Some Considerations When Giving Employment References
By Janice G. Dubler

Sometimes giving a good or bad reference can get an employer sued. Many employers try to reduce their chances of being sued by adopting "no comment" policies -- meaning that the employer will disclose only the former employee's dates of employment and job title during reference checks. This type of policy reduces the chance that an employer will make a defamatory statement about a former employee or give a good reference about a problem employee. However, it also has its drawbacks. For example, it may be used against an employer in a retaliation case brought by a former employee, or it may expose an employer to lawsuits brought by third parties who are subsequently harmed by a former employee.

The following are some considerations for employers when giving references:

I. Claims of Defamation by the Former Employee

A. Elements of Defamation

Employers can be held liable for defamation in connection with information they provide about their current and former employees. A plaintiff alleging defamation must generally prove four things: (1) the employer made a false and defamatory statement about the plaintiff; (2) the employer made an unprivileged publication of the statement to a third person; (3) the employer had the requisite intent (actual knowledge of the statement's falsity, reckless disregard as to truth or falsity of the statement, or negligence in determining the truth or falsity of the statement), and (4) the plaintiff sustained damages due to the defamatory statement. *See* Restatement (Second) of Torts § 558; *see also* 42 Pa. Cons. Stat. §§ 8343, 8344; *DeAngelis v. Hill*, 847 A.2d 1261, 1267-68 (N.J. 2004).

B. Ways for Employers to Avoid Liability for Defamation

1. Stick to the Facts

Sticking to basic facts that are not capable of a defamatory meaning (such as job titles and dates of employment) is a good way to avoid defamation claims. Indeed, "words that are not susceptible of any defamatory interpretation are not actionable, and a cause of action will not lie for such statements." *Printing Mart-Morristown v. Sharp Elec. Corp.*, 563 A.2d 31, 45 (N.J. 1989); *see also Grogan v. Duane, Morris & Heckscher*, Civ. A. No. 90-4105, 1991 WL 98888, at *5-6 (E.D. Pa. June 4, 1991).

For example, in *Singer v. Beach Trading Co.*, the New Jersey Appellate Division held that an employer who incorrectly reported the plaintiff's prior job titles to a prospective employer was not liable for defamation because the report was not susceptible of any defamatory meaning as a matter of law. 876 A.2d 885, 894-95 (N.J. Super. Ct. App. Div. 2005). By way of contrast, in *Geyer v. Steinbronn*, the Superior Court of Pennsylvania held that an employer's accusations of dishonesty and theft about a former employee provided in the context of an employment reference – even though indirect – were defamatory. 506 A.2d 901, 909 (Pa. Super. Ct. 1986).

2. Speak the Truth

Truth is an absolute defense to a defamation claim. *See, e.g.*, 42 Pa. Cons. Stat. § 8343(b)(1); *Erickson v. Marsh & McLennon Co.*, 569 A.2d 793, 806-07 (N.J. 1990) (citing *Laurence v. Bauer Publ'g & Printing*, 446 A.2d 469, 473 (N.J. 1982), *cert. denied*, 459 U.S. 999 (1982)). However, an employer must be careful to give enough information to ensure an accurate account of the former employee's work history. If material parts of the work history are missing, the reference may imply a falsity.

3. Obtain Consent

Consent is also a defense to a defamation claim. *See, e.g., Moses v. McWilliams*, 549 A.2d 950, 971 (Pa. Super. Ct. 1988) (citing Restatement (Second) of Torts § 583); *Rogozinski v. Airstream by Angell*, 377 A.2d 807, 816-17 (N.J. Super. Ct. App. Div. 1977) (citing *Mick v. Am. Dental Ass'n*, 139 A.2d 570 (N.J. Super. Ct. App. Div. 1958)). When an individual consents to the release of employment references by former employees, an employer providing such a reference may be protected from defamation claims arising from the reference given. Accordingly, some employers require an employee, upon termination or resignation, to sign a document authorizing the employer to speak to prospective employers and releasing the employer from liability for any statements made. Although nothing guarantees that an employer will avoid defamation lawsuits, such releases do appear to deter litigation.

4. Do Not Abuse the Qualified Privilege

An employer is not liable under the tort of defamation when protected by a qualified privilege. In general, communications are privileged when made on a proper occasion, from a proper motive, in a proper manner, and with reasonable cause. In the employment reference context, the New Jersey Supreme Court held in *Erickson v. Marsh & McLennon Co.* that "a qualified privilege extends to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee." 569 A.2d at 805. Similarly, Pennsylvania common law provides a qualified privilege "whenever a prior employer evaluates a former employee at the request of a prospective employer." *Zuschek v. Whitmoyer Labs., Inc.*, 430 F. Supp. 1163, 1165 (E.D. Pa. 1977); *see also Geyer*, 502 A.2d at 909 (citing *Zuschek*, 430 F. Supp. 1163).

If an employer abuses its qualified privilege, however, it is no longer protected from defamation claims. The New Jersey Supreme Court has explained that the qualified privilege can be overcome if the plaintiff establishes malice by clear and convincing evidence. *Erickson*, 569 A.2d at 806-07. In Pennsylvania, the plaintiff bears the burden of proving an abuse of a conditional privilege by showing that the employer (1) acted with malice or ill will, (2) did not believe in the truth of the statements or did not have reasonable grounds for so believing, or (3) made a publication outside the scope of the privilege. *Zuschek*, 430 F. Supp. at 1166. Thus the qualified privilege is not a "silver bullet" that can protect employers from the inconvenience and expense of defending against a defamation claim.

II. Liability to the Former Employee for Negligent Misrepresentation

The New Jersey Appellate Division has held that an employer can also be liable for negligent misrepresentation for misstating a former employee's work history. *Singer*, 876 A.2d at 888, 891-93.

In *Singer*, the plaintiff worked as the Vice President of Daily Operations of Beach Trading Company for almost a year. *Id*. at 888. After leaving Beach Trading Company, she began working for a new employer who began to question the "validity of the representations she made in her resume" about her experience as a supervisor. *Id*. at 889. The new employer called Beach Trading several times and was told that the plaintiff had never held a supervisory role at her job there. *Id*. The new employer fired the plaintiff, who then sued Beach Trading for negligently misrepresenting that she did not work there in a supervisory capacity. *Id.* at 890.

The court held that an employer can be liable for negligent misrepresentation if: (1) the inquiring party clearly identifies the nature of the inquiry; (2) the employer voluntarily decides to respond to the inquiry, and then unreasonably provides false or inaccurate information; (3) the person providing the false information is acting within the scope of his or her employment; (4) the recipient of the incorrect information relies on its accuracy to support an adverse employment action against the plaintiff; and (5) the plaintiff suffers damages that are proximately caused by the negligent misrepresentation. *Id*. at 888.

Although Pennsylvania courts have not, to date, applied the law of negligent misrepresentation in connection with employment references, the lesson from *Singer* is that even employers who stick to the basic facts may get into trouble if they are not careful that their facts are accurate.

III. Claims of Interference with Prospective Contractual Relations by the Former Employee

In certain extreme circumstances, a former employee may be able to make out a case of interference with prospective contractual relations against a former employer who provides a false and negative employment reference. Such a claim requires that the employer acted with the intent to interfere with the former employee's prospective contractual relation with the employer seeking the reference.

For example, in *Geyer v. Steinbronn*, the Superior Court of Pennsylvania refused to disturb a jury verdict finding an employer guilty of interference with prospective contractual relations. 506 A.2d at 909-10. In that case, the defendant-former employer falsely stated during an employment reference that a former employee had drank on the job, forged checks, and was the subject of a lawsuit. *Id.* at 906-08. The court found that the plaintiff had established a *prima facie* case, which had gone unrebutted by the defendant, by showing that (1) the plaintiff and the prospective employer had a prospective contractual relationship, (2) the defendant had acted with the intent to interfere with that relationship, (3) the defendant's act was unprivileged, and (4) actual harm resulted to the plaintiff because he was not hired by the prospective employer. *Id.* at 909-10.

IV. Negative References as Evidence in Retaliation and Discrimination Cases

Employees often try to use bad references as evidence that the employer discriminated or retaliated against the employee. *See, e.g., Robinson v. Shell Oil*, 519 U.S. 337, 339 (1997) (holding that an employee who claimed that his former employer gave him a negative reference in retaliation for filing a discrimination charge with the EEOC could sue for retaliation under Title VII); *but see Beck v. Tribert*, 711 A.2d 951, 956 (N.J. Super. Ct. App. Div. 1998) (holding that negative references about *former* employees will not amount to an "adverse employment action" under NJ's Conscientious Employee Protection Act).

Similarly, employees sometimes argue that the employer's *refusal* to say anything in response to a reference request evidences discrimination or retaliation. For example, in *EEOC v. L.B. Foster Co.*, the Third Circuit found that an employer's refusal to provide a reference when it had routinely provided references in the past was sufficient to support a claim for retaliation. 123 F.2d 746, 749 (3d Cir. 1997); *see also Pantchenko v. C.B. Dolge Co.,* 581 F.2d 1052, 1055 (2d Cir. 1978) (stating that it would constitute prohibited discrimination for the plaintiff's former employer to refuse to provide her with a reference after having initially agreed to provide such a reference in retaliation for her filing charges with the EEOC). Thus, an employer who adopts a "no comment" policy should follow it consistently for all employees to avoid a former employee's argument that the employer selectively refused to provide him or her with a reference.

V. Positive References as Evidence in Discrimination and Retaliation Cases

Giving a former employee a good reference can also get an employer into trouble. If an employer fires an employee for poor performance and then gives her a good reference, the employee may point to the reference to try to prove that she did a good job and the real reason for firing her was discrimination or retaliation.

VI. Liability to a Subsequent Employer or Other Third Parties for Negligent Misrepresentation

If an employer provides a good reference for a former employee when the former employee actually misbehaved, the employer could potentially be exposed to a lawsuit brought by the new employer or another third party based on negligent misrepresentation. Although an employer does not have an affirmative duty to disclose information concerning a former employee, misleading or incomplete statements related to a former employee's work history (for example, by providing a "half truth" reference emphasizing only favorable qualities) may result in liability.

Regarding liability to subsequent employers, in *Fluid Tech., Inc. v. CVJ Axles, Inc.*, the employer gave a positive recommendation about a former employee who it had fired for embezzling. 964 P.2d 614, 615-16 (Colo. Ct. App. 1998). After the employee stole from his new employer, the court held that the former employer could be liable to the next employer for giving the good reference. *Id.* at 616.

Regarding liability to third parties, in *Randi W. v. Muroc Joint Unified School District*, an former employer was found liable to the victim of a former employee because it had provided a positive reference without disclosing the former employee's history of sexual misconduct. 929 P.2d 582, 591 (Cal. 1997). The court limited this holding by emphasizing that although there is no general duty to warn a prospective employer of a past employee's dangerous propensities, an employer may not mislead a prospective employer with "half truths." *Id.* at 591-93. Moreover, it noted that in the absence of resulting physical injury (or a special relationship), a third party does not have a cause of action against the former employer. *Id.*; *see also Davis v. Bd. Of County Comm'rs of Dona Ana County*, 987 P.2d 1172 (N.M. Ct. App. 1999) (employer that provided a good reference to an employee who had been disciplined for sexual misconduct was liable to subsequent victims of the employee's sexual misconduct).

It is worth reiterating that no court has found an employer liable for negligent misrepresentation to a subsequent employer or a third party when the employer has simply refused to comment on the employee's work history. Rather, an employer will only run into trouble for negligent misrepresentation when it provides a "half truth" reference by focusing on the employee's positive attributes while failing to mention his adverse or criminal tendencies.

VII. Statutory Protections for Employers Who Provide References

"No comment" policies can leave prospective employers without information they really ought to have. Over thirty-five states, therefore, have passed statutes protecting employers who provide employment references to prospective employers. Pennsylvania recently adopted such a law, which went into effect on August 15, 2005. Delaware also has a statute protecting employers from liability. The New Jersey legislature is currently considering such a law.

A. Pennsylvania

In Pennsylvania, an employer who "discloses information about a current or former employee's job performance to a prospective employer . . ., upon request of the prospective employer or the current or former employee, is presumed to be acting in good faith." 42 Pa. Cons. Stat. § 8340.1. Unless a lack of good faith is shown by "clear and convincing evidence," the employer is "immune from civil liability for such disclosure or its consequences in any case brought against the employer by the current or former employee." *Id.* A plaintiff can establish a lack of good faith only by showing that (1) the employer knew or should have known that the information disclosed was false; (2) the employer knew the information disclosed was materially misleading; (3) the information disclosed was false and the employer acted with reckless disregard as to the truth or falsity of the information; or (4) the disclosure of information was prohibited by a contract or by law. *Id.*

It is important to note that the Pennsylvania statute applies only to the disclosure of information about an employee's *job performance*. Employers will not, therefore, be protected by the law if they provide other kinds of information about an employee, such as information about an employee's lifestyle. Nonetheless, the term "job performance" is not defined, which is arguably advantageous to employers as it provides Pennsylvania courts with flexibility in determining whether a particular disclosure falls within the ambit of the statute's protection.

In addition, the Pennsylvania statute only protects employers from liability in cases brought by the current or former employee. It would not, therefore, be applicable to a negligent misrepresentation action brought by the subsequent employer or by another third party who is injured as a result of a misleading reference. Another notable characteristic is that the statute covers only those employers who provide information upon request of a prospective employer or a current or former employee; employers who voluntarily offer information will not be protected.

B. Delaware

In Delaware, an employer who "discloses information about a current or former employee's job performance to a prospective employer is presumed to be acting in good faith" and, unless lack of good faith is shown, "is immune from civil liability for the disclosure or its consequences." 19 Del. C. § 709. The presumption of good faith can be rebutted by showing that the information disclosed by the employer was knowingly false, deliberately misleading, or rendered with malicious purpose. *Id.* In addition, an employer is not immune from civil liability if the information was disclosed in violation of a nondisclosure agreement, or was otherwise confidential under the law. *Id.*

Like the Pennsylvania statute, the Delaware statute is limited to information about job performance. However, the Delaware statute elaborates on the type of "job performance information" to which it refers: (1) information about an employee's job performance; (2) any act committed by the employee that would constitute a violation of the law; and (3) an evaluation of the ability of the employee to accomplish or comply with the duties or standards of the position held by the employee. *Id.* The statute is not limited to employers who are responding to a reference request, so it would presumably extend to employers who voluntarily provide references. Nor is the statute limited to lawsuits brought by the current or former employee.

In *Collier v. Target Stores Corp.*, No. 03-1144-SKR, 2005 WL 850855 (D. Del. Apr. 13, 2005), the only case to address the Delaware statute, the court dismissed the plaintiff's claim that her former employer intentionally provided false and misleading information to a prospective employer because she provided only conclusory allegations rather than specific facts. *Id.* at *10. The court noted, however, that as there is no precedent interpreting the statute, the plaintiff's burden of proof was unclear. *Id.*

3. New Jersey

In early 2004, the New Jersey legislature introduced a bill intended to protect employers who provide employment references. N.J. A.B. 246, 211th Leg. (N.J. 2004); N.J. S.B. 861, 211th Leg. (N.J. 2004). Although the bill got stuck in the Senate and Assembly's committees on labor and failed to pass, it was reintroduced in 2006. N.J. A.B. 1409, 212th Leg. (N.J. 2006); N.J. S.B. 1527, 212th Leg. (N.J. 2006). This bill would exempt an employer from civil liability when the employer, in good faith, discloses certain information about the job performance or reason for terminating a present or former employee. Employers would be presumed to be acting in good faith unless it is shown by clear and convincing evidence that the employer acted with actual malice.

Like the Pennsylvania statute, New Jersey's proposed law does not define the term "job performance," and would not extend to employers who voluntarily provide references. It does not limit its protections to lawsuits brought by the current or former employee.

VIII. Statutory Duty Upon Certain Employers to Provide Reference Information

In some circumstances, employers may have a statutory duty to disclose information about former employees. For example, in Delaware, employers who operate child care or health care facilities are required to request "service letters" from prior employers of a prospective employee. 19 Del. C. § 708. If an employer receives a written request for a service letter, it is obligated to provide a service letter within ten business days. *Id.* The service letter must include information about the type of work performed by the employee, the duration of the employment, the nature of the employee's separation from employment, and "any reasonably substantiated incidents involving violence, threat of violence, abuse, or neglect . . . including any disciplinary action taken as a result of such conduct." *Id.*

New Jersey has a similar law, which requires a health care entity, upon inquiry of another health care entity, to "provide information about a current or former employee's job performance as it relates to patient care . . . and, in the case of a former employee, the reason for the employee's separation." N.J.S.A. 26:2H-12.2(c). Specifically, a health care entity must provide information with respect to the suitability of the employee for employment at a health care facility, and the employee's skills and abilities as they relate to a health care facility.

Both the Delaware and New Jersey statutes contain provisions protecting employers from civil liability based on references provided in good faith and as required by the laws.

IX. Suggestions for Employers

Since nothing will provide complete protection against lawsuits, employers need to be careful about what they say to prospective employers and, quite simply, use common sense. Here are some tips for providing employment references:

- Require inquiring parties to submit requests in writing.
- Consider a policy under which only the dates of employment and job title may be provided.
- If you want to provide additional information, consider requiring a written waiver from the former employee authorizing you to provide the reference information and releasing you from liability for doing so.

- Establish a clear policy designating who at the company is authorized to provide employment reference information. Make it company policy that anyone who receives a request for employment information direct the request to the designated individual. Make sure employees are familiar with the policy and know that off-the-record references violate the policy.

- When asked to give a reference, provide only relevant and factual information. Avoid characterizations and opinions.

- Do not provide misleading or incomplete “half truth” references that include only good characteristics.

- Consider whether failure to disclose certain information will result in foreseeable harm to a third party.

- Apply all reference policies in a consistent manner.