Truth and Consequences: Navigating the Minefield of References for Dangerous Former Employees
By Matthew J. Maguire, Esq.

Employers who draft zero tolerance workplace violence policies are off to a good start. But it's only a start. When it comes to dealing with threats of physical violence and workplace safety, employers must be prepared to face the tough issues that will inevitably arise. Among these issues is what to say, if anything, when asked to provide an employment reference for a former employee who was terminated for violating the company's workplace violence policy.

When assessing what to say in response to an employment reference inquiry in these circumstances, an employer has several alternatives. An employer can tell the truth and risk potential legal claims from the former employee such as defamation or tortious interference with prospective business relations.

Employers may refrain from disclosing such information for fear of a violent response from the former employee. Alternatively, an employer can say nothing, or at least nothing that would indicate a problem to the prospective employer. This "no comment" approach to employment references has become prevalent over the years as the most cautious way to avoid potential claims from former employees. Unfortunately, some employers, whether consciously or not, provide references that fail to disclose relevant information about an employee's violent conduct and are misleading. In situations where an employer is burdened by the knowledge that its former employee presents a potential danger to others, however, the employer's misleading reference raises the potential for claims from a subsequent employer or another third-party who is harmed by the former employee.

In an effort to encourage employers to disclose relevant information about their former employees, states in recent years have enacted laws that hold employers immune from civil liability for providing good faith employment references. Over thirty states now maintain some form of "shield law statute" that affords protection for employment references. But because the vast majority of these shield laws have been around for fewer than four years, it's still too soon to determine whether they are achieving their desired effect: encouraging open communications among employers and making employment references meaningful by diminishing the threat of litigation.

In order to address the problems associated with remaining silent, providing no or minimal information, or disclosing the existence of a dangerous employee, employers need to understand the underlying legal principles that will implicate liability, the effect of an employment reference "shield law," and their role in preventing or perpetuating workplace violence.

An Employer's Liability Under Tort Law

Two generally recognized legal principles of tort law provide the background for an employer's dilemma in providing references. First, the common law requires every person to exercise ordinary care in their actions for the safety of others. Second, the law will not, without a special relationship or statutory duty, require a person to take some affirmative action to prevent criminal acts by a third party. Applying these principles to the context of an employer's duty to another employer or third party when providing an employment reference has produced mixed results among various courts. In some cases, for example, the courts have refused to impose liability on an employer for negligent or intentional misrepresentation where employers fail to disclose negative information, including violent behavior, about a former employee while simultaneously providing positive recommendations.

These decisions are guided by common law tort principles, which are reluctant to require persons to take affirmative action to warn or protect third parties from harm. Other court decisions, however, have held employers liable for negligent misrepresentations in employment references where the employers provided favorable references despite their knowledge of violent or criminal behavior by their former employees. Two compelling decisions provide insight into the parameters of the claim and the inescapable conclusion that the employers would have been better off if they had provided a simple "no comment" response.

In Randi W. v. Muroc Joint Unified School District, the Supreme Court of California recognized the existence of a claim for fraud or negligent misrepresentation where three different school districts provided letters of recommendation that contained only positive employment references despite their knowledge of complaints and charges of sexual misconduct against Robert Gadams, a former employee. According to the plaintiff 's allegations, each former employer had knowledge that Gadams had been accused of sexually touching female students and making sexual remarks to them. Nevertheless, each former employer made recommendations on forms submitted to the Fresno Pacific College placement office, which in turn assisted Gadams in finding work. The forms clearly advised those responding to employment history inquiries that the information provided would be sent to prospective employers. The employment references remarked, "I wouldn't hesitate to recommend Mr. Gadams for any position!"; "[I] would recommend him for almost any administrative position he wishes to pursue" and described Gadams as someone who was responsible for making his former school "a safe, orderly and clean environment for students and staff." Following these glowing recommendations, Gadams was hired as the vice principal of the Livingston Middle School where he subsequently sexually touched and molested a 13-year-old student.

The court concluded that a writer of a letter of recommendation owes legal duty to others not to misrepresent facts about the character or qualifications of a former employee. Given the affirmative misleading "half-truths" of the reference letters provided on behalf of Gadams, the court refused to dismiss the claims of fraud and negligent misrepresentation.

Similarly, the Court of Appeals of New Mexico in Davis v. The Board of County Commissioners of Dona Ana County recognized a claim for negligent misrepresentation in the employment reference context.
In that case, Joseph Herrera, while working as a detention officer at the Dona Ana County Detention Center, was accused of inappropriate sexual conduct with female prison inmates and of trading favors for sex. Herrera's supervisor, Frank Steele, investigated the charges and informed Herrera that he would be disciplined. Herrera resigned to avoid disciplinary action. Six days later, Steele wrote a recommendation letter on Herrera's behalf that characterized him as an "excellent employee" and told prospective employers: "I am confident that you would find [Herrera] to be an excellent employee." Similarly, positive verbal references were made by another Detention Center supervisor.

On the basis of these positive references, Herrera obtained a position as a mental health technician at Mesilla Valley Hospital, a psychiatric care hospital. Approximately six weeks later, Herrera sexually assaulted and physically abused a female patient.

Relying in large part on the reasoning of the Muroc court, the Davis court held that employers who choose to recommend individuals for employment owe a reasonable duty of care to prospective employers and other third parties. When they fail to exercise reasonable care in their employment references, employers are subject to liability for negligent misrepresentation.

What If They Said Nothing?

Both the Muroc and Davis decisions relied upon legal principles that impose liability on a person who either intentionally or negligently gives false information to another for the physical harm that results from an act done in reliance on the information. Thus, the necessary element is the existence of some false information. As demonstrated by the foregoing cases, the false information does not need to be an express denial of a particular fact. Rather, the failure to provide relevant negative information about an employee, coupled with the inclusion of positive information, is sufficient to support a claim of negligent or intentional misrepresentation.
Yet neither case would have reached this conclusion had the employers refused to provide an employment reference at all.
In fact, the court in Davis specifically acknowledged that the former employer could have avoided all liability by remaining silent. Because New Mexico's shield law was enacted after the conduct in Davis occurred, it was not at issue in the case. Nevertheless, the court's reasoning ran counter to the legislative intent to encourage employers to provide truthful references.

Reference Shield Laws

The majority of states now have laws on the books that are intended to encourage employers to give employment references. Although the particulars of the employment reference laws differ from state to state, they generally seek to

balance the interests of both employees and employers by providing employers with immunity from civil law suits when they provide truthful employment references in good faith to another prospective employer. One of the desired effects of these employment reference shield laws is to encourage informed hiring decisions, especially where an individual has exhibited violent or criminal behavior. For example, Delaware's employment reference law, the Quality in Hiring Act, covers the disclosure of information on employee job performance, work characteristics, as well as any act committed by the employee that would constitute a violation of federal, state or local law. As demonstrated in the Muroc and Davis cases, the employers' desire to avoid a conflict with their former employee caused them to participate in the proliferation of workplace violence.

Be Prepared To Respond

With the shield laws encouraging the disclosure of information about employee violence and court decisions condoning employer silence, what is the best business decision? Whether the ultimate decision is to reveal the existence of a workplace violence problem to a prospective employer or to remain silent on the issue, an employer's response should be made based upon the information available and under the relevant circumstances of each situation. The decision should be made consciously, carefully, and with a sensitivity that the public policy in protecting the safety of workers is one of the central purposes of the employment reference shield laws. In any event, employers must make sure that their references are truthful. Although it may appear to be a "no cost, no risk" decision to agree to provide a favorable employment recommendation for a former employee who has engaged in violent conduct, in fact it could be very expensive. It is the untruthful reference that creates the most significant legal exposure. And while silence remains a prudent strategy for reducing the risk of legal liability, employers know well, especially in a full-employment economy, that silence makes it increasingly difficult to get accurate information that could reduce workplace violence.

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