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A Quarterly Legal Update For Business ■ June 1997

Employee References: Can an Employer Ever Win?

By Jill K. Blackmer

You receive a call from a prospective employer asking for a reference on a former or current employee. What do you say? Should you restrict your answer to "name, rank and serial number" or do you have a duty to disclose what you know? What are the risks of the different approaches?

Understandably concerned about claims for defamation, tortious interference and invasion of privacy, many employers adopt non-disclosure policies and are tight lipped when providing references.

While employers generally do not have a duty to reveal information (favorable or unfavorable) when contacted by a prospective employer, they face serious legal consequences if their reference consists of misleading half-truths or is just plain false.

For example, in February this year the California Supreme Court, in *Randi W. v. Muroc Joint School District*, ruled that employers who had knowledge that a school administrator had improper physical contacts with female students (or who had been the subject of such complaints) could be liable for fraud and negligent misrepresentation when they provided favorable references that omitted any reference to the improper touching.

The court decided that having undertaken to provide some information about the individual's teaching credentials and character, the employers were obliged to disclose all other facts that might materially qualify what they actually did disclose. The case arose when a 13-year old girl alleged that the school administrator sexually molested her. The student sued the school district as well as the prior employers who provided the favorable references.

Similarly, in 1995 a Florida court ruled that Allstate could be sued for concealing the violent nature of a former employee. The suit alleged that Allstate wrote a recommendation letter indicating that the employee, who was fired after bringing a gun to work, was let go as part of a company restructuring. The employee, later hired by Fireman's Fund, opened fire in a company cafeteria, killing three people and wounding two others. Again, the basis for liability was the misleading and untruthful nature of the reference letter written by Allstate.

In addition, in a February 1997 decision, Robinson v. Shell Oil Co., the United States Supreme Court ruled that an employer who provided a negative reference after a terminated employee filed a discrimination charge with the Equal Employment Opportunity Commission could be sued for retaliatory discrimination under Title VII of the Civil Rights Act.

Based on these cases employers are well advised to exercise caution when providing oral and written references or recommendations. Any reference must be true and must not contain serious omissions that, if known, would materially qualify the information actually disclosed. On the other hand, disclosing too much negative information invites claims for defamation, breach of privacy or wrongful interference from a rejected job seeker.

Since employers have little to gain and much to lose when providing a reference, they should adopt and follow a non-disclosure policy and educate management employees about the risks posed by recommendations. These measures should minimize exposure to (1) claims by third parties who were injured after a "problem employee" was favorably recommended (such as the cases in California and Florida); and (2) claims by employees for whom a reference was provided.

Critics of non-disclosure policies argue that they prevent useful information from passing between employers and potentially expose third parties to harm. In response to this growing problem, Senate Bill 25 was introduced this session by Senators Danais and Cohen in the New Hampshire Senate. S.B. 25 would have made employers immune from civil liability when acting in good faith to inform a prospective employer about the performance or work history of a past or current employee. The bill passed the Senate, but was found inexpedient to legislate by the House. It is anticipated the bill will be reintroduced next year as at least 26 other states have adopted laws providing various levels of protection to employers who release true information. ■

EMPLOYEE REFERENCES: CAN AN EMPLOYER EVER WIN?

by Jill K. Blackmer, June 1997

You receive a call from a prospective employer asking for a reference on a former or current employee. What do you say? Can you disclose what you know or should you restrict your answer to "name, rank and serial number"? What are the risks of the different approaches? What do you stand to lose?

Prudence dictates that employers limit a reference to a description of the job responsibilities, the dates of employment, and whether the employee would be rehired. Understandably concerned that revealing more will lead to claims for defamation, tortious interference and invasion of privacy, many employers adopt nondisclosure policies and are tight lipped when providing references.

But do employers have a duty to disclose, in response to a request for a reference, information they have learned about an employee during the course of the employment? While employers generally do not have a duty to reveal information (favorable or unfavorable) when contacted by a prospective employer, they face serious legal consequences if their reference consists of misleading half-truths or is just plain false. For example, in February 1997 the California Supreme Court, in *Randi W. v. Muroc Joint School District*, ruled that employers who had knowledge that a school administrator had improper physical contacts with female students (or had been the subject of such complaints) could be liable for fraud and negligent misrepresentation when they provided favorable references that omitted any reference to the improper touching. The court decided that having undertaken to provide some information about the individual's teaching credentials and character, the employers were obliged to disclose all other facts that might materially qualify what they actually did disclose. The case arose when a 13-year old girl alleged that the school administrator sexually molested her. The student sued the school district in which she was hired as well as the prior employers who provided the favorable references.

Similarly in 1995, a Florida court ruled that Allstate could be sued for concealing the violent nature of a former employee. The suit alleged that Allstate wrote a recommendation letter indicating that the employee, who was fired after bringing a gun to work, was let go as part of a company restructuring. The employee, later hired by Fireman's Fund, opened fire in a company cafeteria, killing three people and wounding two others. Again, the basis for liability was the misleading and untruthful nature of the reference letter written by Allstate.

There is yet another reason to be careful when giving references. In a February, 1997 decision, *Robinson v. Shell Oil Co.*, the United States Supreme Court ruled that an employer who provided a negative reference after a terminated employee filed a discrimination charge with the Equal Employment Opportunity Commission could be sued for retaliatory discrimination under Title VII of the Civil Rights Act.

Based on these two cases employers are well advised to exercise caution when providing oral and written references or recommendations. Any reference must be true and must not contain serious omissions that, if known, would materially qualify the information actually disclosed. In other words, as one legal scholar noted, "half of the truth may obviously amount to a lie, if it is understood to be the whole." On the other hand, disclosing too much negative information invites claims for defamation, breach of privacy or wrongful interference from a rejected job seeker. Since employers have little to gain and much to lose when providing a reference, they should adopt and follow a nondisclosure policy and educate management employees about the risks posed by recommendations. These measures should minimize exposure to (1) claims by third parties who were injured after a "problem employee" was favorably recommended (such as the cases in California and Florida); and (2) claims by employees for whom a reference was provided.

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