an applicant for employment . . . by a current or former employer of the applicant to, and upon request of, the prospective employer." *Id.* Kansas's statute is unusual in that current or former employers may disclose certain types of information, such as dates of employment and pay levels, without having to wait for requests, while in other areas, such as written employee evaluations and the reasons for release from service, employers must wait for written requests from prospective employers. See KAN. STAT. ANN. § 44-119a(b), (c) (Supp. 1996).

184. See S.C. CODE ANN. § 41-1-65(C) (Law Co-op. Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996).

er the publication was made in response to a request rather than simply volunteered by the publisher.<sup>185</sup> Some employer attorneys have argued that the statutory provisions extending the good faith presumption only to cases in which employers are responding to requests alter the common law because, under the common law, employers need only business purposes for the giving of information.<sup>186</sup> Even though employers generally are presumed to have a conditional privilege due to the important interest at stake,<sup>187</sup> the statutory requirement that employers must wait for requests follows the Restatement's favoring of responsive publication over voluntary publication.<sup>188</sup>

This requirement is also desirable from a policy standpoint. The primary function of references is to provide *prospective* employers with needed information. By requiring employers to wait for requests for information, the statutes aid in preventing employers from maliciously attempting to ruin employees' chances for employment elsewhere, or publishing information about employees to those who have no legitimate interests in the employees' actions. Employees' privacy interests outweigh employers' interests in publishing information to those who are not considering employees for positions. Such action by employers might also violate a state's antiblacklisting statute if one exists.<sup>189</sup>

Four states require that employees be given access to any written responses, either by requiring the referencing employer to send copies of the responses or by giving employees access to the responses.<sup>190</sup> This requirement is more problematic from a

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185. See RESTATEMENT (SECOND) OF TORTS § 595(2)(a) (1977).

186. See *New Ohio Statute Covers Liability for Employment References*, OHIO EMPLOYMENT L. LETTER, May 1996, at 2, available in LEXIS, Employ Library, Emplaw File.

187. See *supra* note 27 and accompanying text.

188. See RESTATEMENT (SECOND) OF TORTS § 595.

189. For a discussion of these types of statutes, see Saxton, *supra* note 84, at 54-57.

190. See ARIZ. REV. STAT. ANN. § 23-1361(B) (West Supp. 1996) (requiring that copies of any written communication regarding employment be sent to employees); COLO. REV. STAT. § 8-2-114(2)(b) (Supp. 1996) (requiring copies of the information provided be sent to employees and allowing employees to obtain copies of references by appearing at employers' places of business); IND. CODE ANN. § 22-5-3-1(c) (Michie 1997) (requiring the prospective employers to provide copies of any written communi-



policy standpoint. It may, in some cases, strengthen employees' privacy interests and provide an added incentive for employers to provide truthful information. If employers know employees can find out exactly what is being said about them, employers will be less inclined to include false information. It also enables employees to explain or deny the facts contained in references and thereby potentially salvage their employment prospects.

The requirement may also have a negative effect. It creates an additional burden, albeit slight, on employers and could potentially create new litigation when employers, through oversight, fail to comply with the requirement. Furthermore, it may prompt already skittish employers to be less than candid in their evaluations. A sensible solution would be to require, as Indiana does, employers to provide copies of responses only if the employees request them.<sup>191</sup> This approach would have the advantages of providing a deterrent for employers to provide false information while still limiting their compliance burden.

### *Miscellaneous Provisions*

#### *Absolute Immunity*

One notable exception to the general trend of recognizing a qualified privilege is Kansas's statute.<sup>192</sup> While granting employers a qualified privilege when they provide certain information to prospective employers,<sup>193</sup> Kansas takes the unusual step of granting employers an absolute privilege when they provide information about employees': (1) dates of employment; (2) pay levels; (3) job descriptions and duties; and (4) wage histories.<sup>194</sup> In the case of written responses to prospective employers' re-

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cations that may affect employees' possibilities of employment upon written request of employees); KAN. STAT. ANN. § 44-119a(c) (Supp. 1996) (requiring employers to provide upon request from employees copies of any written evaluations provided to prospective employers); see also R.I. GEN. LAWS § 28-6.4-1(a) (Supp. 1996) (allowing employees to inspect their personnel files, but specifically exempting references).

191. See § 22-5-3-1(c).

192. See § 44-119a.

193. See *id.* § 44-119a(a).

194. See *id.* § 44-119a(b).

quests, employers have absolute immunity if they provide written evaluations conducted prior to terminations and information about whether employees were voluntarily or involuntarily released from services and the reasons for such separations.<sup>195</sup>

Kansas's statute provides a good illustration of the dangers inherent in granting employers too much protection. Undeniably, the statute goes a long way toward calming employers' concerns over lawsuits. Under this statute, however, employers with negative feelings toward their former employees have little incentive to provide unbiased or even truthful references.<sup>196</sup> Because employment relationships often end acrimoniously and both parties may still harbor hostility, the statute fails to provide safeguards for employees who are potentially at the mercy of their former employers.

### *Attorney Fee Shifting*

Both Arizona and Ohio have attorney fee shifting provisions in their respective statutes.<sup>197</sup> Arizona's statute states that a court "shall award court costs, attorney fees and other related expenses to any party that prevails in any civil proceeding in which a violation of this section is alleged."<sup>198</sup> Ohio's statute provides that if the verdict is in favor of the defendant, the court shall decide if the lawsuit was frivolous and may award reasonable attorney fees.<sup>199</sup>

Arguably, this type of provision could do more to calm employers' fears than any other measure. Because one of the greatest concerns to employers is the possibility of incurring substantial attorney fees simply by having to defend against suits, an attorney fee shifting provision would greatly ease employers' concerns over the cost of having to defend such suits. This provision would sever one of the root causes of employers' reluctance to provide references. It is, therefore, surprising that

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195. See *id.* § 44-119a(c).

196. See Ross, *supra* note 66, at 2 (describing the concerns of opponents of the measure).

197. See ARIZ. REV. STAT. ANN. § 23-1361(I) (West Supp. 1996); OHIO REV. CODE ANN. § 4113.71(C) (Banks-Baldwin Supp. 1997).

198. § 23-1361(I) (emphasis added).

199. See § 4113.71(C).

so few legislatures have implemented such a provision. The decision can perhaps be explained by the longstanding reluctance to alter the "American Rule," whereby each party pays its own legal fees regardless of the outcome of the case.<sup>200</sup> The omission might also be explained as a decision by legislatures not to unduly restrict employees' ability to take legal action when they feel it appropriate.

Bradley Saxton has suggested a compromise approach.<sup>201</sup> In his model statute, Saxton proposed that the awarding of attorney fees should focus on the truthfulness of the reference.<sup>202</sup> If the employer prevails at trial and the jury finds that a reference was substantially true, the employer should be awarded attorney fees.<sup>203</sup> If the employer loses and the jury finds that the reference was knowingly false and that the employer abused the qualified privilege, then the employee should be awarded attorney fees.<sup>204</sup> An employer could not recover attorney fees if he prevailed only by virtue of the qualified privilege.<sup>205</sup> This solution seems sensible. This rule would simultaneously discourage frivolous suits and allow parties to litigate genuine disputes.

### *Explicit Protection Against Negligent Hiring Claims*

Louisiana appears to be the only state that provides explicit protection for prospective employers from negligent hiring suits.<sup>206</sup> The statute reads in part:

Any prospective employer who reasonably relies on information pertaining to an employee's job performance or reasons for separation, disclosed by a former employer, shall be immune from civil liability including liability for negligent hiring [and] negligent retention . . . based upon such rea-

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200. For a discussion of the historical development of the "American Rule," see John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1575-78 (1993).

201. See Saxton, *supra* note 84, at 100-01.

202. See *id.* at 100.

203. See *id.*

204. See *id.*

205. See *id.*

206. See LA. REV. STAT. ANN. § 23:291(B) (West Supp. 1997).

sonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.<sup>207</sup>

Granting this immunity is a prudent step. The statute seeks to minimize transaction costs by encouraging former employers to provide references and prospective employers to seek them. Furthermore, the provision does not limit completely an injured third party's ability to bring suit. Prospective employers' reliance upon references must still be reasonable and the statute may, in some instances, require further investigation.<sup>208</sup> Through its grant of immunity, the statute also addresses the issue of workplace violence and seeks to ensure a safer, more efficient workplace. Louisiana's statute implicitly recognizes that the exchange of references is a two part process—the providing of information and the receipt thereof. In the future, when legislatures address the employer reference problem, they should address both sides of the problem.

### *Employee Approval of the Release of References*

Oklahoma takes the unusual step of requiring the employee's consent before information about his job performance can be disclosed to a prospective employer.<sup>209</sup> It is certainly advisable from a liability standpoint for employers to demand release forms authorizing the disclosure of information upon request, but it is somewhat problematic to require this action by statute.<sup>210</sup> The requirement creates an additional burden of compliance on employers that the benefits of such a requirement do not outweigh. Presumably, the benefits of requiring employee consent are the increased privacy protection for employees and the reduction in the likelihood that employees will be able to allege subsequently that publications were

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207. *Id.*

208. *See id.* The law, however, may be interpreted to require a greater obligation on the part of prospective employers to check references because they now have been granted immunity. *See Landry & Hoffman, supra* note 2, at 460.

209. *See OKLA. STAT. ANN. tit. 40, § 61(A)* (West Supp. 1997).

210. The Restatement's position is that "the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation." *RESTATEMENT (SECOND) OF TORTS § 583* (1977).

motivated by malice. Undoubtedly, this argument has merit.

The problem with requiring employee consent arises in its practical application. Although employers should be encouraged to obtain such consent prior to the termination of the employment relationship, in some instances the employer will simply fail to do so. In order to comply with this statutory requirement, employers then will be forced to track down employees to gain their consent. If employment relationships have ended less than amicably, employees might justifiably be wary of giving consent. Employers, therefore, would legally be unable to comply with requests for information and prospective employers would be left without potentially relevant information. If the ultimate goal of the statute is to provide employers with the information needed to make informed hiring decisions, this requirement actually may hinder the exchange of references and, therefore, is not desirable.

### *Imposing A Duty To Warn*

In order to reconcile the tension between employers' concerns over defamation and negligent hiring doctrines, some commentators have argued that there should be an affirmative duty to warn prospective employers of potentially dangerous employees.<sup>211</sup> Janet Swerdlow, for example, has argued that a current or former employer, when contacted for a reference, should "have a duty to inform [a prospective employer] of any information it has about the employee that could foreseeably present a risk of danger to [the prospective employer] or anyone the employee could foreseeably harm as a result of the employment."<sup>212</sup> None of the newly enacted statutes impose such a duty.<sup>213</sup> These types of proposals have merit; however, because of their open-ended nature, they ultimately may create more problems than

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211. See Swerdlow, *supra* note 45, at 1657-67.

212. *Id.* at 1671. Saxton's solution is more limited: "[A]n employer must disclose information, if any, that may be reasonably necessary to warn the inquiring prospective new employer of the current or former employee's propensity to engage in violent or dangerous conduct posing a threat of physical injury to others." Saxton, *supra* note 84, at 109.

213. See, e.g., COLO. REV. STAT. § 8-2-114 (Supp. 1996).

they solve. Instead of imposing a blanket duty to disclose, legislatures should impose a duty to warn in specific occupations in which there is a high risk of danger or in which the consequences of dangerous employees are likely to be severe.<sup>214</sup>

The theory behind imposing a duty to warn stems from the seminal California Supreme Court decision in *Tarasoff v. Regents of the University of California*.<sup>215</sup> In *Tarasoff*, a patient told his school psychotherapist that he intended to kill an unnamed girl, readily identifiable as Tatiana Tarasoff.<sup>216</sup> When the patient made good on his threat, Tarasoff's parents alleged that the psychotherapist and his superior had failed to carry out their duty to warn the victim of the patient's intentions.<sup>217</sup> After stating that generally no duty to warn exists, the court held that such a duty does arise when: (1) a special relationship exists between one who has knowledge of the dangerous person's intent to do harm and either the dangerous person or the potential victim; (2) the risk of harm is foreseeable; and (3) the potential victim is identifiable.<sup>218</sup> Swerdlow argued that the three elements of the *Tarasoff* test are satisfied by the employer/employee relationship and that the *Tarasoff* holding, therefore, should be extended to the relationship.<sup>219</sup>

Admittedly, imposing such a duty would have benefits. If employers were required to disclose the dangerous propensities of their employees, incidents of workplace violence might be reduced. Potential employers would be on notice of employees who pose a threat of physical violence such as the worker in *Allstate Insurance Co. v. Jerner*<sup>220</sup> who was fired for bringing a gun into his former workplace. Furthermore, because the law would require employers to warn, this requirement would essentially mute potential claims concerning the malicious intent of the disclosure.

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214. See *infra* text accompanying notes 240-51.

215. 551 P.2d 334 (Cal. 1976).

216. See *id.* at 341.

217. See *id.* at 339-40.

218. See *id.* at 342-43.

219. See Swerdlow, *supra* note 45, at 1660-67.

220. 650 So.2d 997 (Fla. Dist. Ct. App. 1995); see *supra* text accompanying notes 64-69.

The notion that all employers should have a duty to warn about potentially dangerous employees, however, should be rejected by state legislatures for several reasons. The special relationship requirement of *Tarasoff* seems somewhat attenuated in the case of the employer/employee relationship. The *Tarasoff* court concluded that the relationship between a patient and a psychotherapist was sufficiently special to impose a duty to warn.<sup>221</sup> As Swerdlow noted, the courts have expanded the concept of special relationships to include relationships of dependence.<sup>222</sup> Because in most jurisdictions prospective employers have a duty to exercise reasonable care in selecting employees and because prospective employers must often rely on former employers for the information they need to exercise such care, Swerdlow argued that a dependent relationship exists between former and prospective employers.<sup>223</sup> She claimed that the relationship between former employers and employees constitutes a special relationship so as to justify the imposition of a duty to warn.<sup>224</sup>

But Swerdlow herself recognized factual distinctions exist between the cases she cited to demonstrate a special relationship and the case of former and prospective employers.<sup>225</sup> Swerdlow cited *Mann v. State*<sup>226</sup> to justify this type of special relationship.<sup>227</sup> In *Mann*, a police officer stopped to aid motorists whose cars were stranded in the speed-change lane of the San Bernardino Freeway.<sup>228</sup> When a tow truck arrived, the officer,

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221. See *Tarasoff*, 551 P.2d at 343-44.

222. See Swerdlow, *supra* note 45, at 1660 (citing RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1967)). Among the examples Swerdlow cited as constituting a special relationship include the relationship between bank and depositor, passenger and carrier, parent and child, doctor and patient, and employer and employee. See *id.*

223. See *id.* at 1660-61.

224. See *id.* at 1661.

225. See *id.* ("Although there are differences in the factual situations . . . the characteristics of the relationships themselves are similar to those in the relationship between [current and prospective employers].").

226. 139 Cal. Rptr. 82 (Cal. Ct. App. 1977).

227. See Swerdlow, *supra* note 45, at 1660.

228. See *Mann*, 139 Cal. Rptr. at 84.

without advising those present, left the scene.<sup>229</sup> After his departure, a passing car struck one of the cars and several of the stranded motorists.<sup>230</sup> The court in *Mann* held that a special relationship between the officer and the motorists existed once the officer stopped to render assistance.<sup>231</sup> Swerdlow viewed the relationship between former employers and prospective employers as being analogous to that of the police officer and the motorists.<sup>232</sup> As Swerdlow noted, however: "In *Mann*, the special relationship between the police officer and the motorists did not arise until the officer stopped to aid them."<sup>233</sup> By analogy, unless former employers have voluntarily agreed to provide information, a special relationship does not exist. Courts addressing the employment context have reached similar conclusions.<sup>234</sup>

Likewise, the relationship between former employers and former employees does not seem sufficiently "special" to justify the imposition of a duty. The Restatement classifies the relationship of master and servant as a special relationship,<sup>235</sup> but it is silent on the issue of an ongoing relationship after employers and employees have parted ways.<sup>236</sup>

Even if the imposition of a blanket duty to warn could be justified under the law, it should be rejected for policy reasons.<sup>237</sup> Unlike the therapist in *Tarasoff*, the average employer generally lacks the ability to adequately assess an employee's

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229. *See id.*

230. *See id.*

231. *See id.* at 86.

232. *See Swerdlow, supra note 45, at 1660.*

233. *Id.* at 1661.

234. *See Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. Ct. App. 1990) (refusing to recognize a special relationship between a former employer and a prospective employer sufficient to impose a duty to warn); *Cohen v. Wales*, 518 N.Y.S.2d 633, 634 (N.Y. App. Div. 1987) (holding that "[t]he mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring") (citations omitted).

235. *See RESTATEMENT (SECOND) OF TORTS* §§ 315, 317 cmts. b & c (1965).

236. *But cf., Bodewig v. K-Mart*, 635 P.2d 657, 661 (Or. Ct. App. 1981) (holding that such a special relationship does exist).

237. This Note does not expressly reject the notion that such a duty could be justified. Swerdlow made a plausible argument for such a duty. *See Swerdlow, supra note 45, at 1660-71.* Instead, this Note argues that the imposition of a duty to warn in all cases would not be justified by the underlying policy concerns.



dangerous propensities. Therapists are trained to assess patients' behavior. Given the realities of the workplace, most employers lack the insight into the inner workings of employees' minds that would be required to make determinations as to their potential for dangerous behavior. Unless an employee has confided in the employer or has blatantly displayed a potential for violent conduct, an employer could not state with any certainty that an employee does or does not pose a threat.

The imposition of such a duty also might be impractical. Constructing a workable definition of when employers have obligations to disclose information would be difficult. Should employers have to warn prospective employers if employees have short tempers? If employees have gotten into shoving matches with co-workers? If employers have good faith beliefs that employees are dangerous? Under a blanket duty, some employers' actions could fall under the category of officious intermeddling. The imposition of a duty upon employers might have the perverse effect of actually encouraging more defamation suits from employees who employers branded as "dangerous." If employers believe they are potentially liable for not disclosing information, they may disclose trivial or minor incidents that have little bearing on whether employees truly pose threats. Such disclosures could adversely affect employment potential for good employees.

Admittedly, the imposition of such a duty would, in cases such as *Allstate Insurance Co. v. Jerner*,<sup>238</sup> in which an employee brought a gun to work, probably reduce the likelihood of workplace violence and injury. These types of cases, however, appear to be a distinct minority and the common law provisions seem sufficient to address them.<sup>239</sup> The additional burdens on employers resulting from the imposition of a duty to warn do not seem to outweigh the minimal benefits realized from such a requirement. Employers would be forced to be constantly on the lookout for tell-tale signs of potential danger. Employers would

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238. 650 So. 2d 997 (Fla. Dist. Ct. App. 1995); see *supra* text accompanying notes 64-67.

239. See Larson, *supra* note 96, at A1, A10 (citing a 1994 Bureau of Labor Statistics report that found co-workers and ex-employees were responsible for only 59 of 1063 workplace homicides in 1993).

have to keep even more detailed records of workplace incidents for fear of forgetting the one "smoking gun" that could land them in court.

### *A Narrow Application of Tarasoff*

In *Tarasoff*, the court concluded that although the therapist's conversations with a patient are privileged, "[t]he protective privilege ends where the public peril begins."<sup>240</sup> In keeping with this notion, a better solution would be to impose a duty to warn only in situations in which a high risk of danger exists or in which the consequences of dangerous employees are likely to be severe. Following *Tarasoff* in such cases, the potential burdens on employers and the reduction in employee privacy rights are outweighed by the potential for harm. When a significant threat of harm exists or the harm is likely to be great, the public policy of promoting safety should prevail.<sup>241</sup>

Ultimately, legislatures would have to make a policy choice as to which occupations they believe warrant the imposition of a duty to warn. A recently proposed, but not enacted, federal aviation safety bill might provide a workable example for state legislatures. In 1996, Congressmen John Duncan and Fred Heineman introduced the Airline Pilot Hiring and Safety Act of 1996,<sup>242</sup> which would have *required* an air carrier to request past performance records of pilots seeking new flying jobs.<sup>243</sup> The legislation would have required both the Federal Aviation Administration (FAA) and any air carrier that had employed the pilot during the preceding five years to furnish information concerning the applicant.<sup>244</sup> The lawmakers proposed the bill in response to

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240. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

241. See *infra* text accompanying notes 249-51.

242. H.R. 3536, 104th Cong. (1996). The bill proposed to amend 49 U.S.C. § 44,723 by redesignating § 44,723 as § 44,724 and designating the new bill as § 44,723. See *id.* § 2(a).

243. See *id.* § 2(a)(1).

244. See *id.* The records to which the Act would apply include summaries of legal enforcement actions; records pertaining to the "training, qualifications, proficiency, or professional competence of the individual;" records concerning any disciplinary action relating to the individual; and records concerning the "release from employment or resignation, termination, or disqualification with respect to employment." *Id.* § 2(a)(1)(A), (B).

the November 1994 crash of American Eagle Flight 3379 that killed fifteen people.<sup>245</sup> The National Transportation Safety Board (NTSB) charged that such a policy could have prevented the crash had it been in place when American Eagle hired the pilot of the flight.<sup>246</sup> American Eagle failed to ask the pilot's former employer, Comair, about the pilot's record because it did not believe that Comair would have divulged any information beyond dates of employment and the kind of equipment the pilot flew.<sup>247</sup> Had Comair provided full records on the pilot, American Eagle would have learned that the pilot was on the verge of dismissal from Comair for his unsatisfactory performance and for fear "that in an emergency he might freeze up."<sup>248</sup>

The healthcare industry is a logical choice on which to impose a duty to exchange references. West Virginia, for example, requires residential day care facilities, day care centers, and home care service providers to respond to all requests by other service providers for references for former or present employees.<sup>249</sup> The same rationale might also be applied to any occupation involving substantial interaction with minors.<sup>250</sup> There is a logical analogy between these types of occupations and the airline industry. In the airline industry, the *risk* from a dangerous pilot is high. In the service provider industry, the *consequences* of a dangerous employee are great. The public peril in both situations justifies the additional burden upon employers and the potential privacy

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245. See Eric Dyer, *RDU Crash Spurs Pilot Histories Legislation; Measure Protects Airlines From Suits, Gives Basis for Hiring*, HERALD-SUN, July 24, 1996, at C1.

246. See *Aviation Safety: Should Airlines Be Required to Share Pilot Performance Records?*: Hearings Before the Subcomm. on Aviation of the Committee on Transportation and Infrastructure, 104th Cong. 72-75 (1995) [hereinafter *Congressional Hearing*] (statement of Jim Hall, Chairman, NTSB).

247. See Matthew L. Wald, *Safety Board Urges Government to Monitor Pilots' Job Records*, N.Y. TIMES, Nov. 10, 1995, at A3.

248. *Congressional Hearing*, *supra* note 246, at 75 (statement of Jim Hall, Chairman NTSB); see also Wald, *supra* note 247.

249. See W. VA. CODE § 15-2C-8(3) (Supp. 1996).

250. Some states already require criminal background and fingerprint checks of school employees. See, e.g., *Wyoming Legislature Passes Employment Laws Favorable to Employers*, WYO. EMPLOYMENT L. LETTER, May 1996, at 3, available in LEXIS, Employ Library, Emplaw File (discussing the recently enacted Wyoming law requiring school boards to make such checks).

concerns of employees.<sup>251</sup> Legislatures should therefore require the free exchange of information in these types of situations.

### *Proposed Model Statute*

The following model statute borrows from existing statutes and incorporates the analysis undertaken in the previous sections.

## SEC. X EMPLOYMENT REFERENCE IMMUNITY

### A. As used in this section:

(1) "Employee" means any person, paid or unpaid, in the service of an employer.<sup>252</sup>

(2) "Employer" means any person, firm, or corporation who employs an individual for compensation or who supervises an individual providing labor as a volunteer.<sup>253</sup>

(3) "Prospective employer" means any "employer," as defined herein, to whom an employee or former employee has submitted an application, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment.<sup>254</sup>

(4) "Prospective employee" means any individual who has taken such actions as defined in subsection (3).

(5) "Information pertaining to job performance" includes, but is not limited to attendance, attitude, awards, dates of service, demotions, duties, evaluations, knowledge, level of pay, promotions, skills, and disciplinary action.<sup>255</sup>

### B. Any current or former employer that responds to a request from an employee or a prospective employer of that

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251. Admittedly, serious privacy concerns are involved in any such action. If a teacher, for example, was accused falsely of misconduct with a student and was forced to resign from his or her position, this accusation could be disclosed with impunity by the teacher's former employer so long as the disclosure was not made with actual malice. Potentially, teachers, health care providers, or pilots could suffer grave and undeserved consequences in their future job searches.

252. See LA. REV. STAT. ANN. § 23:291(C)(2) (West Supp. 1997).

253. See MICH. COMP. LAWS ANN. § 423.451(b) (West Supp. 1997).

254. See LA. REV. STAT. ANN. § 23:291(C)(3) (West Supp. 1997).

255. See *id.* § 23:291(C)(5).

employee for information pertaining to job performance is presumed to be acting in good faith and is qualifiedly immune from liability in a civil action by the employee or any other person for any harm sustained as a proximate cause of the disclosure. This immunity shall not apply to information not requested by an employee or prospective employer of that employee. This immunity shall not apply if:

(1) it is shown by a preponderance of the evidence that the information provided was not limited to the scope of inquiry by the employee or prospective employer of that employee or was not reasonably necessary to achieve the purposes for which the information was requested; or

(2) it is shown by clear and convincing evidence that the disclosure was knowingly false or deliberately misleading, or made with reckless disregard as to the information's truth or falsity; or

(3) it is shown by a preponderance of the evidence that the disclosure was in violation of an employee's civil rights or in violation of any applicable state or federal law.

C. Any prospective employer who reasonably relies on information pertaining to an employee's job performance or reasons for separation, disclosed by a current or former employer, shall be immune from civil liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employees, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.<sup>256</sup>

D. If, in a civil action based upon an employment reference, the verdict is in favor of the defendant, the jury shall assess whether the disclosure was substantially true. If the jury so finds, the court shall award reasonable attorney fees and court costs of the defendant. If the verdict is in favor of the plaintiff, the court may award reasonable attorney fees and

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256. *See id.* § 23:291(B).

court costs of the plaintiff.<sup>257</sup>

E. Upon written request by the prospective employee, the prospective employer will provide copies to the employee of any written communications from current or former employers concerning the employee. The request must be received by the prospective employer not later than thirty days after the application is made to the prospective employer.<sup>258</sup>

F. A current or former employer, in one of the occupations listed below, shall provide information concerning an employee's job performance upon the request of a prospective employer. Such information must be disclosed only if the prospective employer is also engaged in one of the occupations listed below:

- (1) residential day care facilities, day care centers, and home care service providers authorized to operate in the state;<sup>259</sup>
- (2) school personnel or those who, in the course of their duties have regular contact with minors.

G. With the exception of subsection F, this section does not create any new cause of action.

### *Analysis*

The existing statutes may provide some psychological comfort to employers as they wrestle with whether they should provide references. At least now employers have a more definitive standard to which they may look when making decisions. Instead of consulting legal counsel to interpret the vagaries of common law, employers may now simply read the law.

Upon close examination, however, the statutes may not be successful in encouraging employers to provide references. The majority of statutes grant employers little that they did not

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257. Cf. Saxton, *supra* note 84, at 100, 110-11.

258. See IND. CODE ANN. § 22-5-3-1(c) (Michie 1997).

259. Cf. W. VA. CODE § 15-2C-8(3) (Supp. 1996) (requiring all residential care facilities, day care centers, and home care service providers to "[r]espond promptly to all requests by other service providers for references for former or present employees of the agency, which response may include a subjective assessment as to whether the individual for whom the reference is sought is suited to provide services to children or incapacitated adults").

already have at common law.<sup>260</sup> Employers previously were entitled to a conditional privilege when they provided references and the new statutes add little to this protection.<sup>261</sup> By retaining the common law form of malice, many of the statutes fail to protect employers from questionable verdicts rendered by juries confused over the vague concept of ill will. Statutes that fail to define liability fully may risk leaving the ultimate interpretation of the statutes to judges who may rely simply on the muddled common law abuse of privilege standard. Practitioners who represent employers will almost certainly notice these shortcomings and will most likely advise their clients accordingly. So far, reaction from employer attorneys has been mixed.<sup>262</sup>

Perhaps the single greatest cause of the current employer reference gridlock is employers' fear of lawsuits.<sup>263</sup> Defending lawsuits takes time and money. Even if employers ultimately

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260. Indeed, some practitioners have argued that individual statutes in some ways actually afford employers less protection than at common law. See *New Ohio Statute Covers Liability for Employment References*, *supra* note 186, at 2-3 (arguing that the Ohio statute may weaken the common law through its requirement that employers receive requests before providing information through its use of the malice standard and other provisions); cf. Landry & Hoffman, *supra* note 2, at 458-61 (discussing limitations of the Louisiana statute).

261. See *supra* text accompanying note 27.

262. See *Briefs*, WIS. EMPLOYMENT L. LETTER, Aug. 1996, at 8, available in LEXIS, Employ Library, Emplaw File ("[T]his law should ease employers' fears of being sued for providing truthful information about former employees. . . ."); *New Delaware Law Provides Immunity for Employer References*, DEL. EMPLOYMENT L. LETTER, Aug. 1996, at 1, available in LEXIS, Employ Library, Emplaw File ("Since Delaware had already provided in judicial decisions the same protection that the statute affords, cautious employers might wonder whether they should alter [their current] practice."); *New Indiana Law Simplifies Employee Reference Dilemma*, IND. EMPLOYMENT L. LETTER, July 1995, at 2, available in LEXIS, Employ Library, Emplaw File ("[E]ven the amendment's limited protection will likely help employers sleep easier and avoid lawsuits."); *New Ohio Statute Covers Liability for Employment References*, *supra* note 186, at 2-3 (discussing ways in which Ohio's statute may weaken existing common law protections); *Wyoming Legislature Passes Employment Laws Favorable to Employers*, *supra* note 250, at 3 ("[I]t is still not advisable to disclose performance information to prospective employers without a written authorization to release such information signed by the former employee.").

263. See generally Paetzold & Willborn, *supra* note 6, at 138-43; Reed & Henkel, *supra* note 6, at 317-18.

win, they will have invested considerable resources in their defense—resources that smaller companies often cannot afford.<sup>264</sup>

While prospective employers have much to gain from the free exchange of references, current or former employers have little incentive to provide them. Some employers may wish to provide a reference about a former employee, arguing that “Jane Smith was a dedicated employee of this company for fifteen years. She deserves a good reference.” Others, particularly those in smaller communities, may hope that by providing references, other employers will be encouraged to do the same when the appropriate time comes. These inclinations should be encouraged.

So long as the perception exists among employers that they run the risk of losing a lawsuit every time they provide references, employers will likely not stick out their collective necks. Though it is too soon to judge how effective the new laws will be in breaking the reference gridlock, it appears doubtful that they will succeed. Indeed, it is questionable how successful even the best-designed statute, standing alone, might be in bringing about the desired affect.

Consider the case of *Sigal Construction Corp. v. Stanbury*,<sup>265</sup> a run-of-the-mill defamation case based on an employer reference. Sigal Construction Corp. (“Sigal”) fired Kenneth Stanbury, one of its project managers, because he was “not doing his job correctly.”<sup>266</sup> After Stanbury applied for a job with a new company, his prospective employer contacted the defendant in order to obtain a reference.<sup>267</sup> Paul Littman, Sigal’s project executive, told Stanbury’s prospective employer that Stanbury “seemed detail oriented to the point of losing sight of the big picture” and “[o]bviously [Stanbury] no longer worked for us and that might say enough.”<sup>268</sup> Littman in fact had never worked with Stanbury nor had he even read an evaluation of Stanbury’s work performance.<sup>269</sup> Littman could recall no facts or work related

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264. See *supra* notes 100-04 and accompanying text.

265. 586 A.2d 1204 (D.C. 1991).

266. *Id.* at 1206.

267. See *id.*

268. *Id.*

269. See *id.*



incidents to support his conclusion and based it primarily on a "general impression [he] had developed' from 'hearing people talk about [Stanbury's] work at the job."<sup>270</sup>

At trial, the jury returned a verdict for Stanbury on his defamation count.<sup>271</sup> On appeal, Sigal argued that the statements were mere opinions and, as such, could not be defamatory.<sup>272</sup> The court disagreed and held that Littman should have known that Stanbury's prospective employer would interpret the statements as factual evaluations of Stanbury's work.<sup>273</sup>

A similar outcome probably would occur under an employer-immunity statute as well. Both parties agreed that a conditional privilege attached to the defendant's statements.<sup>274</sup> A typical statute's grant of a good faith presumption or conditional privilege, therefore, would not have altered the disposition of the case. The *Stanbury* court applied Virginia law, whereby the plaintiff can overcome the conditional privilege through a showing of clear and convincing evidence that the defendant acted with common law malice, or in other terms, bad faith.<sup>275</sup> The jury's finding that the defendant abused the privilege would have remained unchanged whether the statute required the more typical preponderance standard or the stricter clear and convincing standard of proving common law malice.<sup>276</sup> Moreover, because the court upheld the jury's conclusion that, by relying on mere office gossip, the defendant had acted with gross indifference or recklessness,<sup>277</sup> a similar outcome would have occurred, even under a statute requiring a showing of actual malice.

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270. *Id.*

271. *See id.* at 1208. The jury awarded Stanbury \$370,440 in damages. *See id.* The trial court subsequently reduced the damages award to \$250,000. *See id.*

272. *See id.* Sigal did not contest, on appeal, that the statements were false or negligently made. *See id.* at 1213.

273. *See id.* at 1211-13.

274. *See id.* at 1213.

275. *See id.* at 1214.

276. The court noted that "[o]nly if there is no evidence to support a finding of common law malice will a court be justified in withholding the issue from the jury." *Id.*

277. *See id.* at 1215.

The *Stanbury* decision illustrates several important points. First, it demonstrates how little protection even employer-friendly statutes might provide employers who act foolishly.<sup>278</sup> Second, the case helps to illustrate how closely the newly-enacted statutes parallel the common law as they apply to employer references. Finally, *Stanbury* reveals how little new protection the statutes provide. Even if the court mechanically applied one of the typical statutes, an identical outcome probably would have resulted. This analysis thus suggests that, although the statutes offer some psychological benefit to employers, the substance of the law remains largely unchanged.

#### EDUCATION OF EMPLOYERS: ADDRESSING THE ROOT CAUSE OF THE PROBLEM

Because of the important interests at stake for both employers and employees, state legislatures face a difficult task in drafting even-handed statutes that effectively resolve the current dilemma. To encourage the flow of references, groups representing employers should move beyond reliance upon statutory grants of immunity. The statutes, although a step in the right direction, do not fully address what appears to be the root cause of the current reference standstill—employers' fear over being sued. In order to overcome this fear, employer groups should institute a campaign designed to correct employers' apparent misconception that providing references to prospective employers is likely to

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278. A 1984 decision from a Texas appellate court provides a good illustration. In *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. App. 1984), Larry Buck sued his former employer for damages for defamation. After being fired by Frank B. Hall & Co., Buck was unable to obtain other employment. *See id.* at 617. Buck hired an investigator to discover the true reasons for his dismissal. *See id.* Posing as a prospective employer, the investigator contacted several Hall employees and requested information about Buck. *See id.* One employee described Buck as "untrustworthy, and not always entirely truthful; . . . disruptive, paranoid, hostile, and . . . guilty of padding his expense account." *Id.* Another employee said that "Buck was horrible in a business sense, irrational, ruthless, and disliked by office personnel. He described Buck as a 'classical sociopath,' who would verbally abuse and embarrass Hall employees." *Id.* Summing up, the employee described Buck as "a zero," "a Jekyll and Hyde person" who was "lacking in compucture[sic] or scruples." *Id.* The jury awarded Buck \$1,905,000 in damages. *See id.* at 616. Given the extreme nature of the Hall employees' comments, it is difficult to imagine any state passing an employer reference law which would shield an employer from liability for such comments.

land them in court. Additionally, employer groups should instruct employers on how to avoid such suits in the first place.

### *Calming Employer Fears*

Currently, disagreement exists as to the seriousness of the threat of defamation suits that employers providing references face. One authority states that "[t]he number of defamation actions filed by employees against employers has surged during the past few years."<sup>279</sup> Another claims "as many as five thousand claims involving employment references are filed each year."<sup>280</sup> Employers' fears over being sued for providing references is a constant theme in the articles reporting the recently enacted employer immunity laws.<sup>281</sup> A logical conclusion from reading these accounts is that nearly every employer knows of another employer who lost a lawsuit for providing an allegedly false reference.

The empirical evidence suggests otherwise. A 1992 study of employee defamation suits by Ramona L. Paetzold and Steven L. Willborn concluded that from 1985 to 1989, employees were less likely to win a defamation suit, were less likely to win an award of damages, and in cases in which damages were awarded, were likely to win a lesser amount than in the period from 1965 to 1969.<sup>282</sup> Although trends may have changed after the conclusion of this study, even some members of employer groups seem to acknowledge that the number of defamation suits has not substantially increased in recent years.<sup>283</sup>

Whatever the reality, employers apparently *believe* that defamation lawsuits are a deterrent to providing references. Like the story about Jimmy Hoffa being buried under the end zone at

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279. GREEN & REIBSTEIN, *supra* note 21, at 63.

280. Ronald Turner, *Compelled Self-Publication: How Discharge Begets Defamation*, 14 EMPLOYEE REL. L.J. 19, 20 (1988).

281. See, e.g., Ross, *supra* note 66.

282. See Paetzold & Willborn, *supra* note 6, at 136-38.

283. See Forster, *supra* note 4 (quoting Michael Fields, the state director of South Carolina's chapter of the National Federation of Independent Businesses as saying "[t]he problem is not that there was a rash of lawsuits . . . [rather] [t]here were no lawsuits because no one was talking").

Giants Stadium, the belief is not unlike urban folklore.<sup>284</sup> The stories have been repeated so often that they are now accepted as being true. Until this belief is addressed adequately, the problem is likely to continue.

Education can address the concerns of employers. Education was, at least in part, an intended goal of the campaign to implement the various reference laws. A representative of the Society for Human Resource Management predicted that as employers learn more about the protection the new laws afford, their anxieties will lessen.<sup>285</sup> If, however, attorneys for employers regard the new laws as merely a codification of what they perceive as the already ineffective common law or the same broken car with a new paint job, then the educational goal of the laws will be thwarted.

This Note has argued that the newly enacted statutes, standing alone, are unlikely to substantially improve the current situation. In order to increase the exchange of references, employers need to feel that they run only a slight risk of getting sued in the first place. Attorney fee shifting provisions and increased burdens of proof might be effective to an extent, but they cannot guarantee employers that they have nothing to fear from providing references. Until the root causes of employer reluctance are addressed, the reference problem is likely to continue.

Now that employer groups have taken the first step of pushing for statutory immunity, they need to take the complementary step of conducting research in the area of employment defamation suits. If, as Paetzold and Willborn's study suggested,<sup>286</sup> employer concern is exaggerated, this fact should be publicized to employers. Regardless of the outcome of such a study, employer groups should coordinate an education program that will teach employers how to avoid such suits.<sup>287</sup> Better information

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284. For a discussion of urban folklore, see JAN HAROLD BRUNVAND, *THE VANISHING HITCHHIKER: AMERICAN URBAN LEGENDS AND THEIR MEANINGS* (1981).

285. See Forster, *supra* note 4 (citing a statement by Sharon Horrigan, state legislative affairs manager, Society for Human Resource Management).

286. See *supra* note 6.

287. For a discussion of some of the steps employers can take to protect themselves from liability, see Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787 (1993).

will do more to increase the exchange of information than statutory reform alone. Only after the root causes of reference gridlock are addressed will the statutory protections be effective.

### CONCLUSION

References are a valuable resource for both employers and employees. Both sides have a legitimate interest in ensuring that employers are free to provide honest and complete information. When references function effectively, they benefit not only the parties involved, but society as a whole through safer and more efficient workplaces.

New reference immunity laws are a commendable first step toward addressing employer reluctance to provide references, but standing alone, they fail to, and are in fact incapable of, eliminating the problem. To fully address the problem, legislatures and employer groups must coordinate their efforts. For their part, employer groups need to supplement the existing statutes by undertaking a campaign to fully inform their members about the actual risks of providing references and how employers can reduce such risks. Only through a combination of legislative action and grass roots effort will all interested parties obtain the protection they deserve.

Alex B. Long