William & Mary Law Review

Volume 30 (1988-1989)
Issue 2 The American Constitutional Tradition of Shared and Separated Powers

Article 18

February 1989

Employer Defamation: The Role of Qualified Privilege

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EMPLOYER DEFAMATION: THE ROLE OF QUALIFIED PRIVILEGE

INTRODUCTION

"Jane Doe has applied for a position with our company and has listed you as her most recent employer. We are calling to inquire about her job performance and work history. Was she a satisfactory employee? How would you rate her abilities? Would you hire her again? Would you recommend her for this or other positions? Why did she leave your employ?"

The questions are ones posed frequently to former employers by prospective employers. Candid answers can help the prospective employer evaluate the advisability of hiring a job applicant. The answers can supplement information supplied on an application or garnered from first impressions and allow the hiring party to compare the day-to-day reality of a work relationship with the best-foot-forward appearance of an interview situation.

The questions posed, however, are ones that former employers are increasingly reluctant to answer. Comments and evaluations can form the basis of liability for defamation, a cause of action growing in popularity among employees who feel they were treated unfairly, dismissed wrongfully or hampered in their job search by unjustified appraisals.[1] Some court-watchers estimate that employer defamation actions currently account for up to one-third of all defamation verdicts.[2]

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1. The popularity of defamation as a cause of action against employers is symptomatic of the demise of the employment-at-will doctrine. *See* Prentice & Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 208 & n.2 (1987).

2. Middleton, *Employers Face Upsurge in Suits Over Defamation*, Nat'l L.J., May 4, 1987, at 1, col. 3. See Martin & Bartol, *Potential Libel and Slander Issues Involving Discharged Employees*, 13 EMPLOYEE REL. L.J. 43 (1987) for a lower estimate. The authors cite authority that employer defamation claims comprise one-third of all defamation claims. *Id.* at 43, 60 n.2.

Liability to current and former employees looms in every statement, written or oral, concerning their performance.[3] Some employees retain their jobs, even get promotions, and still press their actions for reputational damage.[4] Some are dismissed and seek compensation for lost wages when they are unable to secure other employment.[5]

The employer's response to these hazards threatens to cut off completely this important source of information for hiring decisions.[6] Anticipating uncooperative responses, many prospective employers have discontinued the practice of checking an applicant's work history and job experience.[7] The result is blind hiring with increased potential for fraud and misrepresentation by applicants.

The increase in employer defamation actions is aggravated by misunderstanding and misapplication of common law qualified

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3. Comment, *Potential Employer Liability for Employee References*, 21 U. RICH. L. REV. 427, 434 (1987). A narrowing of qualified privilege increases the likelihood of liability for almost every statement made in the employment context. *Id. See also* Middleton, *supra* note 2, at 30, col. 1 (quoting Paul H. Tobias, founder of Plaintiff Employment Lawyers Association: " 'Spread the word. Every wrongful discharge must be looked at as a defamation case,' " and Chicago lawyer Michael J. Leech: " 'Every time you open your mouth or write something down, you're opening yourself up to potential liability' ").

4. *See* Marchesi v. Franchino, 283 Md. 131, 387 A.2d 1129 (1978). Although she remained at her job and received a promotion, the plaintiff, a probation officer for the Maryland Department of Juvenile Services, successfully brought a defamation action against a fellow employee. Accused by the fellow employee of homosexual advances, the plaintiff had been the subject of an investigation by the employer, and a report to the state medical advisor suggested that she receive a medical examination and possibly a psychiatric consultation. *Id.* at 132-33, 387 A.2d at 1130.

5. *See* Frank B. Hall & Co. v. Beck, 678 S.W.2d 612 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980). In *Stuempges*, an employment agency refused to find employment for the plaintiff after his former employer gave "the worst recommendation" the placement office had ever received. 297 N.W.2d at 255.

6. Job references from former employers are a primary source of hiring information. Ninety-five percent of employers check references supplied by a prospective employee. Martin & Bartol, *supra* note 2, at 43, 60 n.1. Offensive and defensive strategies explain the practice. Eighty percent of all resumes contain misleading information about employment histories. Prentice & Winslett, *supra* note 1, at 224 n.102. Management experts also agree that the best predictor of future job performance is past job performance. *Id.* at 224.

7. A survey by a Chicago placement firm revealed that its employer/clients did not check the references of nearly 75% of their job candidates. Middleton, *supra* note 2, at 30, col. 2.

privilege.[8] Employers enjoy a qualified privilege when discussing most matters related to employment with individuals having a corresponding interest or duty.[9] The privilege has the potential for affording sweeping protection to employers. Courts, however, have diluted the protection by using low-threshold standards to defeat the privilege and to shift the burden of defense to employers.[10]

This Note examines the development of the employer defamation cause of action, reviewing the elements of common law defamation and the historical background of qualified privilege. The Note also describes the strained analysis courts have used to extend defamation to the employment context.

The courts' treatment of the "duty" and "interest" components of qualified privilege in the employment context are analyzed closely. The Note examines the situations in which courts have upheld the privilege and the standards courts have used to defeat the privilege. The results indicate widely divergent interpretations of common law qualified privilege. At worst, the privilege extends only to true statements[11] or is defeated by mere negligence.[12] At best, the privilege extends a protection to employers that is pierced only by actual malice.[13] The Note concludes with a call for reinforcement of the qualified privilege in the employment context as the judicial solution for protecting the socially valuable information embodied in job recommendations. Although the problem is best resolved in the courts in which the difficulty has arisen, legis-

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8. "[I]diosyncratic interpretation and application of the [qualified] privilege from state to state can mean the difference between no liability and very substantial liability . . . ." Castagnera-Cain, *Defamation and Invasion of Privacy Actions in Typical Employee Relations Situations*, 13 LINCOLN L. REV. 1, 18 (1982).

9. RESTATEMENT (SECOND) OF TORTS § 595 (1977) (conditional privilege extends to information given in response to a request, when a relationship exists between the parties and the information affects a sufficiently important interest of the recipient or the recipient is one to whom the publisher owes a duty; the privilege covers information concerning the honesty and efficiency of an employee's work); 50 AM. JUR. 2D *Libel and Slander* § 275 (1970) (qualified privilege generally applies to communications about the character and qualifications of an employee or former employee made to any person who has a legitimate interest in the subject matter of the communication).

10. The courts have been narrowing the scope of employers' qualified privilege to comment on employees, increasing the employer's risk of liability. Comment, *supra* note 3, at 432.

11. *See* Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980).

12. *See* Schneider v. Pay'n Save Corp., 723 P.2d 619 (Alaska 1986).

13. *See* Marchesi v. Franchino, 283 Md. 131, 387 A.2d 1129 (1978).

lative alternatives may be appropriate if courts decline to take the initiative.

DEFAMATION IN THE EMPLOYMENT CONTEXT

Although the tort of defamation varies slightly from jurisdiction to jurisdiction, the basic elements consist of an unprivileged publication of false statements to third parties.[14] The statements must tend to harm the reputation of the person who is the subject of the statements, lowering him in the estimation of the community.[15] Defamation is actionable without proof of actual damages if the statement tends to harm the individual in his business, trade, or profession.[16]

The common law established public policy exceptions to basic defamation actions for areas in which the importance of the information outweighed the risk of damaging an individual's reputation.[17] Without changing the actionable character of the words spoken, the law extended a privilege to communicators of essential information.[18] By placating the fear of liability, the common law

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

15. *Id.* § 559. The defamatory statement may also be one that tends to harm the reputation of another in such a way that it deters third parties from associating or dealing with him. *Id.*

16. *Id.* § 573.

17. Qualified privilege is based on public policy. It arises out of the necessity of full and unrestricted communication concerning the matter in which the parties have an interest or duty. 50 AM. JUR. 2D *Libel and Slander* § 195 (1970). The extension of privilege involves balancing the interest of a defamed person in protecting his reputation against the interests of the publisher and the party receiving the information. RESTATEMENT (SECOND) OF TORTS § 595 comment b (1977). When qualified privilege applies, "public policy is deemed to favor the free exchange of information over the individual's interest in his or her good reputation." Turner v. Halliburton Co., 240 Kan. 1, ___, 722 P.2d 1106, 1112 (1986).

18. When the information was essential, the courts decided that the publisher of the information needed complete immunity from liability to encourage the most free exchange. RESTATEMENT (SECOND) OF TORTS § 593 scope note (1977). An absolute privilege emerged for government officials who serve in a legislative, executive, or judicial capacity "[t]o facilitate the effective performance of government." *Turner*, 240 Kan. at ___, 722 P.2d at 1112.

When the information was sufficiently important, the courts gave the communicator increased incentive to furnish that information by relaxing the usual standard for liability. RESTATEMENT (SECOND) OF TORTS § 595 comment b (1977). The resulting qualified privilege burdens the defamation plaintiff with the additional proof of malice, a factor ordinarily imputed to unprivileged communications. 50 AM. JUR. 2D *Libel and Slander* § 195 (1970).

encouraged a free exchange of the essential information.[19]

In *Marchesi v. Franchino*,[20] the Court of Appeals of Maryland recognized that certain statements by employers "advance[d] social policies of greater importance than the vindication of a plaintiff's reputational interest" and that such statements fell within the common law qualified privilege.[21] By doing so, the court allowed the defendant employer to "escape liability for an otherwise actionable defamatory statement."[22] The court reasoned, "Were it not for this safeguard, 'information that should be given or received would not be communicated because of [the] fear of . . . persons capable of giving it that they would be held liable in an action of defamation if their statements were untrue.' "[23]

In *Rosenberg v. Mason*,[24] the Virginia Supreme Court recognized qualified privilege in the employment context, devising a three-prong test to determine when the privilege would apply. To benefit from the privilege, the defendant employer had to establish that the occasion was privileged, that the words used did not transcend the scope of the privilege, and that the words were used in good faith, without actual malice.[25] The "facts and circumstances leading up to and surrounding the use of the alleged defamatory words" determine if the elements are established.[26]

Concurrent with the historical development of qualified privilege for employers, defamation claimants have tested the judicial wa-

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19. As a result of the privilege, the defendant "ought to be shielded against civil liability for defamation where, in good faith, he publishes a statement in furtherance of his own legitimate interests, or those shared in common with the recipient or third parties, or where his declaration would be of interest to the public in general." Marchesi v. Franchino, 283 Md. 131, 135-36, 387 A.2d 1129, 1131 (1978).

20. 283 Md. 131, 387 A.2d 1129 (1978).

21. *Id.* at 135, 387 A.2d at 1131.

22. *Id.*

23. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 593 scope note (1977)).

24. 157 Va. 215, 160 S.E. 190 (1931). In *Rosenberg*, a retail store manager fired an employee of the store, believing she was responsible for shortages in receipts. The employee brought a defamation action when a clothing store denied her employment after talking with her former boss. The court found for the employer on the basis of qualified privilege because the employee did not affirmatively prove an abuse of the privilege.

25. *Id.* at 234, 160 S.E. at 197.

26. *Id.* (particularly any words tending to show that the defendant believed the words to be true when he used them).

ters in several employment contexts: evaluations, discharge, and job references. They have met with varying degrees of success.

Evaluations

In *Caslin v. General Electric Co.*,[27] an employee attempted to press a defamation action for allegedly libelous comments contained in his written performance evaluations. The circumstances, however, did not support a defamation claim. The employee "had been fully aware for years that he would periodically be rated as to efficiency and in spite of not obtaining the status he thought he deserved these reports are communications within the employing company which are necessary to its functioning and, therefore, do not incur a liability" to the employer.[28]

In *Bratt v. International Business Machines Corp.*,[29] a similar attempt also failed. The employee premised his defamation claim on a memorandum circulated among his supervisors that indicated he had a mental disorder.[30] The Supreme Judicial Court of Massachusetts quoted with approval authority from other jurisdictions: " '[e]mployers . . . have a legitimate need . . . to determine whether or not their employees are professionally, physically, and psychologically capable of performing their duties.' "[31] Accordingly, the court found that good faith disclosures by employers of defamatory

27. 608 S.W.2d 69 (Ky. Ct. App. 1980). The employee had been an in-house attorney for General Electric for 24 years. In 1974 and 1977, his supervisor rated him " 'below average' " and " 'not promotable,' " a rating of four on a scale of nine. *Id.* at 70. The employer did not discharge the employee because of the efficiency reports. Instead, the employee elected to resign before he filed the lawsuit. *Id.* at 71. Although the court addressed the viability of a defamation action based on the reports contained in his file, it did not decide the case on the facts. The court entered a summary judgment for the employer because the statute of limitations had run on the action. *Id.* at 70.

28. *Id.* The court dealt with the allegedly defamatory statements in the context of a qualified privilege. In assessing the utility of the evaluations, the court also noted that the reports "not only point out his shortcomings but are also complimentary to him in many areas covered." *Id.* at 71.

29. 392 Mass. 508, 467 N.E.2d 126 (1984). In *Bratt*, the trial court had granted defendant employer's motion for summary judgment. With the appeal pending before the United States Court of Appeals for the First Circuit, the Massachusetts Supreme Judicial Court answered certified questions of law referred by the federal judge. Its responses supported the employer's qualified privilege in each instance. *Id.*

30. *Id.* at 512, 467 N.E.2d at 130.

31. *Id.* at 516, 467 N.E.2d at 133 (quoting Hoesl v. United States, 451 F. Supp. 1170, 1176 (N.D. Cal. 1978), *aff'd*, 629 F.2d 586 (9th Cir. 1980)).

medical information relevant to employees' fitness to work were conditionally privileged.[32]

Discharge

Defamation also has developed as a back door approach in states that do not recognize a wrongful discharge tort.[33] In *Loughry v. Lincoln First Bank, N.A.*,[34] a bank employee prevailed in a defamation action for statements made at a meeting the day before his discharge. The bank produced evidence purporting to implicate him for drug use, theft, and general misconduct; a senior vice president of the bank justified his termination on grounds that "the bank had lost confidence in him."[35] The court held that "[s]tatements among employees in furtherance of the common interest of the employer, made at a confidential meeting, may well fall within the ambit of a qualified . . . privilege. But the privilege is conditioned on its proper exercise. . . ."[36]

In *Kroger Co. v. Young*,[37] the Virginia Supreme Court considered a claim based on an employer's explanation of an employee's termination. The store manager offered full-time work to a part-time cashier " 'because they had to get rid of two of the girls over there for taking money.' "[38] The court found that the manager's statement was within his duty and legitimate business interest.[39]

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32. *Id.*

33. *See* Blodgett, *New Twist to Defamation Suits*, A.B.A. J., May 1, 1987, at 17 (predicting that courts will substitute defamation by self-publication and defamation to third parties in states that bar the wrongful discharge action, especially when employers' insurance policies generally cover defamation verdicts). *See also* Martin & Bartol, *supra* note 2; Striharchuk, *Fired Employees Turn Reason for Dismissal into a Legal Weapon*, Wall St. J., Oct. 2, 1986, at 29, col. 2.

34. 67 N.Y.2d 369, 494 N.E.2d 70, 502 N.Y.S.2d 965 (1986).

35. *Id.* at 374, 494 N.E.2d at 72, 502 N.Y.S.2d at 967.

36. *Id.* at 376, 494 N.E.2d at 73, 502 N.Y.S.2d at 968 (citations omitted). In *Loughry*, the plaintiff prevailed on a showing that managers made the statements solely out of malice. *Id.*

37. 210 Va. 564, 172 S.E.2d 720 (1970). In *Kroger*, the employer confronted an employee with evidence that she had stolen money from the cash register. After confessing to the theft, the employee implicated the plaintiff, stating that the plaintiff taught her how to remove the money without being detected. *Id.* at 565, 172 S.E.2d at 721. The supreme court reversed the trial court, which had erroneously ruled that statements by the employer explaining the plaintiff's discharge were not qualifiedly privileged. *Id.* at 567, 172 S.E.2d at 722.

38. *Id.* at 566, 172 S.E.2d at 722.

39. *Id.* at 567-68, 172 S.E.2d at 723.

Job References

The most prevalent type of employment defamation action, however, is based on statements made by the former employer to a prospective employer who is checking references or confirming an applicant's work history. Obviously, an employer's unfavorable response to an inquiry may impair the employee's chances of securing subsequent employment.[40] The success of this type of action can be traced to an increasing recognition that an employer cannot deprive one of the quasi-property interest in one's job without some minimal due process.[41]

Defamation cases involving job references abound. Circumstances vary from unsolicited letters to potential employers characterizing the employee's voluntary departure as a termination[42] to an unsubstantiated diatribe maligning the employee's work habits and sales record.[43]

Because job references implicate most directly the employee's professional reputation in the business community and, simultaneously, the public interest in the free exchange of the information sought, they create the greatest difficulties for the courts and, consequently, for employers as well.

In *Stuempges v. Parke, Davis & Co.*,[44] the Supreme Court of Minnesota wrestled with these countervailing interests. On the one hand, the court remarked, "[i]t is certainly in the public interest that this kind of information be readily available to prospective employers . . . . [U]nless a significant privilege is recognized . . .,

40. Comment, *supra* note 3, at 429.

41. Castagnera-Cain, *supra* note 8, at 4.

42. Davis v. Ross, 754 F.2d 80 (2d Cir. 1985). Singer Diana Ross disseminated a note listing the names of seven former employees, including the plaintiff, whom she no longer employed. The note continued: "If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact, if you hear from these people, and they use my name as a reference, I wish to be contacted." *Id.* at 81-82. The plaintiff claimed that she resigned voluntarily and never used Ross as a reference. Regardless, the note hampered her efforts to secure subsequent employment. The court of appeals reversed the trial court, which had dismissed the complaint as nonlibelous as a matter of law. The appellate court ruled the letter was "reasonably susceptible of several interpretations, at least one of which is potentially libelous." It therefore presented a question for the jury. *Id.* at 86.

43. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980). See *supra* note 5 (discussion of *Stuempges*).

44. 297 N.W.2d 252 (Minn. 1980).

employers will decline to evaluate honestly their former employees' work records."[45] On the other hand, the court noted the importance of "protect[ing] the job seeker from malicious undercutting by a former employer."[46]

Regardless of the circumstances under which a defamation claim arises in the workplace, employment defamation presents special problems that complicate consistent judicial resolution.

Problems with Defamation in the Employment Context

In the employment context, courts have been willing to stretch legal analysis in three general ways to extend generous protection to the employee's reputational interest. First, courts have treated employers' statements as fact, rather than opinion, which would not implicate defamation.[47] Second, courts have found defamation when the employee himself made[48] or authorized[49] the only publication of the allegedly damaging statements. Finally, some courts' multifarious interpretations and application of qualified privilege have woven a tangled web of liability from which employers are unable to extricate themselves.[50]

Job References: Fact or Opinion

Courts have recognized employer's impressions and evaluations as fact, rather than opinion. The distinction is critical in light of dicta in *Gertz v. Robert Welch, Inc.*[51] The United States Supreme

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45. *Id.* at 257.

46. *Id.* at 258.

47. *See* Note, *The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule*, 72 Geo. L.J. 1817 (1984).

48. *See* cases cited *infra* note 67.

49. *See* Frank B. Hall & Co. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985). In *Buck*, the employer, an insurance company, discharged the plaintiff, a salesman, only months after luring him away from a competing firm. The employer explained that the plaintiff failed to meet its expectations. The employee, unable to secure subsequent employment, hired a private investigator to discover the true reasons for his termination. He brought a defamation action based on statements made by the former employer to the private investigator. *Id.* at 616-17. The appellate court affirmed a $1.9 million jury verdict for the plaintiff. *Id.* at 619.

50. Castagnera-Cain, *supra* note 8, at 18-19.

51. 418 U.S. 323 (1974). In *Gertz*, the United States Supreme Court declined to extend the *New York Times v. Sullivan* actual malice standard to defamation of a private citizen by the media. The private individual is more vulnerable to injury and more deserving of

Court indicated that, under the first amendment, "there is no such thing as a false idea."[52] The Court suggested a constitutional basis for providing absolute immunity from liability for defamation actions based on pure opinion.[53]

This understanding mirrors the common law "fair comment doctrine" that provides immunity from defamation for opinions on matters of public interest.[54] To fall within the purview of the doctrine, the opinions stated must not relate to the person who is the subject of the statements but rather to his acts. The statements also must be an honest and fair expression of opinion based on facts truly stated.[55]

The question of whether specific statements are fact or opinion is a matter of law to be determined by the court.[56] Most courts have not given serious consideration to the distinction.[57] At the

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recovery because he does not have the same opportunity for self-help as the public figure or public official. He does not have the same access to channels of effective communication to correct the error. He has not invited attention and comment by thrusting himself into public affairs, thereby voluntarily risking an increased chance of injury. Given these concerns, the plurality opinion left the individual states to define the appropriate fault-based standard for defamation liability by balancing first amendment concerns against the legitimate state interest of redressing reputational harm. *Id.* at 344-46.

52. *Id.* at 339.

53. *Id.* at 340 n.8.

54. 50 AM. JUR. 2D *Libel and Slander* § 289 (1970). To be covered by the fair comment doctrine, the statement must be an opinion, in whole or in part, and not an assertion of a factual proposition. The statement must relate to a matter of public interest or concern. *Id.* Although the courts have applied the doctrine most frequently to the media, it is available to the general public as well. *Id.* § 290. *See* Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (applying the fair comment doctrine in the context of a published newspaper column criticizing the political and philosophical bent of a university professor).

55. 50 AM. JUR. 2D *Libel and Slander* § 290 (1970). A derogatory inference may become a statement of fact, rather than a fair comment, if it states a conclusion without specifying the facts from which the inference is derived. *Id.* § 289. When stated with the relevant facts, a fair comment gives the recipient the opportunity to examine the basis for the opinion and arrive at a different conclusion based on the same information. The *Restatement* position also places an opinion outside the purview of the fair comment doctrine if the opinion suggests undisclosed defamatory facts as its basis. Note, *supra* note 47, at 1827; *see* RESTATEMENT (SECOND) OF TORTS § 606 (1977).

56. *Ollman*, 750 F.2d at 978.

57. Indeed, because most cases do not address the distinction between fact and opinion in employment defamation, one can only assume that the courts have adopted a per se rule of treating employers' statements as fact.

very least, they have not articulated any specific analysis to determine whether an employer's impressions are subjective opinion.[58]

The Circuit Court of Appeals for the District of Columbia, however, has extrapolated from Supreme Court cases a four-factor standard for distinguishing fact from opinion.[59] The test focuses on context of the statement, social context, common meaning, and verifiability by objective proof.[60]

The immediate context of a statement influences the audience's readiness to infer that the comment has factual content.[61] Certain contexts, including job recommendations, may imply the existence of facts not disclosed by the speaker. Again, drawing a parallel to the fair comment doctrine, the speaker would bear the ultimate burden of establishing that his opinion was indeed based on facts, even though reasonable individuals could form differing opinions using the same raw data.

The broader social context or setting in which the statement is made also may signal the audience whether the statement is likely to be fact or opinion.[62] In the employment context, the prospective employer solicits an opinion—an overall perception of an individual as a person and an employee. He may reasonably expect some factual basis for the appraisal, but human experience suggests that people do not make uniform impressions on all of those with whom they come into contact.

The common meaning of the specific language used in a recommendation is also a valuable indicator in determining whether the statement is opinion. The former employer's comments may have a

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58. *See* Note, *supra* note 47, at 1819. When judicial tests are applied, they tend to be vague and unpredictable. The vagueness limits their usefulness and raises the problem of self-censorship. *Id.* The article argues for a "bright line rule" to protect the media and end the question of how the courts will construe opinion statements made by the press. *Id.* at 1846. The same reasoning, however, applies in the employment context. If employers are unsure of when their conduct will cross into some unprotected realm, the predictable reaction will be a reluctance to make any statement.

59. In *Ollman*, a professor of political science brought suit against two nationally syndicated columnists for an allegedly defamatory article. 750 F.2d at 979.

60. *Id.* The court called for predictability and the use of an announced legal standard. It rejected approaches of other jurisdictions in which courts used no standard, but treated the distinction as a judgment call; used verifiability as a single-factor test; or used the multifactor test of totality of circumstances. *Id.* at 978. *See also* Note, *supra* note 47, at 1846.

61. *Ollman*, 750 F.2d at 979.

62. *Id.*

precise core meaning or may be fairly ambiguous. The more indefinite the comments, the less likely they are to infer facts.[63]

Finally, the statement's susceptibility to objective proof is a key factor in the distinction between fact and opinion. If the statement is not easily verifiable, the prospective employer is less likely to accept it as a fact.[64]

Use of the *Ollman* test in employment defamation cases would identify statements so factually ladened that they are not entitled to benefit from opinion privilege.[65] The test also supplies a bright line rule by which employers could measure their statement and avoid excessive self-censorship.[66]

Self-Publication: Supplying the Missing Element

A second analytical leap has encouraged the proliferation of employer defamation suits. Some courts have been willing to allow defamation actions to proceed without actual publication of the statements by the employer to any third party.[67] The employee

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63. *Id.* at 980. Conversely, the more precise the statements, the more likely they are to give rise to clear factual implications. The relevant question is whether the statement has a meaning definite enough to convey facts. *Id.*

64. *Id.* at 981. The court recognizes that objective verifiability is a difficult line to draw. However, "[t]rial judges . . . will be particularly well situated to determine what can be proven." *Id.* at 982.

65. *Id.* at 985.

66. *See* Note, *supra* note 47, at 1818. *But cf.* Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988) (which proposes to replace the *Ollman* four-prong test with a requirement of an explicit and specific defamatory charge to support a defamation action; broad, unfocused, subjective allegations would be insufficient, regardless of defamatory implications and innuendo).

67. Blodgett, *supra* note 33, at 17. The theory of compelled self-publication has prevailed in California (McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980)), Georgia (Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946)), Iowa (Belcher v. Little, 315 N.W.2d 734 (Iowa 1982)), Michigan (Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969)), Minnesota (Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875 (Minn. Ct. App. 1985), *rev'd in part*, 389 N.W.2d 876 (Minn. 1986)). The courts found that the employees involved had no choice but to disclose the facts of their previous termination; the prospective employers inquired about previous employment before they would consider the employees for a job. Misrepresentation was not an option because the prospective employers intended to check the stories with former employers. Further, the courts wanted to encourage a truthful response. The former employers were therefore exposed to liability even if their actual response to inquiries was a neutral one. Blodgett, *supra* note 33, at 17. *Contra* Churchey v. Adolph Coors Co., 725 P.2d 38 (Colo. Ct.

himself satisfies the publication element of defamation by disseminating the employer's allegedly defamatory statement.

Using the legal fiction of compelled self-publication,[68] courts have reasoned that the employees had no alternative but to disclose statements of previous employers to prospective employers.[69] To expect otherwise would condone falsehoods and fabrication by job applicants.[70] Under this analysis, the former employer is held responsible for publication of his statements if he could have reasonably foreseen circumstances in which the employee would be *morally obliged* to divulge the communication.[71]

In *Lewis v. Equitable Life Assurance Society*,[72] the Court of Appeals of Minnesota recognized that "[o]rdinarily the defendant is

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App. 1986) (in which the court found no reason to weaken the general rule with an exception for self-publication).

68. *See* Blodgett, *supra* note 33, at 17.

69. *See* cases cited *supra* note 67; Middleton, *supra* note 2, at 30, col. 3; Blodgett, *supra* note 33, at 17. In *McKinney v. County of Santa Clara*, the California Court of Appeals determined that the inquiry was a reasonable one for a prospective employer to make of a job applicant. Information about previous employment is "required of him as a practical matter." 110 Cal. App. 3d 787, 793, 168 Cal. Rptr. 89, 91 (1980).

70. Middleton, *supra* note 2, at 30, col. 4; *see also* Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) ("[f]abrication . . . is an unacceptable alternative").

71. Middleton, *supra* note 2, at 30, col. 4 (quoting Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986): " 'The concept of compelled self-publication does no more than hold the originator . . . liable . . . where [he] knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages' "). *See also* McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980) (applicant was compelled to tell police departments to which he applied that his departure from his previous job was involuntary; he had a foreseeable strong compulsion to republish the former employer's statements, and the originator knew of those circumstances at the time he made the statements); Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946) (the employee was required by law to present a certificate of separation and statement of availability from the former employer to be eligible for a new employment referral; the certificate contained prejudicial information stating that he was discharged for improper conduct toward a fellow employee); Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969) (finding a publication "where the conditions are such that the utterer of the defamatory matter intends or has reason to suppose that in the ordinary course of events the matter will come to the knowledge of some third person").

72. 361 N.W.2d 875 (Minn. Ct. App. 1985), *rev'd in part, aff'd in part*, 389 N.W.2d 876 (Minn. 1986) (affirming the decision but reducing the award by eliminating punitive damages). The employer terminated the plaintiffs for gross insubordination when the plaintiffs refused to reconstruct their expense report to reflect lower totals than the actual amount they incurred. In interviewing for other positions, they admitted they were terminated for

not liable for any publication made to others by the plaintiff himself, even though it was to be expected that he might publish it."[73] The court reasoned that a departure from the general rule is warranted, however, "[w]hen an injured party operates under a strong compulsion to republish, and that compelled repetition is reasonably foreseeable."[74] The court found that the employer's refusal to explain the employees' discharge to prospective employers forced them to explain the circumstances themselves.[75] The employees were fired for "gross insubordination" when they refused to falsify expense account records to claim a lower total amount.[76]

Considering the case on appeal, the Supreme Court of Minnesota recognized the implications of the decision and the significant impact on employers. The court, however, minimized the import of accepting compelled self-publication by concluding, "[W]hen properly applied, it need not substantially broaden the scope of liability for defamation."[77] Under the court's instructions, the greatest impact would be felt by employers whose communications demonstrate dishonesty and malice.[78] The dissenting justice noted that, as a result of the decision, the employer's only avenue to avoid litigation is "to cease communicating the reason it felt justified the

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gross insubordination. The jury awarded them $1.25 million in damages, which later was reduced. *Id.* at 878-79.

73. *Id.* at 880 (quoting W. PROSSER & R. KEETON, LAW OF TORTS § 113 (5th ed. 1984)).

74. *Id.* at 881 (relying on the "strong causal link" between making a statement and compelled repetition identified in McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980)).

75. 361 N.W.2d at 881. The cases, however, do not turn on the employer's refusal to give a reference or respond to an inquiry. Even with a neutral response to an inquiry, the employer can be liable when the ex-employee applies for a new job and has to reveal the reason for his or her dismissal. *See* Blodgett, *supra* note 33, at 17.

76. 361 N.W.2d at 878-79. The court determined that unless the employees decided to lie, they were compelled to communicate the grounds given them. "[D]efamation is not erased by opportunities for explaining or refuting it." *Id.* at 881.

77. Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d at 888.

78. Although the court was willing to recognize self-publication, it noted the need for simultaneous recognition of "a significant privilege" to protect the public interest in the availability of such information. *Id.* at 890. It favored a common law malice standard for defeating the privilege, making employers liable only if they made the statements "from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff" employee. *Id.* at 891.

termination, not only to third persons, but even to the employee himself or herself."[79]

The discharged employee can meet the self-publication test easily. He likely will seek other employment. A prospective employer predictably will ask about his employment history. The result is an open invitation for the discharged employee to create his own wrong, implicate the defendant of his choice, aggravate rather than mitigate damages, and collect for the self-inflicted injury.[80]

Qualified Privilege: The Confused Privilege

In an employment-related defamation claim, the employer's liability may turn on his ability to establish that he made the statements on an appropriate occasion without abusing his privilege.[81] The difficulty arises in determining from case law the scope of an employer's qualified privilege. Courts differ widely on what parties share the requisite interests and duties to invoke the privilege[82] and on what is required of the plaintiff to defeat the privilege.

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79. *Id.* at 896 (Kelly, J., dissenting)). "Not surprisingly, defense lawyers are telling employers to do just that—or to frame any reason for termination given to the employee in non-defamatory terms." Middleton, *supra* note 2, at 30, col. 4.

80. *See* Prentice & Winslett, *supra* note 1, at 213, 228-38 (which attempts to discredit the arguments against self-publication). A similarly questionable result occurs when the employee can maintain a defamation action based on the employer's statements to the employee's agent. In one case, the discharged employee hired a private investigator to discover the true reason for his termination. Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 617 (Tex. Ct. App. 1984), *cert denied*, 472 U.S. 1009 (1985). The investigator contacted the employer, identified himself as an investigator checking the former employee's background, and inquired about his work history. The employer responded with an unflattering evaluation. *Id.* at 617. The court rejected the employer's argument that the employee had authorized, invited, or procured the defamation, reasoning that the employee did not know in advance that the employer's response would be defamatory. *Id.* He did know, however, that the employer discharged him for unsatisfactory performance. Again, the court allowed the plaintiff to orchestrate the employer's liability, creating his own wrong and collecting for it.

81. *See* Rosenberg v. Mason, 157 Va. 215, 234, 160 S.E. 190, 197 (1931) (an available defense is the assertion that the statement was spoken on a privileged occasion and the privilege of the occasion was not abused).

82. *See* RESTATEMENT (SECOND) OF TORTS §§ 595, 596 (1977) (the privilege may arise from common interest between the parties or a legal, moral, or social duty of the publisher to the recipient); *see also* Marchesi v. Franchino, 283 Md. 131, 135-36, 387 A.2d 1129, 1131 (1978) (employer may rely on qualified privilege when publishing statements to further his own interests or those shared in common with the recipient or third parties).

The Scope

Courts have extended a qualified privilege to various relationships within the employment context.[83] They have acknowledged that the efficient transaction of business requires a degree of freedom to speak candidly without undue concern over liability.[84] Courts also have recognized that an employer has a duty to disclose to the affected employee the basis for evaluations of his work made during his employment[85] and the reasons for his dismissal.[86] In *Caslin v. General Electric Co.*,[87] the Kentucky Court of Appeals stated that employee evaluations were "necessary to [the] functioning" of the employing company and benefitted the employee by pointing out his shortcomings and complimenting his strengths.[88]

The employer has no corresponding duty, however, to volunteer information about an undesirable employee to third parties with whom the employee might seek employment. In *Davis v. Ross*,[89] the United States Court of Appeals for the Second Circuit determined that singer Diana Ross did not enjoy a qualified privilege when she distributed an unsolicited letter impugning the qualifications of a former employee. Ross had no reason to conclude that

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83. *See generally* 50 AM. JUR. 2D *Libel and Slander* § 275 (1970) (extending the privilege in the employment context to any person who has a duty to speak and has a legitimate interest in the subject matter when the topic is the character and qualifications of an employee or former employee); Duffy, *Defamation and Employer Privilege*, 9 EMPLOYEE REL. L.J. 444 (1984) (examining the relationships to which the privilege applies in the employment context); Annotation, *Libel and Slander: Privileged Nature of Communication to Other Employees or Employees' Union of Reasons for Plaintiff's Discharge*, 60 A.L.R. 3D 1080 (1974).

84. *Marchesi*, 283 Md. at 1335-36, 387 A.2d at 1131 (considering the advancement of social policies of greater importance than vindication of an individual's reputational interest).

85. Caslin v. General Elec. Co., 608 S.W.2d 69 (Ky. Ct. App. 1980).

86. Lewis v. Equitable Life Assurance Soc'y, 361 N.W.2d 875, 880 (Minn. Ct. App. 1985), *rev'd in part, aff'd in part*, 389 N.W.2d 876 (Minn. 1986) (when made in good faith, an employer has the privilege to describe the discharge of an employee).

87. 608 S.W.2d 69 (Ky. Ct. App. 1980).

88. *Id.* at 70.

89. 754 F.2d 80 (2d Cir. 1985); *see also* RESTATEMENT (SECOND) OF TORTS § 595 (2)(a) (1977) (consider whether publication is in response to a request, rather than voluntary, in determining if publication to protect the interest of a third party is within generally accepted standards for decent conduct).

"the recipients of the letter would be interested in whether [she was] . . . personally satisf[ied]."[90]

The courts are split on whether an employer shares an interest with its employees that can serve as the basis for a qualified privilege to disseminate information about co-workers or subordinates. On the one hand, the employer may be able to protect his business interests by alerting co-workers to suspected dishonesty or misconduct in their ranks.[91] More than fifty years ago, the Virginia Supreme Court decided the issue, holding that an employer was protecting his own business interest by communicating with his employees about the discharge of two fellow employees for theft.[92] His statements were reasonable to "impress upon [them] the necessity for [their] own meticulous handling of company funds."[93]

On the other hand, employers need not inform nonsupervisory co-workers of circumstances surrounding the dismissal of their colleagues. In *Sias v. General Motors Corp.*,[94] the Michigan Supreme Court declined to extend the privilege beyond supervisory ranks. The employer disseminated information to employees that the wrongdoer in their midst had been detected and dismissed. His interest in boosting their morale and their interest in being free from suspicion did not rise to the level of a privileged communication.[95]

Managers present a different problem. Qualified privilege may extend to supervisory personnel by virtue of their interest in business matters concerning their subordinates.[96] Managers may be

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90. *Id.* at 84.

91. *See* Kroger Co. v. Young, 210 Va. 564, 172 S.E.2d 720 (1970); *cf.* Jones v. J.C. Penney, 164 Ga. App. 432, 297 S.E.2d 339 (1982) (employer told co-employee of the plaintiff's dismissal for wrongdoing because the co-employee was a close personal friend of the former employee and he requested the information).

92. *Kroger*, 210 Va. at 568, 172 S.E.2d at 723.

93. *Id.*

94. 372 Mich. 542, 127 N.W.2d 357 (1964).

95. *Id.* at 546-48, 127 N.W.2d at 360. *Contra Jones*, 164 Ga. App. 432, 297 S.E.2d 339 (1982).

96. *See* Turner v. Halliburton Co., 240 Kan. 1, —, 722 P.2d 1106, 1114 (1986) (noting that all of the employees to whom the information was communicated were managerial level employees with an interest in the situation); *see also* Schneider v. Pay'n Save Corp., 723 P.2d 619, 624 (Alaska 1986) (loss prevention manager's statements to the employer regarding employee's failure to ring up certain sales was conditionally privileged because the employer had a legitimate interest in protecting its business from theft and the manager had a duty to report to the employer instances of shortfall and employee misconduct).

identified so closely with the employer that the court may view them as one and the same. Internal discussions among supervisors may not constitute publication.[97] The theory, based on agency law, asserts that intraoffice communication between supervisory employees of a corporation about the work of another employee of the corporation "is simply the corporation talking to itself and not publication."[98]

The courts have less difficulty acknowledging a shared interest between former and prospective employers for information concerning job applicants.[99] In *Stuempges v. Parke, Davis & Co.*,[100] the Minnesota Supreme Court affirmed the existence of a qualified privilege covering an employer's statements about a former employee's qualifications. The privilege prevails if the statements are made in good faith to a party with a legitimate interest in the subject matter. "It is certainly in the public interest that this kind of

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97. For a discussion of the division of authority on this theory, see Luttrell v. United Tel. Sys. Inc., 9 Kan. App. 2d 620,—, 683 P.2d 1292, 1293-94 (1984), *aff'd*, 236 Kan. 710, 695 P.2d 1279 (1985). In *Luttrell*, the Kansas Supreme Court determined that the theory confused publication with privilege and affirmed the appellate court ruling that the existing qualified privilege was sufficient protection for the employer. For an argument that courts finding no publication in these circumstances actually confuse publication with qualified privilege, see Note, *Libel and Slander - Intracorporate Communication as Publication to Third Parties*, 33 U. KAN. L. REV. 759 (1985).

98. *Luttrell*, 9 Kan. App. 2d at —, 683 P.2d at 1293. The theory, which presented an issue of first impression in *Luttrell*, was accepted in other cases. *E.g.*, Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); Monahan v. Sims, 163 Ga. App. 354, 294 S.E.2d 548 (1982); Commercial Union Ins. Co. v. Melikyan, 424 So. 2d 1114 (La. Ct. App. 1982); Ellis v. Jewish Hosp., 581 S.W.2d 850 (Mo. Ct. App. 1979); Jones v. Golden Spike Corp., 97 Nev. 24, 623 P.2d 970 (1981). It was rejected in Brewer v. American Nat'l Ins. Co., 636 F.2d 150 (6th Cir. 1980); Arsenault v. Allegheny Airlines, 485 F. Supp. 1373 (D. Mass.), *aff'd*, 636 F.2d 1199 (1st Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); Pirre v. Printing Devs., Inc., 468 F. Supp. 1028 (S.D.N.Y.), *aff'd*, 614 F.2d 1290 (2d Cir. 1979); and Kelly v. General Tel. Co., 136 Cal. App. 3d 278, 186 Cal. Rptr. 184 (1982).

99. In the context of employment recommendations, the courts generally recognize a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980); *see, e.g.*, Holdaway Drugs, Inc. v. Braden, 582 S.W.2d 646 (Ky. 1979); Wynn v. Cole, 68 Mich. App. 706, 243 N.W.2d 923 (1976); Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975); *see also* RESTATEMENT (SECOND) OF TORTS § 595 comment i (1977) (a former employer has a qualified privilege to make defamatory communications about the character and conduct of a former employee to present and prospective employers if the communications are made for the purpose of enabling the recipient to protect his own interest and are reasonably calculated to do so).

100. 297 N.W.2d 252 (Minn. 1980).

information be readily available to prospective employers . . . ."[101] The difficulty comes in valuing the information and extending the privilege.

The Standard

Once the privilege is established, a plaintiff may still prevail by showing abuse of the privilege by excessive publication (to too many people), excessive language (too much information),[102] or malicious motivation for the statements.[103]

Any lesser construction would render the qualified privilege a nullity. Truth, nondefamatory construction, or absence of ill will would defeat a defamation claim in situations that are not privileged. Truth is an absolute defense to a defamation claim.[104] Ambiguous meaning could foreclose the element of reputational harm.[105] Absence of any ill will could suggest mere mistake.

The employer's qualified privilege has been defeated by simple

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101. *Id.* at 257. The court found, however, that a demonstration of malice defeated the privilege. *Id.* at 258.

102. Duffy, *supra* note 83, at 448.

103. W. PROSSER & R. KEETON, LAW OF TORTS § 115 (5th ed. 1984). "[P]rivilege is forfeited if the publication is 'malicious.' It is clear that this means something more than the fictitious 'legal malice' which is 'implied' as a disguise for strict liability in any case of unprivileged defamation." *Id. See* RESTATEMENT (SECOND) OF TORTS § 595 comment b (1977) (after Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (plurality opinion), fault amounting to negligence is required of all defendants; thus mere negligence is no longer sufficient to constitute an abuse of qualified privilege); *see also* Duffy, *supra* note 83, at 447; Comment, *supra* note 3, at 431; Annotation, *Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualifications*, 24 A.L.R. 4TH 144 (1983).

104. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977) (defamatory statements must be false); *see also* Luttrell v. United Tel. Sys., Inc., 9 Kan. App. 2d 620, ___ 683 P.2d 1292, 1293 (1984), *aff'd*, 236 Kan. 710, 695 P.2d 1279 (1985); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980). *But see* Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 625 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985) (questioning whether truth is a defense to defamation actions brought by a private person).

105. *See* Davis v. Ross, 754 F.2d 80, 82-83 (2d Cir. 1985) (to determine if the statement has more than one meaning: consider the publication as a whole, test its effects on the average reader, do not strain to place a particular interpretation on the published words, read it against the background of its issuance with respect to the circumstances of its publication); *see also Buck*, 678 S.W.2d 612, 619 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985) (words susceptible to nondefamatory construction create a factual issue).

bad faith,[106] negligence,[107] recklessness,[108] common law malice manifested as spite and ill will,[109] or actual malice embodying known falsity or reckless disregard for truth.[110]

The *Second Restatement of Torts* states that negligence is an insufficient standard to defeat qualified privilege in the wake of *Gertz v. Robert Welch, Inc.*[111] In *Gertz*, the United States Supreme Court determined that strict liability for defamation is unconstitutional.[112] Plaintiffs must make some showing of fault, establishing at least negligence. If negligence is required of all defamation defendants, clearly mere negligence is no longer sufficient to constitute abuse of qualified privilege.[113]

The more commonly held view is that some sort of malice is required to defeat qualified privilege.[114] Courts sharing this view differ on the requisite degree of malice. Two common concerns courts

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106. *See* Vigoda v. Barton, 348 Mass. 478, 204 N.E.2d 441 (1965) (for defamation cases not involving a public employer defendant, the lack of reasonable ground to believe the matter communicated compels a finding that the employer abused his conditional privilege; if the defendant acted apart from the purpose of protecting the interests giving rise to the privilege, he has abused the privilege); *Buck*, 678 S.W.2d 612, 620-21 (Tex. Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985) (qualified privilege comprehends comments made in good faith).

107. *See* Schneider v. Pay'n Save Corp., 723 P.2d 619 (Alaska 1986) (despite the qualified privilege that attaches in the employment context, liability attaches if the speaker, at the very least, acted negligently in publishing a defamatory statement about a private individual and issues of private concern).

108. *See* Bratt v. International Business Machs. Corp., 392 Mass. 508, 467 N.E.2d 126 (1984) (clarifying earlier case by stating affirmatively that recklessness, not negligence, is the threshold standard for determining whether a conditional privilege is lost).

109. *See* Agarwal v. Johnson, 25 Cal. 3d 932, 603 P.2d 58, 160 Cal. Rptr. 141 (1979) (malice defined as the state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) (with nonmedia defendant, the state of mind of the employer and his attitude toward the employee is more significant than whether he knew what he was saying was false); Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975) (using express, not actual, malice).

110. *See* Turner v. Halliburton, 240 Kan. 1, 722 P.2d 1106 (1986) (using as actual malice standard of specific intent to injure); Marchesi v. Franchino, 283 Md. 131, 387 A.2d 1129 (1978) (known falsity or reckless disregard for truth is the standard by which malice, required to defeat the conditional privilege defense, is to be measured in cases of private defamation).

111. RESTATEMENT (SECOND) OF TORTS § 595 comment b (1977).

112. 418 U.S. 323, 347-48 (1974).

113. RESTATEMENT (SECOND) OF TORTS § 595 comment b (1977).

114. For example, the Minnesota Supreme Court has settled on a common law malice standard in the employment context. Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 891 (Minn. 1986); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980). The court has done so largely as a result of misinterpreting *Gertz* as applicable to media defendants only. *Stuempges*, 297 N.W.2d at 258 n.5 (ignoring the Supreme Court's rejection

express include the status of the plaintiff as a private person and the possibility of confusing a jury with a multiple-malice standard.

Using language from *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[115] that clarifies the proper use of the actual malice standard,[116] some courts have foreclosed any use of actual malice in "purely private" defamation. Their misapprehension of the decision has encouraged lesser standards for defeating qualified privilege.[117]

In *Dun & Bradstreet*, the Court determined that actual malice was not a prerequisite to recovery of presumed or punitive damages when certain factors existed.[118] The communication in question was not a matter of public concern but, rather, was a purely private matter; it had such a limited audience that it did not implicate any interest in the free flow of commercial information. Profit was the defendant's sole motivation in making the statements. The Court characterized the profit motive as hardy, unlikely deterred by threatened liability, and sufficient incentive for accuracy.[119]

Dun & Bradstreet, however, involving no privilege, is inapposite to the employment defamation cases. The qualified privilege in the

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of the media, nonmedia distinction in Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985)).

Although the court should have focused on the defendant's attitude toward the *truth* of what he said, it considered an employer-defendant's attitude toward the plaintiff employee in the employment situation. The court found a common law malice standard more appropriate in the employer-employee situation because of the need "to protect the job seeker from malicious undercutting by a former employer." *Id.* at 258. Consequently, it said that "the state of mind of the utterer . . . is more significant than whether he knew that what he was saying was false." *Id.*

Such a view, however, fails to recognize the social importance of and public interest in the requested information about a former employee. In these circumstances, the employer, like the media, is performing a "function of informing" an element of the public and thus deserves protection from defamation liability. *Id.* Focusing on the employer also fails to consider abuses by disgruntled employees who depart on less amicable terms.

115. 472 U.S. 749 (1985) (plurality opinion).

116. Much of the analysis in *Dun & Bradstreet* restates and clarifies confusion created by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), concerning status of plaintiffs and standards of review.

117. *See* Note, *Private Individual May Recover Presumed and Punitive Damages Without a Showing of Actual Malice*, 16 SETON HALL 785 (1986).

118. 472 U.S. 749, 763 (1985) (plurality opinion).

119. *Id.* at 761-62.

employment context argues for a more strenuous test than that imposed on communication that does not arise from shared interest or duty. In addition, because the privilege is based on socially valuable information, a public concern is involved. The same inherent safeguards against deterrence are not present because profit does not motivate the exchange of information. The free flow of commercial information is, then, implicated.[120]

Under the weaker standards for evaluating both validity and durability of qualified privilege, the protection accorded employers is virtually meaningless. The defamation equation in the employment context is changed little from that used for unprivileged communications. Bad faith or negligence standards for defeating the privilege may place employers in a less favorable position than defamation defendants with no relationship to the plaintiff. No defamation verdict can stand without some finding of fault.

Courts have struggled with these difficult principles, generally focusing on the competing values of free speech and individual liberties. Failing to resolve the larger issues in some satisfactory manner, two courts shifted their focus to a more mundane and manageable consideration—simplicity.[121] The issue became: can a jury understand and apply more than one malice standard in the same case.

In *Great Coastal Express, Inc. v. Ellington*,[122] the Virginia Supreme Court settled on a negligence standard of fault for defamation of a private individual, a common law malice standard to defeat common law qualified privilege, and an actual malice standard to recover punitive damages.[123] Conceding that the multiple standards were likely to create confusion, the court adopted "clear and convincing evidence" as the burden of proof for both common law and actual malice.[124] The adoption of one standard reflected a con-

120. *See* Calero v. Del Chem. Corp., 68 Wis. 2d 487, —, 228 N.W.2d 737, 745-46 (1975) (describing the thrust of qualified privilege as averting the danger of self-censorship and the fear of a chilling effect on free expression).

121. *See* Marchesi v. Franchino, 283 Md. 131, 387 A.2d 1129 (1978); Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 334 S.E.2d 846 (1985).

122. 230 Va. 142, 334 S.E.2d 846 (1985).

123. *Id.* at 151-54, 334 S.E.2d at 852-54.

124. *Id.* at 154, 334 S.E.2d at 854. The "clear and convincing evidence" standard is the same one articulated in New York Times v. Sullivan, 376 U.S. 254 (1964).

cern that juries might "be confused in these cases by two different burdens of proof of malice, one pertaining to the defeat of a qualified privilege, the other pertaining to punitive damages."[125]

The Court of Appeals of Maryland had arrived at a different conclusion, for the same reason, several years earlier. In *Marchesi v. Franchino*,[126] the court addressed "the compelling need for consistency and simplicity in the law of defamation"[127] and required the plaintiffs to prove malice for punitive damages and to overcome qualified privilege. The court noted that juries encounter difficulty in applying even a single standard of malice.[128] They concluded: "The solution . . . lies in the adoption of the *New York Times* standard of malice to defeat the conditional privilege defense in cases of private defamation, thus resulting in a uniform definition of malice . . . for all purposes where defamatory conduct is charged."[129]

Given these concerns, the Maryland solution seems more tenable. A single definition of malice would seem to alleviate more confusion than would a single standard of proof for different types of malice. Both courts, however, sidestep the real issues by patronizing the unsophisticated jury. In actuality, courts call upon juries every day to make difficult decisions by resolving complicated issues and applying convoluted or obtuse tests.

An Answer: Reinforcing the Privilege

As disgruntled former employees become more litigious, employers could adopt policies designed to minimize legal liability. One approach to limiting potential liability is to withhold information about former employees except to confirm their job title and employment period.[130] A second approach of giving only positive eval-

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125. *Id. See also* Kohler, *Toward a Modern Defamation Law in Virginia: Questions Answered, Questions Raised*, 21 U. Rich. L. Rev. 3, 16-17 (1986).

126. 283 Md. 131, 387 A.2d 1129 (1978).

127. *Id.* at 138, 387 A.2d at 1133 (quoting Jacron Sales Co. v. Sindorf, 276 Md. 588, 593, 350 A.2d 688, 696 (1976)).

128. *Id.*

129. *Id.* (referring to a discussion of the persistent confusion surrounding the bi-definitional nature of actual malice by Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1441 (1975).

130. Middleton, *supra* note 2, at 31, col. 2. *See also* Blodgett, *supra* note 33, at 17 (employers are clamming up because of potential liability); Castagnera-Cain, *supra* note 8, at 12

uations could infer a negative appraisal when the employer declines to give a job reference for a particular employee.[131] Finally, a policy of commenting only on the former employee's strengths and contributions could leave employers open to another emerging cause of action: misrepresentation to subsequent employers.[132]

Such alternatives are unsatisfactory. The former employer's candid answers can help the prospective employer evaluate the advisability of hiring a job applicant. The former employer is familiar with the applicant in the job context, knows the concerns of the employer, and is experienced with business decision making. Presumably, the former employer would prefer to check the job references of its prospective employees with the same hope of cooperation.

("[I]t should surprise no one to learn that many companies have chosen a policy of responding to employment inquiries *only* to the effect that the applicant did indeed work for the company between date one and date two, and no more."); Duffy, *supra* note 83, at 444 (employers are reluctant to give anything but name, rank, and serial number). *Contra* Martin & Bartol, *supra* note 2, at 60 (encouraging employers to communicate properly rather than to refrain from communicating).

131. A no-comment policy may be insufficient to shield employers from liability for workplace defamation as the doctrine of compelled self-publication gains judicial acceptance. The adoption of the doctrine on a wide scale "would substantially reduce the protective effects of such defensive measures." Prentice & Winslett, *supra* note 1, at 209. For discussion of compelled self-publication, see *supra* notes 67-80 and accompanying text.

132. Comment, *supra* note 3, at 446-47. The subsequent employer's misrepresentation claim may arise from intentional or negligent false assertions or from willful or negligent failure to disclose all relevant information about the former employee "who later causes damage or commits a crime after changing jobs." *Id.*

Third parties might also sue the former employer for the subsequent actions of a former employee. *See id.* at 450. When a former employer fails to reveal an employee's criminal propensity or behavior suggesting a dangerous nature, he may share liability if the employee does some harm to a third party during the scope of his subsequent employment. The basis of the contribution claim is the "important informational link between employers." *Id.* The underlying negligent hiring claim against the subsequent employer is based on the assertion that the employer "knew or should have know that the employee posed an unreasonable risk of harm." Silver, *Negligent Hiring Claims Take Off*, A.B.A. J., May 1, 1987, at 72-73. For example, an employee dismissed for a sexual assault on a customer might later assault a subsequent employer's customer. If the former employer did not disclose the reason for termination when asked for a job recommendation, the new employer would have no notice of the danger the employee poses. Regardless, the customer/victim could seek to hold the subsequent employer liable for what he should have known. Faced with a negligent hiring claim, the subsequent employer could cross-claim against the former employer because of the withheld information.

Candor, however, may soon disappear as a viable alternative for some former employers, and the courts are largely responsible. In the rush to defend the downtrodden worker, courts have wreaked havoc with defamation law. Courts have rejected the general principles of defamation law in favor of inconsistent case-by-case determinations. As previous sections of this Note have shown, courts facing cases with no defamatory statement of fact settle for derogatory opinion.[133] Courts facing cases with no publication improvise, allowing the plaintiff to step in and create his own wrong.[134] Courts confronted with a claim of privilege grudgingly recognize its societal value but "qualify" it almost out of existence by narrowing its scope and weakening its standard.[135]

Because most courts still recognize the value of protecting the flow of important information, the most appealing solution to the weakening of the privilege in the employment context is judicial reinforcement.[136]

Courts could effectively control litigation in the employment defamation area by giving the privilege appropriate weight and by making it sufficiently difficult to overcome. With this approach, the courts can protect the employee's reputational interest *and* preserve socially valuable information in the job market.

A Judicial Solution

Courts can resolve the problems involved in employment defamation cases with a more standardized basis for review and more demanding standard for nullifying the privilege.[137]

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133. *See supra* text accompanying notes 51-66.

134. *See supra* text accompanying notes 67-80.

135. *See supra* text accompanying notes 81-129.

136. Defamation is, of course, a common law tort, created and controlled almost exclusively by judge-made law. The courts are the arena for redressing defamation; the problems with defamation in the employment context have arisen in the courts. In fact, the courts will feel the impact if this cause of action continues to gain popularity because of the increasing ease with which disgruntled former employees can press such a claim. Logically, then, *courts* should respond to the problem with a judicial solution.

137. For an argument that the appropriate solution is abolishment of qualified privilege, see Comment, *Qualified Privilege to Defame Employers and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143 (1977) (suggesting a reasonableness standard to determine whether an employee had adequate basis for making defamatory statements).

As long as courts continue to deal with employment defamation on an ad hoc basis, creating and dismissing legal fictions to fit the facts of each case and focusing on the complainant with a narrow view that overlooks the employer's role and the social value of the information he possesses, confusion and conflict will continue in this area of law. The complaining employee will have the opportunity to subvert the judicial system by forum shopping for the least effective privilege defeated by the weakest standard. The interstate employer will be handicapped by uncertainty and lack of uniformity in dealing with its subordinates. The courts can reverse these difficulties by discovering and considering other jurisdictions' approaches. A uniform approach to qualified privilege corrects most of the problems.

Certainly, the shared interests of former and prospective employers justify application of the privilege to job references. The importance of the information involved and lack of alternative sources for the same data justifies an actual malice standard of known falsity or reckless disregard for truth to defeat the employer's qualified privilege. This standard, first used in *New York Times Co. v. Sullivan*,[138] is the most strenuous articulated by the Supreme Court. Courts have reserved it for situations in which constitutional principles are implicated.[139]

Communications in the employment context clearly do not involve the framers' first amendment concerns for democratic self-government and political expression; they are, however, critical to informed decision making outside the political arena. Such communications implicate the ability to protect one's business interests and investments.

An actual malice standard would protect employers and thereby encourage the exchange of information. Employers would violate the actual malice standard only by intentionally disseminating false information or by failing to discover falsity when the circumstances dictate further inquiry.[140] A lesser standard runs the risk of penalizing employers for truthful, yet unflattering performance evaluations and protecting inadequate or dishonest employees

138. 376 U.S. 254 (1964).

139. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (plurality opinion).

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

from disclosure of that behavior. Common law malice, embodying spite or ill will, is too subjective a standard to guard against retaliatory actions by disgruntled employees. Defamation should be unavailable as a back door to courts in jurisdictions that do not recognize the tort of wrongful discharge.

Legislative Alternatives

If the courts decline to protect information about employees by using a stringent standard to defeat the qualified privilege, legislative alternatives are available.

One statutory solution would require a written reason for termination at a discharged employee's request. A variation would require a written statement of the employee's service record. The statements would not subject an employer to a defamation action.[141]

A statute could also make pre-employment, pre-inquiry waivers executed between the prospective employer and applicant enforceable. Courts have disagreed on whether such an authorization for exchange of information can effectively shield the parties from liability.[142]

Finally, failing other solutions, workmen's compensation could cover employer defamation on a no-fault basis.[143] This solution would limit employers' liability by capping damages and decrease the plaintiff's monetary incentive to sue. Under such a system, employers could evaluate their risks more accurately and make more informed decisions concerning disclosure of employee information.

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141. The Minnesota legislature considered adopting a service letter statute in response to Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876 (Minn. 1986), the Supreme Court of Minnesota's first recognition of compelled self-publication. It was not enacted. Some scholars argue that such legislation presents the prospect of great and unremediable abuses. Prentice & Winslett, *supra* note 1, at 219, n.71. For an example of service letter statutes, see, e.g., KAN. STAT. ANN. § 44-808(3) (1981); MO. REV. STAT. §§ 290, 140 (1986); *see also* TEX. REV. CIV. STAT. ANN. art. 5196 (Vernon 1971) (statement of termination statute).

142. Martin & Bartol, *supra* note 2, at 53. Some courts have rejected reference releases as against public policy. The releases would absolve the former employer of any obligation to disseminate only information with a reasonable basis in fact.

143. *See* Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857 (1985).

CONCLUSION

As our society has become more litigious, employment defamation actions have become increasingly commonplace. Liability looms in everything written or spoken by an employer about an employee. Yet the need for sharing certain information remains, both for the employee and for future employers. Without this data, personal deficiencies will go uncorrected, and bad hiring decisions will abound.

In their zeal to redress individuals' reputational harm without thoroughly evaluating the implications, the courts run the risk of cutting off completely an essential source of information in the business community. The confusion of imprecise and conflicting judicial standards has already begun to chill the exchange of information between employers. If legal obstacles stymie this dialogue, all employers will suffer the consequences of blind hiring. The danger lies in this chilling effect. Clearly this risk outweighs the risk that some reputational damage might go uncorrected.

In the interest of uniformity and predictability, the courts must adopt a single standard, sufficiently strong to protect the free exchange of information. A qualified privilege should be extended to an employer commenting on the job performance and work history of a past or present employee to another prospective employer. The privilege should be pierced only by actual malice on the part of the employer supplying false and damaging information. This solution sufficiently protects an employee from unsolicited defamatory reviews and the malicious employer who would intentionally or recklessly make false statements. Simultaneously, it would give employers an incentive to seek and to share information critical to sound hiring decisions. If a judicial solution is not forthcoming, the legislatures could end the mystery by enacting laws that spell out each party's potential liability.

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