Employer Update

Weil

April 2019

Reference Checks For Employees Discharged Due to Misconduct

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In This Issue

Over the past year and a half, spurred in part by the #MeToo movement, many employers have begun taking additional steps to expand and enhance their sexual harassment policies. Yet when employers take disciplinary action against an employee for engaging in sexual harassment, particularly termination, they face another difficult question: to what extent should employers inform their former employees' prospective employers about the employees' misconduct in connection with a reference check?

Many employers have reference check policies that provide only minimal information. Some employers, for example, might provide prospective employers with only their employee's dates of employment and the last position held. Such employers reason that they have no legal obligation to provide references in the first place, and more detailed or candid disclosures regarding a former employee – particularly a disclosure of a fact that could be taken in a negative light – may form the basis of a potential defamation claim by the former employee. In the #MeToo era, at least one legislature has sought to protect employers from defamation arising from references that mention sexual harassment. The California legislature recently enacted a law that explicitly grants employers a qualified privilege to disclose to prospective employers whether an employee has engaged in sexual harassment.

Whether other states will follow California's approach remains to be seen. However, in light of the heightened focus on employees discharged due to misconduct, employers would be well advised to familiarize themselves with the law governing reference checks, and what employers can and cannot say in response to inquiries about former employees. In this article, we examine the risk of defamation arising from reference checks, California's new sexual harassment-related reference check law, and offer some suggestions as to how employers might approach these situations.

Background

Employers generally do not have an affirmative duty under the law to act for the benefit of others, including by responding to reference checks. But when employers *do* provide more information, such as explaining the reason for an employee's termination, for example, the employee might thereafter claim that the employer's statement was defamatory.[1]

Defamation is the act of communicating false statements about a person that injure the reputation of that person. To state a claim for defamation in many

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states, a former employee must show that his or her former employer: (i) made a false statement; (ii) published the statement to a third party, such as a prospective employer; (iii) without privilege or authorization; and (iv) the statement caused special harm or constituted defamation per se.[2]

While the law provides employees with recourse for alleged defamatory statements, in many states, the law also provides employers with legal protection to communicate information in response to reference checks. In New York, for example, employers may provide parties who share a common interest in the subject matter, such as prospective employers, with honest information about the character of a former employee, even though the information may ultimately prove to be inaccurate.[3] The protection is not absolute, however. To overcome this privilege, an employee can demonstrate: (i) that the information is false; and (ii) that the employer acted with actual malice (*i.e.*, "personal spite or ill will, or culpable recklessness or negligence").[4]

Other states provide employers with similar protections. Though the jurisdictions' standards vary, many states' qualified privilege are similar to New York's. Other states provide legal protection to employers unless they knew, or reasonably should have known, that the information that they communicated was false.[5] Yet in others, employers can only provide information with the consent of their former or current employees.[6]

Recent Developments

California recently passed AB 2770, a statute that became effective in January 2019, which explicitly exempts certain sexual harassment-related communications made by employers from defamation claims. The goal of the new law is to encourage employers in good-faith to provide information regarding their previous employees, particularly where they may have been disciplined for sexual harassment.

California's AB 2770 is not the state's first law regarding the qualified privilege. Even before the new statute, California employers possessed a qualified privilege to share information without malice and with an innocent motive to interested parties, such as prospective employers. *See* Cal. Civ. Code § 47(c). The qualified privilege covered communications to prospective employers concerning the job performance or qualifications of an applicant for employment, based upon credible evidence. California's new defamation law extended these protections to – or, at a minimum, stated explicitly that the state's existing law covered – three categories of communications that specifically relate to sexual harassment:

- Complaints of sexual harassment: "complaint[s] of sexual harassment by an employee, without malice, to an employer based upon credible evidence";
- Investigations regarding sexual harassment: "communications between the employer and interested persons [*e.g.*, witnesses], without malice, regarding a complaint of sexual harassment"; and
- Communications during reference checks regarding sexual harassment: the law authorizes current or former employers "to answer, without malice, whether or not the employer would rehire a current or former employee and whether the decision to not rehire is based upon the employer's determination that the former employee engaged in sexual harassment." *Id.*

The California legislature recognized that absent these explicit provisions extending the qualified privilege to communications regarding sexual harassment, employers were "deter[ed] . . . from telling others about a genuine harasser." CAL. S. FLOOR ANALYSIS, Bill No. AB 2770, at 4 (2018). California legislators believed that the new law "would protect employers and allow them to warn potential employers about an individual's harassing conduct during a reference check without the threat of a defamation lawsuit." *Id.*

"Compelled Self Publication"

California's new statute may affect other areas of California's body of defamation law. The law might impact, for example, California's recognition of the

doctrine of "compelled self-publication defamation."[7] As noted above, in traditional defamation cases, the employee typically claims that the former employer published the alleged defamatory statement to a third party. However, under the "compelled self-publication defamation" theory, some states may find defamation even where the former employer did not publish the alleged defamatory reason for the former employee's dismissal.[8] Rather, the discharged employee claims to have been "compelled" by the former employer to repeat the defamatory reason given by the employer for the termination of employment during the process of applying for a new job.

AB 2770 might abrogate California's "compelled self-publication defamation" doctrine, at least in the context of communications related to sexual harassment. Under the new law, if an employer articulates to an employee the company's reasons for its decision to terminate the employee, it is conceivable – though it has not yet been litigated – that those communications, too, could be immune from liability under AB 2770 for claims of "compelled self-publication defamation."

Practice Suggestions

Notwithstanding the new legal protections for employers afforded in California, employers should remain concerned that communications about a former employee's misconduct could form the basis of a defamation lawsuit. To take advantage of the qualified privilege, employers must have acted without malice, an inherently fact-based inquiry. In a defamation case, the question of whether the malice element has been met may or may not be resolved by the court at the pleading stage, thereby exposing the employer to litigation. Accordingly, to avoid the risk and cost of lawsuits arising from reference checks of employees discharged for misconduct, employers should proceed with caution, and consider the following measures to increase the likelihood that courts will condone their actions.

Implement Policies for Fielding Reference Checks Regarding Former Employees. As we previously noted, employers should continue to consider formulating an appropriately-tailored procedure for responding to inquiries from prospective employers as to the reasons for an employee's dismissal. Employers often institute procedures limiting the information that they will provide to prospective employers to the employee's dates of employment and final positions held. Alternatively, with respect to problematic dismissals, if the employer makes any statement whatsoever, the employer may wish first to obtain the employee's agreement to the exact wording to be used in such a statement. This is often accomplished by way of a separation agreement with the employee as part of the consideration for a general release of claims.

Direct Reference Checks to a Single Source. As part of a procedure for responding to reference checks, employers should consider directing all inquiries to a single source in the organization. That aspect of company policy would ensure that managers are not free to speak on behalf of the employer when they receive calls from prospective employers which could unwittingly form the basis of a defamation action.

Understand the Law in the Applicable Jurisdiction. As noted above, states differ with respect to their approach to reference checks, creating challenges for multi-state employers. To date, California appears to be one of the few states with a statute that explicitly addresses sexual harassment-related communications in response to reference checks.[9] Additionally, even though the California legislature appears to have intended to protect employers from the threat of defamation lawsuits in the context of sexual harassment-related communications, courts have not yet analyzed the law in any published case to date.

Other Laws. This article focuses primarily on state law with respect to reference checks, but employers should consider additional federal, state, and local employment laws that may be relevant to the hiring process. For example, federal and state laws provide employees with protections from discrimination. If employers request information from previous employers, prospective employers should adopt or maintain a policy with respect to reference checks and treat all candidates equally. Other laws regulate

additional aspects of the employment reference check process, including, for example, requests for genetic information and family medical history.

Whether to Conduct Reference Checks For New Hires. In New York, employers generally have no legal duty to perform reference checks.[10] Generally speaking, though, many employers decide to conduct reference checks in an effort to avoid hiring employees who may engage in résumé fraud, promote the hiring of qualified candidates, and, particularly in the #MeToo era, inquire about possible instances of misconduct. If employers do conduct reference checks, and they learn facts that would lead a "reasonably prudent person" to investigate, then they have a duty to conduct such an investigation. Employers who fail to conduct an investigation upon learning facts that would lead a "reasonably prudent person" to investigate may expose themselves to a future claim of negligent hiring.[11]

[1] *See, e.g.*, *Lavin v. Trezza*, No. 01 Civ. 135, 2002 WL 57247, at *5 (D. Me. Jan. 15, 2002) (denying an employer's motion to dismiss a defamation claim after the employer had disclosed to its former employee's prospective employer that the employee was terminated for sexual harassment); *Deutsch v. Chesapeake Ctr.*, 27 F. Supp. 2d 642, 644 (D. Md. 1998) (plaintiff brought a defamation action against his former employer because his employer disclosed to a prospective employer that the employee was fired for sexual harassment); *see also Harris v. Superior Court of Arizona in & for Cty. of Maricopa*, No. 02 Civ. 0494, 2009 WL 775462, at *12 (D. Ariz. Mar. 23, 2009), *vacated on other grounds sub nom. Harris v. Maricopa Cty. Superior Court*, 631 F.3d 963 (9th Cir. 2011) (denying the defendant's motion for the award of attorney's fees on plaintiff's defamation claim because the plaintiff's claim was not frivolous; the plaintiff alleged that the false and defamatory statement that he had been fired for sexual harassment was published to prospective employers).

[2] *See Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 (1st Dep't 1999) ("The elements [for a claim of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se."); *Makaeff v. Trump Univ.*, LLC, 715 F.3d 254, 264 (9th Cir. 2013) ("Under California law, defamation is the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injure or which causes special damage." (citation and internal quotation marks omitted)).

[3] *See De Sapio v. Kohlmeyer*, 52 A.D.2d 780, 781, 383 N.Y.S.2d 16 (1st Dep't 1976) ("A qualified privilege exists for the purpose of permitting a prior employer to give a prospective employer honest information as to the character of a former employee even though such information may prove ultimately to be inaccurate."); *see also Serratore*, 293 A.D.2d at 465–66 (affirming dismissal of the plaintiff's defamation claim against his former employer based on the former employer's response to an employment reference questionnaire from the plaintiff's prospective employer because the former employer's communications were protected by the qualified privilege).

[4] *Shapiro v. Health Ins. Plan of Greater New York*, 7 N.Y.2d 56, 61, 163 N.E.2d 333 (N.Y. 1959); *see also De Sapio*, 52 A.D.2d at 780–81 (affirming dismissal of plaintiff's defamation claim against his former employer because the plaintiff failed to demonstrate that the employer's "statements [to the plaintiff's prospective employer] were made with actual malice").

[5] *See, e.g.*, Ind. Code Ann. § 22-5-3-1(b)(3) ("An employer that discloses information about a current or former employee is immune from civil liability for the disclosure and the consequences proximately caused by the disclosure, unless it is proven by a preponderance of the evidence that the information disclosed was known to be false at the time the disclosure was made."); Colo. Rev. Stat. Ann. § 8-2-114 (providing qualified immunity unless "[t]he information disclosed by the current or former employer was false; and [t]he employer providing the information knew or reasonably should have known that the information was false").

[6] *See, e.g.*, Nev. Rev. Stat. Ann. § 41.755(1) (providing an employer with a qualified privilege to disclose information "at the request of an employee"); Conn. Gen. Stat. Ann. § 31-128f (absent an employee's consent, employers generally may only verify the employee's dates of employment, title or position, and wage or salary; though when an employee consents to the employer's disclosure of information, the employer has a qualified privilege to disclose information).

[7] *See* Jeffrey S. Klein and Nicholas J. Pappas, *Compelled Self-Publication Defamation*, N.Y.L.J., Aug. 2, 2004, at 18, available at https://www.weil.com/articles/compelled-self-publication-defamation, for an in-depth discussion of the "compelled self-publication defamation" doctrine.

[8] States differ with respect to their approach to the doctrine of "compelled self-publication defamation." New York courts, for example, have shied away from recognizing the doctrine. *See*

Wieder v. Chem. Bank, 202 A.D.2d 168, 169–70, 608 N.Y.S.2d 195 (1st Dep't 1994); *Caesars Entm't Operating Co. v. Appaloosa Inv. Ltd. P'ship I*, 48 Misc. 3d 1212(A), 18 N.Y.S.3d 577 (N.Y. Sup. Ct. 2015) ("[The] 'compelled self-publication' theory is unavailing because the First Department has rejected this theory." (citation omitted)). Other states that previously recognized the doctrine, such as Texas, have since rejected it altogether. *See Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 581 (Tex. 2017) ("We expressly decline to recognize a theory of compelled self-defamation in Texas."). Yet in other states, such as California, some courts have recognized the "compelled self-publication defamation" doctrine. *See Rangel v. Am. Med. Response W.*, No. 09 Civ. 01467 (AWI), 2013 WL 1785907, at *17 (E.D. Cal. Apr. 25, 2013) ("Under the compulsion doctrine, a defendant may be liable for the foreseeable republication of a defamatory statement by a plaintiff where 'the person defamed [is] operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.'" (quoting *McKinney v. County of Santa Clara*, 110 Cal.App.3d 787, 797, 168 Cal.Rptr. 89 (1980)).

[9] *Cf*. Minn. Stat. Ann. § 181.967, subdivs. 2, 3(a)(5) (extending the state's qualified privilege to employers that disclose "acts of . . . harassment documented in the personnel record that resulted in disciplinary action or resignation and the employee's written response, if any, contained in the employee's personnel record"); Neb. Rev. Stat. Ann. § 48-201(1)(a) (upon an employee's consent, providing employers with a qualified privilege to disclose "harassing acts . . . related to the workplace or directed at another employee").

[10] *See, e.g.*, *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 163, 654 N.Y.S.2d 791 (N.Y. 1997) ("There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee.").

[11] *See T.W. v. City of New York*, 286 A.D.2d 243, 245–46, 729 N.Y.S.2d 96 (1st Dep't 2001) (denying the employer's motion for summary judgment on a negligent hiring claim because a jury could have reasonably concluded that the employer had a duty to conduct an investigation regarding an employee's background).

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

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