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DEFAMATION AT THE WORKPLACE EMPLOYERS BEWARE

Richard J. Larson*

While the slow erosion of the "employment at-will" doctrine has received considerable attention during the last several years,¹ a more subtle liberalization of employee protection has correspondingly evolved in defamation law. Employees who have been terminated, disciplined, investigated, given unfavorable references, or simply subjected to negative managerial evaluations, have increasingly responded with lawsuits alleging that their employer's conduct constituted actionable defamation.² Such lawsuits have become particularly popular in jurisdictions which have resisted abrogation of the "employment at-will" doctrine and where defamation, along with claims for emotional distress or invasion of privacy, are increasingly advanced as substitutes for wrongful discharge actions.

This proliferation in employee defamation suits has resulted in a number of progressive judicial interpretations of the traditional state common law rules of libel and slander. The present article will examine these new trends in employee defamation laws, highlight a number of the most recent decisions applying the law of defamation in the workplace, and review some of the defensive strategies employers are enlisting to combat employee defamation claims.

I. COMMON LAW DEFAMATION

Historically, the common law tort of defamation was governed

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by state law and typically was defined as a communication which tended to harm the reputation of another as to lower him in the esteem of the community or deter third persons from associating or dealing with him. A publisher of defamatory statements was held strictly liable for the consequences of his publication. Written defamation, or libel, was considered actionable per se if its meaning was clearly defamatory without resort to extrinsic evidence. Slander, or spoken defamation, was actionable per se only if it imputed commission of a crime, possession of a loathsome disease, or incompetence in plaintiff's trade or profession.

Language which was defamatory per se gave rise to a presumption that the statements were published with malicious intent, and the plaintiff was excused from having to plead or prove special (pecuniary) damages. Defamatory communications by an employer regarding an employee were usually considered defamatory per se since they typically reflected upon the employee's occupational competency.

II. CHANGING THE COMMON LAW: PUBLICATION

A. Self-Compelled Publication

A fundamental element of a defamation cause of action was the requirement that the defamatory communication had to be published to someone other than the plaintiff. Since the interest sought to be

4. Restatement of Torts § 580 (1938). Specifically section 580 provides:
   Except as stated in § 581, one who publishes defamatory matter of another is not relieved from liability because
   (a) he did not intend the matter so published to be understood as defamatory and neither knew nor by the exercise of every possible precaution could have known that it could be so understood, or
   (b) knowing the matter to be defamatory, he did not intend to harm the other's reputation.
5. Restatement of Torts § 569 (1938).
7. Restatement, supra note 4.
8. 50 Am. Jur. 2d Libel and Slander § 114 (1970); see also Pittman v. Larson Distributing Co., 724 P.2d 1379 (Colo. Ct. App. 1986) (employer stated to a customer that the employee had been fired because "he spent too much time in the office and on the telephone" id. at 1382, rather than calling on customers. The court held the statement was defamatory per se). In Pittman, the court held that the elements of a cause of action for slander per se are: (1) an oral statement, (2) published to a third party, (3) which is defamatory of the plaintiff's trade, business, or profession, and (4) requires no extrinsic evidence to show how it might be taken as concerning the plaintiff or defaming him in his trade or business. Id. at 1387.
protected was a reputational one, no damage could occur without the
defendant communicating the statement to a third person. In the
employment context, however, a number of jurisdictions\(^1\) have re-
cently relaxed the traditional publication requirement and permitted
employee defamation claims although: (1) the employer communi-
cated the defamatory remark solely to the employee; or (2) the com-
munication was made only between agents of the same corporate
employer.

Regardless of whether he has a duty to do so, an employer who
is discharging an employee will frequently give the employee an ex-
planation for the termination. If this communication was conveyed
solely to the employee, the employer would not ordinarily be liable
because there was no publication to a third party. Nonetheless, at
least eight states have recognized a doctrine of “compelled self-pub-
lication” which permits employees to meet the publication require-
ment for defamation if the employee is in some way compelled to
repeat an employer’s defamatory remarks to a third person, and if it
was foreseeable to the employer that the employee would be so
compelled.\(^1\)

To date, this doctrine has been applied only to employment situa-
tions where an employee was discharged and is thereafter com-
pelled to republish his former employer’s defamation when explain-
ing his termination to a prospective employer.\(^2\) The inherent

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10. See Belcher v. Little, 315 N.W.2d 734 (Iowa 1982); Colonial Stores v. Barrett, 73
3d 787, 168 Cal. Rptr. 89 (1980); Lewis v. Equitable Life Assurance Soc’y of the U.S., 389
N.W.2d 876 (Minn. 1986); Neighbors v. Kirksville College of Osteopathic Medicine, 694
S.W.2d 822 (Mo. App. 1985); Herberholt v. DePaul Community Health Center, 625 S.W.2d
that when an employee repeats the employers allegedly defamatory statement to a prospective
employer no actionable publication has occurred. The court perceived no reason “for carving
out an exception to the general rule based on foreseeability in employment termination cases.”
Id. at 41). See infra notes 109-11 and accompanying text.

11. Lewis v. Equitable Life Assurance Soc’y of the U.S., 389 N.W.2d 876, 886 (Minn.
1986). When prospective employers inquired why the plaintiffs had left their previous employ-
ment, they responded by saying they had been terminated for gross insubordination. The com-
pany never directly communicated the statements to the prospective employers.

The Minnesota Court held that “in an action for defamation, the publication requirement
may be satisfied where the plaintiff was compelled to publish a defamatory statement to a
third person if it was foreseeable to the defendant that the plaintiff would be so compelled.
Lewis, 389 N.W.2d at 888.

Manpowers Commission regulation a person seeking employment had to present a certificate

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compulsion for a job applicant to supply a truthful republication of the reason for his prior discharge is generally an expected and foreseeable consequence of employment termination. Therefore the former employer is held liable because of the direct and foreseeable link between his actions and the resulting injury to his former employee.

Undoubtedly, the doctrine of compelled self-publication is a boon to employees seeking redress for employment termination; however, commentators, justices, and at least one state legislature have voiced objections to the adoption of this doctrine. Characterizing the device as a thinly-disguised and ill-founded substitute for the tort of wrongful discharge, these critics observe that the doctrine is not being used to protect reputations but is being misused in an attempt to protect employees from termination for improper or maliciously motivated reasons.

For instance, after the Minnesota’s Supreme Court’s decision to recognize the doctrine, the state legislature enacted legislation which curtailed employers liability for defamatory statements communicated through a former employee. The law allows an em-

\[\text{of availability to prospective employers. The court held the employer had defamed the employee when he wrote the reason for discharge on the employee’s certificate and the employee showed it to a prospective employer.} \]

\[\text{Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (1969) (An employee was given false and defamatory reasons for her discharge. The court held that it was foreseeable by the employer that in the ordinary course of events the employee would repeat the statements to a third party. When the employer repeated the reason for her discharge to a prospective employer a publication had been made); McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); Lewis v. Equitable Life Assurance Soc’y of the U.S., 389 N.W.2d 876 (Minn. 1986).} \]

\[\text{13. Lewis, 389 N.W.2d at 888. [1] “The office manager admitted that it was foreseeable that plaintiffs would be asked by prospective employers to identify the reason that they were discharged. Their only choice would be to tell them ‘gross insubordination’ or to lie. Fabrication, however, is an unacceptable alternative.” Id.} \]

\[\text{14. Id. See also McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980).} \]

\[\text{15. See Comment, supra note 1, at 1092; Tanick, Libel Comes to Work in Minnesota Bench & Bar of Minn., July 1987 at 14; Churchey Adolph Coors Co., 725 P.2d 38, 40 (Colo. App. 1986); Lewis, 361 N.W.2d at 884-85 (Forsberg, J. dissenting), modified, 389 N.W.2d 876; MINN. STAT. § 181-931 (1987).} \]

\[\text{16. Lewis, 361 N.W.2d at 884-85.} \]

\[\text{17. Lewis, 389 N.W.2d at 888.} \]

\[\text{18. MINN. STAT. § 181.933 (1987). The statute provides:} \]

\[\text{Notice of Termination} \]

\[\text{Subdivision 1. Notice required. An employee who has been involuntarily terminated may, within five working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within five working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination.} \]
ployee to demand from his employer a written explanation for his discharge,19 and the employer must comply with a “truthful reason for the termination.”20 An employee cannot thereafter use the written explanation as a basis for a defamation claim against the employer.21

The statute’s effect does not completely abolish the compelled self-publication doctrine. A false reason for the employee’s discharge could result in liability. In addition, the statute does not protect the employer for oral or additional communications which the employee may be compelled to repeat to a prospective employer.

Further criticism of the compelled self-publication rule focuses on the poorly defined language being employed by the courts to describe the appropriate circumstances for application of the doctrine. For instance, one court has cautioned that the exception should be limited to situations where the plaintiff is “in some way compelled” to repeat the defamatory communications, and such compulsion “was, or should have been foreseeable”22 to the defendant. Moreover, the employee must “take all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement”.23

In comparison, the other courts have held the doctrine applicable where the employer “has reason to believe the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement . . .”24 Not only may such vague language make judicial application difficult, but the inherent unpredictability may further discourage already cautious employers from providing honest reasons to an employee regarding his discharge.

B. Intra-Corporate Communications

Another liberalization of the publication requirement in employee defamation claims has occurred through judicial abrogation of the common law rule that intra-corporate communications were

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19. Id.
20. Id.
21. Id.
22. Lewis, 389 N.W.2d at 888.
23. Id.
not considered publications to third parties. The origins for the common law approach are located in an early series of cases involving dictations between corporate managers and their employee stenographers. The courts reasoned that since the originator of the statements had a corporate duty to write letters, and the stenographer's duty was to reduce the communications to shorthand and then recopy it, the communication was simply part of the same act, that of producing the letter. Consequently, the stenographer would not be considered a third person for purposes of defamatory publication.

This “single corporate act” theory was later broadened to encompass not only intra-corporate dictations, but any communication between employees of the same corporation. Thus, a defamed employee who sued the corporation, usually under tort principles of respondeat superior, was likely to have his claim summarily dismissed for lack of legal “publication”.

In essence, the courts had expressed a rule that when agents of the same corporation communicate information in the performance of their appropriate job functions, they are not regarded as separate persons. They are “part and parcel of the corporation itself” and their communications constituted merely the communications of the corporation to itself. The practical effect of this rule was to absolutely immunize the corporate defendant as to intra-corporate communications.

Although some jurisdictions continue to follow the traditional

25. See Owen v. Ogilvie Publishing Co., 32 A.D. 465, 53 N.Y.S. 1033 (1898) (the general manager of the company dictated an alleged libelous letter to a secretary employed by the company as a stenographer and typewriter. The letter was in reference to the business of the company. The court held there was not the requisite publication for a libel cause of action); Cartwright v. Fischel, 113 Miss. 359, 74 So. 278 (1917) (The court held “that dictation of a letter to a stenographer, when employed by the person or corporation, is not sufficient publication, in the absence of any repetition by the person or stenographer to other persons.” Id. at 279). Freeman v. Dayton, 159 Tenn. 349, 19 S.W.2d 255 (1929) (The court held that dictation of a letter containing libelous matter to a stenographer does not constitute publication in the sense of the law of libel).


27. See Prins v. Holland North-America Mortgage Co., 107 Wash. 206, 181 P. 680 (1919) (the court held that there is no publication of the libel when one agent of a corporation communicates the libel to another agent of the corporation); Biggs v. Atlantic Coast Line R.R., 66 F.2d 87 (5th Cir. 1933) (a manager of the railroad made libelous statements about an employee. These statements were communicated to other members of the corporation in the ordinary course of business. As a result, the employee was discharged and not reinstated. The court held there was no publication when the communication was between agents of the corporation); Magnolia Petroleum Co. v. Davidson, 194 Okla. 115, 148 P.2d 468 (1944) (there was no actionable publication when a supervisor spoke allegedly libelous words to an employee in the presence and hearing of a fellow employee).

“no-publication” rule for intra-corporate communications, an increasing number of states have recently abandoned the rule and now recognize legal publication for such communications. In rejecting the logic of the common law rule, courts have referred to the basic fact that while a corporation is a single artificial entity for many legal purposes, corporate status should not afford the entity any added immunity for its torts. Corporate employees are individuals with reputational interests equal to those of non-corporate employees and the former should not receive any less benefit from the defamation laws.

The states which have abolished the common law nonpublication rule generally do acknowledge that many intra-corporate communications will still be immune because of the employer's qualified privilege to communicate work related information within the corporation. Nonetheless, removal of the no publication barrier to employee defamation claims could significantly improve an employee's posture during settlement negotiations and trial. Pretrial motions for dismissal, based upon the employees inability to plead legal publica-


33. A communication is qualifiedly privileged if it is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if it is made to a person having a corresponding interest or duty. Luttrell, 683 P.2d at 1294. See supra note 57-88.

34. As a result of the qualified privilege, the employee has the burden of proving that the defendants acted with knowledge of falsity or reckless disregard for the truth before the privileged can be overcome. Id.
tion, will no longer be routinely granted and the corporate employer faces the risk of triable issues concerning the existence and abuse of its qualified privilege. The intensified uncertainty presented by this scenario will make employee defamation claims increasingly threatening to corporate defendants.

C. Changing the Common Law: Constitutional Privilege

At common law, strict liability was imposed upon a defendant for the publication of a false and defamatory remark. The defendant was liable despite his having used due care to determine the accuracy of his statements and his reasonable belief that the statements were true. However, since 1964 the Supreme Court has insisted that adequate protection of the First Amendment’s guarantees of free speech and free press mandated a modification in the common law rule of strict liability. Liability can no longer be imposed absent a showing that the defendant was at fault to some degree in ascertaining the truth or falsity of his remarks.

In *New York Times Co. v. Sullivan,* the high court ruled that in a case involving a public official and a media defendant, the plaintiff could recover only where the defendant evidenced “actual malice,” or reckless disregard of the truth, in determining the accuracy of its remarks. Thereafter, in *Gertz v. Robert Welch, Inc.*, the Court balanced a private individual’s reputational interests against a media defendant’s First Amendment privileges, and concluded that the actual malice standard of *New York Times* was not a prerequisite for liability. Instead, a state could permit the plaintiff to re-

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39. *Id.* at 256. The Sullivan fault requirement was extended to cases involving public “figures” in *Curtis Publishing v. Butts,* 388 U.S. 130 (1967).
41. *Id.* at 346-48. The Court reasoned that this approach “recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.” *Id.* at 348.
cover upon a lesser standard of fault, as long as strict liability was not imposed. Nonetheless, the private plaintiff would be compelled to establish actual malice before presumed or punitive damages could be awarded.\(^{42}\)

In the two decades following *Gertz*, the Supreme Court addressed a variety of defamation cases in which the characterization of the plaintiff as a public or private figure (and arguably the defendant's media or non-media status) appeared to be the predominant consideration in determining the appropriate fault standard for liability.\(^{43}\) However, during the last few years, several decisions of the Court have interjected new considerations into the liability formula for defamation and confused the prior First Amendment analysis.\(^{44}\)

In *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*,\(^{45}\) the Court addressed a libel claim brought by a private figure plaintiff against a non-media defendant and involving speech which the Court characterized as a "matter of private concern."\(^{46}\) The issue presented was whether the state court erred in holding that a private figure plaintiff could recover punitive damages if only negligence, rather than the "actual malice" required in *Gertz*, were shown. The Supreme Court affirmed the state tribunal's decision, and held that the negligence standard was permissible under these particular facts.\(^{47}\) Justice Powell, reconciled the apparent inconsistency with *Gertz* by noting that the defamatory statements in *Dun*, unlike those in *Gertz*, did not involve any "matters of public concern" and consequently, the First Amendment interests of the publisher were of lesser significance.\(^{48}\)

42. *Id.* at 348-50. The Court requires that state remedies for defamatory falsehoods reach "no farther than is necessary to protect the legitimate interest involved." *Id.* at 349. (wrongful injury to reputation.) Where a defamation plaintiff does not prove knowledge of falsity or reckless disregard for the truth, compensation must be limited to actual injury. Actual injury is not limited to out-of-pocket loss but can include impairment of reputation and standing in the community, personal humiliation, and mental anguish. *Id.* at 350.


46. *Id.* at 751-52. In *Dun*, a private individual sued Dun & Bradstreet, Inc. for a defamatory credit report it sent to potential creditors.

47. *Id.*

48. *Id.* Justice Powell reasoned that the false credit report was a matter of private concern and not of public interest. Since it is speech on matters of public concern that lie at the heart of First Amendment protections, speech concerning a private matter should not be afforded any special protection.
The Court in *Dun* apparently discounted the relevancy of the defendant's non-media status and shifted its focus instead to the public or private content of the defamatory speech. After *Dun*, the eligibility of a private figure plaintiff for recovering punitive or presumed damages, without having to establish the defendant's actual malice, depends upon a characterization of the speech's content as a "matter of private concern." Unfortunately, this analytic departure from earlier First Amendment treatment in defamation cases generated considerable speculation regarding the opinion's possible broader implications, and these uncertainties were exacerbated by

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Justice Powell added that, in speech involving matters of private affairs, "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with meaningful ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. . . . [i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice." *Id.* at 760-61.

49. The Court's focus upon the characterization of the speech as "public" or "private" had been previously employed in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). However, in *Gertz*, the Court seemed to have rejected such a characterization as a pertinent consideration, and it was not until the *Dun* decision that the private or public nature of the speech was again cited by the Court as a decisive factor. See *LeBel, Reforming the Tort of Defamation: An Accommodation of the Competing Interests in a Constitutional Framework*, 66 NEB. L. REV. 249, 267 (1987); Smolla, *supra* note 2 at 66; Mutafis v. Erie Ins. Exch., 775 F.2d 593 (4th Cir. 1985), cert. denied, ___ U.S. ___, 106 S. Ct. 1952 (1986).


51. *Dun* made clear that in defamation claims brought by private plaintiffs and involving speech on private concerns, the First Amendment does not require actual malice before a finding for presumed or punitive damages. However, the broad language of the opinion may suggest further implications. Justice White, in his concurring opinion, observes that although the plurality expressly mentions the inapplicability of *Gertz* only with respect to presumed or punitive damages, the language completely employed negates the *Gertz* fault requirement for defamation liability in cases similar to *Dun*. In other words, *Dun* has been construed as altogether rejecting the *Gertz* rules, at least where the controversy involves a private-figure plaintiff defamed about private concerns. Theoretically, the states would therefore be free to return to strict liability defamation in some cases. Obviously, such an interpretation of *Dun* would lead to a significant adjustment in state defamation actions, including those brought by defamed employees. *See Dun*, 472 U.S. at 774 (White, J. concurring in the judgment); Smolla, *supra* note 2 at 66; LeBel *supra* note 49, at 267; Peters, *supra* note 50, at 110-11; Mutafis v.
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In *Hepps*, the Court held that a private figure plaintiff bears the burden of showing that speech involving a matter of public concern is false before he can recover from a media defendant. The *Hepps* ruling reaffirmed the *Dun* opinion's focus on the content of the defamatory speech, but also reintroduced the defendant's media status as a decisive consideration in its First Amendment analysis.

The justices' confusing and potentially divergent approaches in *Gertz*, *Dun* and *Hepps* reveals the Court's ambiguous position as to the appropriate fault standard in private figure defamation cases. Since employee defamation cases will often involve private figure plaintiffs who are defamed by non-media defendants through speech which could be either a matter of private or public concern, the Court's unsettled interpretations of the First Amendment have a direct and unavoidable effect on workplace defamation claims. Among the most relevant uncertainties posed by the high court's recent decisions are: (1) what is the relevance of a defendant's non-media status in deciding if a private figure plaintiff has the burden of proving the defendant's remarks were untrue. Also, whether the *Hepps* decisions reference to the defendant's status implies another readjustment of the appropriate fault standard for awarding punitive or presumed damages to a private figure plaintiff; (2) whether an identifiable and useful test exists for distinguishing speech involving matters of public versus private concern; and (3) whether *Dun* may be interpreted to not only have narrowed the *Gertz* holding regarding punitive and presumed damages, but to have abolished the requirement of fault, even for liability, in a private figure defamation case.

D. Changing the Common Law: Qualified Privilege

Well before the Supreme Court created constitutional protections for certain defamatory communications, the common law recognized that some publications which might ordinarily be actionable should escape liability because the defendant was acting in further-
ance of a socially important interest. If the interest was one of paramount importance, the defendant might be granted absolute immunity for his false statements, even at the expense of uncompensated harm to the plaintiff's reputation. The defendant's particular purposes, motives, or the reasonableness of his remarks were unimportant if the statements were to be protected by an absolute privilege.

Absolute immunity was, and continues to be, restricted to a few limited situations such as statements made during judicial and legislative proceedings, comments made by certain executive officers in the lawful discharge of their duties, and remarks made pursuant to the consent of the plaintiff. This privilege is rarely applicable to defamatory statement's made by employers about their employees.

If the societal interest which warranted the communication was not substantial enough to enjoy an absolute privilege, the publication might nonetheless be entitled to a conditional or qualified privilege. The qualified privilege was uniformly extended to employers who published statements in the ordinary course of their business. The most commonly expressed interests justifying the employer's protection under a qualified privilege were classified as: (1) A common interest shared between the employer and a third party. The privilege existed as long as the interest concerned a legitimate business concern and the employer believed facts existed which a third party was

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58. Id.
63. See Happy 40, Inc. v. Miller, 63 Md. App. 24, 491 A.2d 1210, 1216 and numerous cases cited therein; Stuempges v. Parke, Davis, & Co., 297 N.W.2d 252, 257 (Minn. 1980) (whether a particular occasion gives rise to the existence of a qualified privileged generally considered to be a question of law for the court to decide). See Garziano, 818 F.2d at 385-86; Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 889 (Minn. 1986); R. Slack, Libel, Slander and Related Problems (1980); see infra notes 67-75.
entitled to know. This occasion for the qualified privilege is exemplified by communications among business partners and intra-corporate communications. (2) The interest of a third party in receiving relevant information about an employee. For instance, if an employee reference letter from a former employer was sent to a prospective employer and the information conveyed was reasonably calculated to protect the prospective employer's interests in hiring honest and efficient servants, the communication was protected; (3) The employers own business interests could also warrant a qualified privilege, although not every alleged reason for a communication would necessarily entitle an employer to defame an employee. A common example of this is an employer's explanation to the work force of the reasons for a particular employees being discharged or disciplined. The employer's interests justifying the publication are the maintenance of general discipline and worker morale. Because the employer's privilege is usually not absolute, it can be forfeited by "abuse". While there is no uniform definition of what constitutes "abuse" of the qualified privilege, the most comprehensive common law definition provides that the privilege could be lost by a publication for an improper purpose, publication in an improper manner, or publication not based upon a reasonable belief in the truth of the statements. Accordingly, communications to persons

64. W. Prosser & W. Keeton, supra note 3, at 826; Restatement (Second) of Torts § 596 (1977); see Lewis, 389 N.W.2d at 876.


66. Restatement (Second) of Torts, § 595 (1977); W. Prosser & W. Keeton, supra note 3, at 826-27.


68. Restatement (Second) of Torts § 594 (1977).

69. See Garziano, 818 F.2d at 380; Lawson v. Howmet Alum. Corp., 449 N.E.2d 1172 (Ind. App. 1983). Communication to co-workers regarding the reasons for an employee's discharge have also been protected based on the employee's interests in avoiding similar terminations.


71. Restatement (Second) of Torts §§ 250-68 (1977). In contrast to the determination of whether a qualified privilege exists in a particular situation, "abuse" of the privilege is
not within the protected interest, publication of information unnecessary to accomplish the protected purpose, excessive or intemperate language, an unreasonable belief in the existence of a protected interest, a publication motivated primarily out of ill will, spite, or hatred, or a publisher's negligent determination of the truth or falsity of the communication were all potential forms of qualified privilege "abuse."

The common law rules regarding the employer's qualified privilege have necessarily been re-evaluated since the aforementioned First Amendment rulings of the Supreme Court. Of particular relevance to the qualified privilege is the Court's suggestion in *Gertz* that the common law rule of strict liability for defamation can no longer be followed. Instead, a defendant must be at least negligent in ascertaining the truth of falsity of his remarks before liability will attach.

Since the common law qualified privilege typically only immunized a publisher from negligence, application of the *Gertz* fault requirement in all defamation cases seemingly renders the qualified privilege meaningless. One manner of avoiding this anomaly would be to interpret *Gertz* as inapplicable to nonmedia defendants, such as employers. However, the clear trend is to find that the constitutional implications of *Gertz* apply regardless of the defendant's status. The states consequently have been left with the option of either abolishing the qualified privilege, or of elevating the standard of fault necessary to abuse the privilege. To date, no jurisdiction has elected to eliminate the employer's qualified privilege, but the states have disagreed as to the new level of fault which should be required for "abuse" of the privilege.

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72. A question of fact. See supra note 66.

73. Id. See also W. PROSSER & W. KEETON, supra note 3, at 831-35; Annotation, supra note 62; Sugarman v. RCA Corp., 639 F. Supp. 780, 787 (M.D. Pa. 1985).

74. See supra notes 36-56 and accompanying text.

75. See supra notes 40-41 and accompanying text.

76. R. SMOLLA, supra note 2, at 8-33; RESTATEMENT (SECOND) OF TORTS § 592A special note to topic 3 (1977).


78. However, the RESTATEMENT (SECOND) OF TORTS § 592A (1977), suggests that this option may be an eventual development of the basic *Gertz* principles.

79. See infra notes 81-83 and accompanying text.
One popular approach is a hybrid standard that triggers a forfeiture of the privilege upon a showing that an employer's communication was either actuated by "common law malice" or made with "actual malice." Common law, or express, malice refers to a publisher's ill will, spite or hostility in making defamatory statements. Actual malice is unrelated to the defendant's motivations for publishing his remarks, but is borrowed from the Supreme Court's First Amendment decisions and focuses solely upon the defendant's degree of care in determining the truth or falsity of his statements.

Relatively few states have undertaken any thorough explanation of this new "constitutionalized" standard for the qualified privilege, but the standard apparently applies the "actual malice" fault requirement only in cases involving abuse through a defendant's faulty ascertainment of the truth or falsity of his remarks. The "common law malice" standard is limited to situations where the alleged abuse arises from defendant's improper motives in communicating the defamatory statements. Unfortunately, the state courts are generally confused over whether the other common law means of abusing the privilege, i.e. excessive publication or unreasonable belief in the existence of a privilege, remain subject to a mere negligence standard, or whether they must be re-evaluated after Gertz. For instance, the Restatement (Second) of Torts was modified after the Gertz ruling to state that the privilege was forfeited if a defendant publishes a defamatory matter knowing it is false or in reckless disregard as to its truth or falsity. However, the Restatement retained the common law forms of abuse such as excessive publication, publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged, publication based upon an unreasonable belief that a privilege existed and publication for improper purpose. These other forms of abuse are apparently preserved under a negligence standard.

82. Restatement (Second) of Torts § 600 (1977).
83. Restatement (Second) of Torts § 604 (1977).
85. Restatement (Second) of Torts § 603 (1977).
86. See supra notes 82-85; see also Schneider v. Pay 'N Save Corp., 723 P.2d 619, 625 (Alaska 1986); Robison v. Le Serenier, 721 F.2d 1101, 1109-10 (1983); but see Bratt v. In-
Other states have opted for alternative interpretations of the effect of Gertz on the employer's qualified privilege. A number of tribunals have elected to rely exclusively upon either common law malice or actual malice in determining whether an abuse of the employer's privilege has occurred. These courts may or may not acknowledge loss of the privilege via excessive publication, for an improper purpose, or other common law basis.87

Interestingly, several of the jurisdictions which have expressly rejected common law malice as a form of abuse nonetheless suggest that a defendant's ill will or spite is relevant evidence of actual malice.88 At least two jurisdictions continue to require only negligence in the employer's determination of the falsity of his remarks, despite the court's express recognition that Gertz may have negated the significance of such a "privilege."89

Obviously, no judicial consensus exists on the correct standard for abuse of the employer's qualified privilege after Gertz and its progeny. The resulting ambiguity has encouraged employees to initiate legal actions for employer defamation, and has generated considerable anxiety for employers. Without clear guidelines regarding the existence and limits of the common law qualified privilege, employers reliance upon their traditional conditional immunity poses significant risks. The following section will address in greater detail some measures being taken by employers to reduce their potential liability from employee defamation claims.

III. EMPLOYER DEFENSIVE STRATEGIES

In response to the current state of flux in judicial construction of defamation claims arising at the workplace, many employers are cautiously experimenting with various defense strategies to curtail employee lawsuits. Foresighted labor law practitioners are providing clients with suggested guidelines to follow when conveying information regarding employees. Although the objective of this article is not

to extensively review these suggested procedures, a brief discussion of some of the most popular defense strategies will highlight the seriousness of employers' concerns about employee defamation claims and aid in illustrating the potential future problems which may face the state courts.

Perhaps the most fashionable practice being adopted to rebut defamation claims in employee termination cases is the policy of providing other employers with only "neutral" employee references. Based on the simple theory that less information conveyed means less chance for defamation liability, neutral references typically release only limited, undisputed facts such as employee job title, period of employment, and wage scale. To avert claims that a neutral reference is impliedly defamatory, the practice is uniformly enforced for all employees. Of course, all employees should also be informed, in advance, of the company's neutral reference policy. Neutral references have the advantage of being both a simple practice to institute and nondiscriminatory.

However, widespread adoption of this policy among employers will undoubtedly focus greater judicial attention on the practice's drawbacks. For instance, if an employee is discharged for some particularly egregious reason, or if the employer has knowledge of some serious impediment to the employee's safe performance of job tasks, a court might consider the former employer's failure to disclose such information a form of "negligent reference." Furthermore, neutral references will penalize capable, diligent former employees who have earned, and who need, a positive referral for a subsequent job. Finally, the practice defeats the continued usefulness of the employer's traditional qualified privilege. Self-censorship by employers can only hinder the societal interest in employment of the best qualified employees.

Although numerous employers disdain the use of neutral employee references, many are willing to adopt the derivative approach of attempting to couch their references in the form of opinions rather than facts. This practice is premised on the widely-held belief that statements of opinion cannot be defamatory. However, far from providing a "safe harbor" against liability, statements believed to be mere opinion can often constitute "mixed opinions" or other actiona-
ble forms of defamation.

Various state courts, legal commentators, and the Restatement’s drafters have exhaustingly, but unsuccessfully, attempted to clearly demarcate nonactionable opinions from actionable defamation.\textsuperscript{92} For instance, in a recent Colorado decision\textsuperscript{93} the court used a “totality of circumstances,”\textsuperscript{94} test to find that an employer had defamed his former employee. The employer had stated that the plaintiff “wasn’t doing a good job” and “spent too much time in the office and on the telephone.”\textsuperscript{95} The court’s three part test required analysis of whether the statements were “cautiously phrased in terms of apparency”;\textsuperscript{96} examination of the statements in light of their context, not just the objectionable words used; and consideration of all circumstances surrounding the publication, including the medium of communication and the audience.\textsuperscript{97}

Other courts have embraced approaches which focus on the degree to which a statement is either “laden with factual context”\textsuperscript{98} or “verifiable.”\textsuperscript{99} The Restatement litmus test turns on whether the alleged opinion implies the existence of undisclosed defamatory facts.\textsuperscript{100} For example, if A writes to B about neighbor C that “I think he (C) must be an alcoholic,” without a further explanation, the statement may be actionable because it implies undisclosed defamatory facts about C.\textsuperscript{101} Only where the speaker expressly discloses the facts upon which his opinion is based is the statement considered “pure opinion” and nonactionable. Given the complexity and variety of these numerous tests for defining what is nonactionable opinion, an employer would seem ill-advised to attempt drafting a

\textsuperscript{92} See infra notes 92-100 and accompanying text.
\textsuperscript{94} Id. at 1387.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 1388.
\textsuperscript{97} Id. See also Capan v. Daugherty, 402 N.W.2d 561 (Minn. Ct. App. 1987) (four factor test for ascertaining whether defamatory remarks are mere opinion: (1) the degree of precision and specificity of the disputed comment; (2) the verifiability of the statement; (3) the literary and social context of the remark; and (4) the public or political arena in which the statement was made); Davis v. Ross, 754 F.2d 80 (2d Cir. 1985) (liability found against employer, Diana Ross, for statements in a “To Whom It May Concern” letter, commenting on her employees’ unacceptable personal and work habits); Connolly v. Labowitz, 519 A.2d 138 (Del. 1986); See generally R. Smolla, supra note 2, at 615-637.
\textsuperscript{98} Cianci v. New Times Publishing Co., 639 F.2d 54, 63 (2d Cir. 1980).
\textsuperscript{99} Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); See generally R. Smolla, supra note 2, at 625-626.
\textsuperscript{100} Restatement (Second) of Torts § 566 (1977); See also Adler v. American Standard Corp., 538 F. Supp. 572, 576 (D. Md. 1982).
\textsuperscript{101} Restatement (Second) of Torts § 506 illustration 3 (1977).
reference which could safely be considered nondefamatory, yet still contain useful information.

Another approach for employers wishing to avoid defamation lawsuits is to obtain the employee's consent to employer-employee communications. Written and/or oral consent agreements are frequently prepared by prospective employers for all job applicants. The effect of the agreements is to permit former employers to fully and freely respond to the employer's inquiries. The advantage of this practice is that the common law has long recognized that consent creates an absolute privilege from defamation liability.102 In other words, the publisher's motives, purposes, or belief in the truth of his remarks is irrelevant because the privilege is unconditional. Further, even if the particular jurisdiction refuses to recognize the absolute privilege, the employees voluntary and knowing consent to the release to employment evaluations should aid in rebutting a charge of employer "malice."

The disadvantages which attend the use of consent forms include the fact that such agreements are not routinely approved by all courts.103 Defenses founded upon duress or unconscionability may be successfully raised. In addition, some courts as well as the Restatement (Second) of Torts,104 logically reason that consent forms generally provide only for the employee's consent to the dissemination of truthful information regarding past employment. Rarely would such agreements expressly ask for an employee's consent to be defamed. Indeed, any such agreement would violate most states public policy against the use of consent as a defense to an intentional tort.105

A final recommendation frequently made to employers who wish to reduce their potential liability for communicating employees' work histories is to keep a detailed record of all correspondence and information pertaining to each employee. A sufficient "paper fortress" will often deter an employee's successful prosecution of a defamation action. Suggested record-keeping would include: employee's resume

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103. See infra notes 105-106 and accompanying text.


and application form, customer correspondences, telephone memos
from communications with the employee's references, employee eval-
uations, copies of any court records or private investigatory reports,
and any disciplinary records.

In an employee discharge case, it is often recommended that the
employer review the relevant records with the employee and commu-
nicate a reason for the termination. Unexplained or unsupported dis-
charges may provoke employees into legal action and invite inquiry
by the Equal Employment Opportunity Commission. Of course,
access to information in employee personnel files should be carefully
restricted to those persons within the legitimate scope of employer's
qualified privilege.

IV. CONCLUSION

The current widespread use of common law defamation by dis-
gruntled employees is motivated by two distinct objectives. First, in
states which provide little or no employee protection from wrongful
discharge, defamation theories have been popularized as well recog-
nized substitutes for improper employment terminations. When exer-
cised in this manner, the tort of defamation has resulted in some
rather expansive judicial interpretations and considerable confusion
both within states and between court systems.

While employees are using the current uncertainties to manipu-
late employers through defamation claims, the use of defamation in
this manner will likely be curtailed as states become more progres-
sive in offering express protection from wrongful discharges. For ex-
ample, recent Minnesota legislation limited the use of compelled
self-publication in employee discharge cases. The statute compels
an employer, upon an employee's written request, to provide a truth-
ful explanation for the employee's termination. The written explana-
tion cannot become the basis for the employee defamation suit. Although the law certainly does not abrogate Minnesota's employment-at-will doctrine, it does significantly increase the employer's obligations to provide a legitimate reason for employee
terminations.

The second objective being pursued by employees through defa-

1984) (employee successfully argued that her employer's refusal to provide a reference was
retaliation for her filing of a Title VII charge); G. Panaro, supra note 89, at 28.

107. See supra note 18.

108. Id.

Employers Beware

Inaction lawsuits is the traditional interest in reputation which defamation laws were created to protect. Although defamation claims motivated by such an interest may originate from an employee's discharge, the most fertile situation for future claims may be in employer's communications regarding continuing employees. Current trends have heightened employees' (and lawyers') awareness of job-related defamation claims, and employers engaging in employee investigations, testings, and personnel evaluations will be compelled to devise new self-protective measures to restrict these new sources of defamation. A limited number of defamation cases have already been decided involving employer allegations of employee thefts, drug use, metal illness, polygraph results, alcohol abuse, and sexual harassment. The defamatory communication in these situations may be the employer's express remarks, or may simply be implied by virtue of the employer's conduct or gestures.

Aside from employer precautions, the most significant factor affecting the future success of employee defamation claims will be the further judicial evolution of the common law qualified privilege. The existing confusion over the applicability and scope of the employer's privilege reflects the courts fundamental uncertainty over the parameters of First Amendment constraints and the precise purposes to be served by the privilege. Until such confusion is reduced, the law of defamation at the workplace will be characterized by copious use and unpredictable application.
