AVOIDING LIABILITY IN EMPLOYMENT REFERENCES

By: Gary S. Kessler and Phil McNicholas
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A former employee asks you to list your firm as a reference on a job application; then you receive a phone call asking your opinion of the individual. Generally, if you have given the go-ahead to your listing as a reference, you only have good things to say about that person. But what if you are called about someone who did not ask and whom you would not recommend? What can you say? Can you inform the caller? If your former employee does not get the job and finds out about your negative reference, what is your exposure? In this article, we explore the employee reference conundrum faced by many employers. First, we provide background on "defamation" in general. Next, we discuss available defenses and what circumstances can immunize an employer from a defamation lawsuit. Then, we discuss whether an arbitration clause in an employment agreement can successfully preclude defamation lawsuits from the courtroom even after employment is ended. Finally, we briefly summarize the best practices for avoiding defamation liability.

Caveat
Please note that defamation is only one of several claims that a former employee can bring against a former employer. Certain states require an employer to provide a "service letter" upon request, which explains the basis for the employee's termination or voluntary leave, and false information in a "service letter" could make the employer liable for damages. In the broker-dealer industry, a terminated employee or independent contractor receives a U-5 form, which outlines the type and reason for the termination. Additional claims that could arise out of a negative employment reference include invasion of privacy, tortious interference with a contractual or business relationship, and wrongful discharge. This article focuses on defamation.

What Is Defamation?
Defamation has been defined as the invasion of a person's interest in her reputation and good name. A defamatory statement is one that tends to lower an individual's reputation and the likelihood of third parties dealing with that individual in the future. Defamation is governed by a combination of common law, state statutes and First Amendment protection. There are two generally recognized categories of defamation: slander and libel. Slander is typically defined as an oral defamatory statement, while libel is a defamatory statement in writing. The elements of a defamation lawsuit vary depending on the circumstances. Some examples of variables that affect defamation claims are whether the harmed individual is a public figure, whether the reputational harm is a matter of public concern, and whether the individual making the defamatory statement is a member of the media. However, generally speaking, the elements of defamation are as follows:

- The defendant "publishes" a statement of fact;
- The statement referred to the plaintiff;
- The statement was defamatory;
- The statement was false;
- With regard to the truth of the statement, the defendant was: (a) acting with actual malice; (b) negligent; or (c) liable without regard to fault; and
- The plaintiff suffered damages.

One category of defamatory statements is defamatory "*per se*," meaning the hurtful nature of a statement is clear on its face. With defamation *per se*, a plaintiff does not have to prove that he suffered any damages in order to recover. At common law, there were four categories of defamatory per se statements:

- Statements accusing the plaintiff of having committed a crime;

- Statements that the plaintiff is afflicted with a loathsome disease;
- Statements disparaging the plaintiff's ability to engage in his or her profession; and
- Statements concerning a woman's lack of chastity.

The other category of defamatory statements is defamatory "*per quod*," which means they are not obviously hurtful on their face and require extrinsic facts or circumstances to explain their defamatory nature.

Employer Defenses to Defamation
Defamation claims can be defeated by negating any of the elements or through a qualified privilege, which precludes liability even when the elements are met.

Statement of Opinion
The first element of defamation requires a statement of fact. Statements of opinion do not give rise to a defamation claim, even if they are defamatory. An employer or any other individual who makes a derogatory statement will not be held liable if the statement is held to be mere subjective opinion.

States have developed different methods for distinguishing fact from opinion. One example of a factor test for differentiating fact statements from opinion statements comes from New York. The four factors that New York courts consider are: 1) An assessment of whether the specific language in issue has a precise meaning which is readily understood or whether it is indefinite and ambiguous; 2) A determination of whether the statement is capable of being objectively characterized as true or false; 3) An examination of the full context of the communication in which the statement appears; and 4) A consideration of the broader social context or setting surrounding the communication including the existence of any applicable customs or conventions which might "signal to readers or listeners that what is being read or heard is likely to be opinion, not fact." *Steinhilber v. Alphonse,* 501N.E.2d 550 (N.Y. 1986).

Truthful Statement
The fourth element of defamation also provides a possible defense. This element requires a statement to be false, so statements that are truthful generally will not be subject to liability for defamation. However, most courts allow for "defamation by implication" even with truthful statements. Defamation by implication involves false suggestions, impressions and implications arising from otherwise truthful statements. *Levin v. McPhee*, 119 F.3d 189, 196 n.5 (2d Cir. 1997). Accordingly, even if a statement is truthful, it could be held defamatory and actionable. When a statement is only somewhat true, U.S. courts often decide liability based on whether the statement is substantially true. "Substantially true" means that a statement is a fair and accurate description of the event in question. *PBM Prods., LLC v. Mead Johnson Nutrition Co.*, 678 F. Supp. 2d 390,400 (E.D. Va. 2009). Other courts have held that a statement is substantially true, and thus not actionable, if its "gist" or "sting" is not substantially worse than the literal truth — this evaluation requires determining whether, in the mind of an average person who reads the statement, the allegedly defamatory statement was more damaging to the plaintiff's reputation than a truthful statement would have been. *Cummins v. Suntrust Capital Mkts., Inc.*, 649 F. Supp. 2d 224, 244 (S.D.N.Y. 2009) (quoting *Gustafson v. City of Austin*, 110 S.W.3d 652, 656 (Tex. Ct. App. 2003)). Substantial truth is a complete defense to an allegation of defamation.

Qualified Privilege
In addition to the defenses of opinion-based and truthful statements, an employer making a negative employment reference may also be protected by the "qualified privilege" affirmative defense. Accusations or comments about an employee by his employer, made to a person having an interest or duty in the matter to which the communication relates, have a qualified privilege unless the employer is shown to have abused the privilege by speaking with actual malice. *See, e.g., Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995).

An example of one state's required elements for the qualified privilege defense is: 1) Good faith by the defendant; 2) An interest or duty to be upheld; 3) A statement limited in its scope to that purpose; 4) A

proper occasion; and 5) Publication in a proper manner and to proper parties only. *Babb v.Minder*, 806 F.2d 749, 753 (7th Cir. Ill. 1986).

Courts have recognized two types of malice: "actual malice" and "common law malice." *Van-Go Transp. Co. v. New York City Bd. of Educ.*, 971 F. Supp. 90, 105 (E.D.N.Y. 1997). "Common law malice" means spite or ill will — not every jurisdiction considers this type of malice in determining whether a qualified privilege has been lost. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 161-62 (Tex. 2004) (actual malice in defamation cases is not used in the common law sense of hatred, ill will, enmity, or wanton desire to injure); cf. *Van-Go Transp. Co.*, 971 F. Supp. at 105 ("Either form of malice will dissolve a qualified privilege."). In the context of defamation claims, "actual malice" is defined as publishing a statement with knowledge of or reckless disregard for its falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Some examples of actual malice have included: when a speaker has serious doubts about the truth of her statement; when a speaker is aware that omitting certain facts from her statement could give a substantially false impression, or when a speaker has purposefully avoided the truth.

Keeping Defamation Lawsuits Out of Court

One question many employers have is whether an employment agreement's requirement of arbitration applies to post-employment defamation claims. This question is important because arbitration is often friendlier to employers than bench or jury trials.

Claims of defamation based on employment references have consistently been held as "arising out of employment" and therefore subject to arbitration clauses in former employees' employment agreements. Courts have reasoned that the content of an employer's defamatory statement is usually based on the employee's work performance and other experiences during the employment.

One relevant example is *Webb v. Harris*, a 2005 case from the Middle District of North Carolina. *Webb v. Harris*, 378 F. Supp. 2d 608, 612 (M.D.N.C. 2005). In *Webb*, a plaintiff sued his former employer for what he believed to be an unlawful negative employment reference. His former employer argued that the dispute was arbitrable because the employment reference contained information learned solely from the plaintiff's time as an employee, and the plaintiff's then-terminated employment agreement had a clause requiring arbitration of all disputes arising out of his employment. In holding the dispute to be arbitrable, the U.S. district court ruled:

> *The statement was given in the context of a job reference, and it is undisputed that Defendant Harris did not know Plaintiff prior to his hire at Full Spectrum. Thus, any opinion given by Defendant Harris about Plaintiff's employability is necessarily going to be based on Defendant Harris' knowledge of Plaintiff's work performance at Full Spectrum, and determination of the truth or falsity of Harris' statements will turn on an evaluation of Plaintiff's work performance.*

As *Webb* shows, courts will generally hold that post-termination defamation claims are subject to arbitration clauses in employment agreements, unless the circumstances demonstrate that the content of the reference was learned outside the scope of employment. Keep in mind that some jurisdictions may hold otherwise, so it is important to review the case law in your specific jurisdiction.

Recent U.S District Court Case Law

In *Nieman v. RLI Corp.***,** a case from the Central District of Illinois, the plaintiff (Nieman) applied for a new position with RLI Corporation (RLI) and was not hired. *Nieman v. RLI Corp.*, 2012 U.S. Dist. LEXIS 26210 (C.D. Ill. Feb. 29, 2012). Nieman found out that an RLI case manager had called a former colleague of Nieman's, Rick Dikeman, and the latter gave his opinion that Nieman was a "bad manager," "tended to put things in file notes that did not belong there," and had filed a lawsuit against his former employer. Nieman filed suit against RLI and added a claim against Dikeman for defamation. Dikeman filed a motion to dismiss the claim, asserting that his comments were only "statements of opinion," which courts have consistently held do not sustain a defamation claim. As for Dikeman's comment on Nieman's lawsuit against a former employer, Dikeman argued that this was in fact a truthful statement. The district

court granted Dikeman's motion to dismiss — Dikeman was protected from liability as Nieman could not support a claim of defamation.

In *Belanger v. Swift Transportation, Inc.*, a case from the District of Connecticut, a truck driver (Belanger) was terminated by his employer Swift Transportation (Swift) after rear-ending another vehicle and sustaining $40,000 in damages. *Belanger v. Swift Transp., Inc.*, 552 F. Supp. 2d 7 (D. Conn. 2008). Belanger began looking for a job with another trucking company, when he discovered that the reason for his termination had been published on a subscription-only electronic driving record clearinghouse website, thus making him an unattractive job candidate. Belanger filed suit against Swift for publishing his driving record on the website. Swift argued that it was not liable because of the qualified privilege of revealing important information to potential employers, but Belanger believed that Swift was not qualified since it had only indirectly published the information to potential employers. The district court granted Swift summary judgment and held that there was no distinction between publishing with a clearinghouse website rather than directly to a potential employer and that Swift had not abused the qualified privilege.

One last recent case is *Wells v. Home Depot USA, Inc.*, from the Eastern District of Michigan. *Wells v. Home Depot USA, Inc.*, 2012 U.S. Dist. LEXIS 39441(E.D. Mich. Mar. 13, 2012). Jermaine Wells, a former employee of Home Depot, claimed that his former employer provided false information about him to his potential new employer, Lowe's Home Improvement (Lowe's). After being turned down by Lowe's, Wells found out that Lowe's had contacted Home Depot and been told that Wells was fired for poor job performance and attendance, that he was unstable, and that he had tried to sue Home Depot for racism. Although these statements could have been a basis for defamation if factual and unsubstantiated, Wells could not ascertain which individual at Home Depot had given the statement, and Lowe's manager did not recall such a conversation with Home Depot. Thus, Wells' complaint was dismissed.

Conclusion

In sum, an employer must be careful when providing employment references, especially ones that could prevent an employee's hiring. However, recent case law demonstrates the difficulty an employee faces in trying to establish defamation by a former employer. As long as an employer sticks to opinion statements and/or remains truthful in her fact statements, while also avoiding implication of untrue negative comments, the employer should not be subject to liability for defamation.