Have you been injured by an individual that you hired only to find out that same individual engaged in similar behavior for a prior employer? There are steps you can take to protect your firm from similar circumstances in the future.

ENABLE THE RIGHT TO NEGLIGENT REFERRAL

Employers have an obligation to provide truthful and factual information on past employees to prospective employers.

Let's talk about an example that probably happens often. You, as a prospective employer, are considering an applicant for a management position in your office. Assume that the applicant was "forced" to resign from a prior employer because the individual was using their position to steal money from customer accounts. Let's further assume that the individual was charged with criminal activity but agreed to make restitution as part of a plea agreement. The applicant might only indicate to you, the prospective employer, that they resigned. And, they will most likely fail to mention the circumstances under which they resigned

You, as the prospective employer, call the prior employer and tell the prior employer you are thinking of hiring the person for a position which would put that person in a similar position. The prior employer has an obligation to inform you of the truthful factual circumstances of that person's resignation. If the prior employer does not disclose the truthful, factual information surrounding that person's resignation, the prior employer could be held liable for the tort of negligent referral if that person likewise steals from you and causes injury.

You cannot enable negligent referral if you have not made the effort to call the prior employer and document the call.

Courts are increasingly intolerant of companies unwilling to communicate truthful, factual information about former employees. The courts are losing patience with employers concerned only with their own liability at the expense of society's need to have access to reasonable information which prospective employers need to conduct business. This is particularly true if the former employee exhibited dangerous and aggressive behavior.

EMPLOYERS HAVE A PROTECTED PRIVILEGE

No cause of action automatically arises by a former employee if the communication is truthful and factual and given without malice. This type of communication enjoys qualified privileges in general. The law is well established that an employer has a qualified privilege to provide information about a former employee.

Many states have enacted statutes to further protect this communication. These statutes are designed to benefit society by encouraging honest references.

There is for example another case in which an employee was asked to resign after bringing a gun to work. His prior employer had given a reference that said that he was let go in a corporate restructuring and did not mention the gun incident. The individual then shot and killed three supervisors at his new job. That case, Jerner v. Allstate Insurance Co., No. 93-09472 (Florida Circuit Court, Aug. 10, 1995), was settled for an undisclosed sum.

Stating a truthful and documented fact between employers is always a defense to a claim of defamation. Who is helped when you don't give a useful reference. When employers give only neutral references, the company risks potential liability for not warning other prospective employers that a bad actor is coming their way.

What can you say to prospective employers that inquire about former employees? The overwhelming advice is usually to say as little as possible.

That's almost all you need to know to deal with 99.5 percent of the situations you'll confront in responding to a reference check. Of course, you should at least acknowledge an employee's dates of employment, jobs held, and sometimes his pay rate. But what about the .5 percent of the cases in which more may be necessary?

TELLING IT LIKE IT IS

That was Howard Cosell's mantra. It's what many people who give employment references would really like to do. And you could get away with it most of the time because most employees are good and deserve favorable references.

But as one federal judge recently observed, in today's world, "It is not uncommon for a soured employer-and-employee relationship to lead to litigation -- whether meritorious or frivolous. Thus it should come as no surprise that statements [to prospective employers] have prompted litigation by former employees."

The fear of defamation claims has enabled more than one marginal or substandard worker to go from one employer to the next, leaving havoc in his wake.

An egregious example of that havoc, a case that should cause you to reexamine the "speak no evil" approach to references, was reported recently. In that case, a doctor left one hospital where his performance was substandard and took up his practice at a hospital on the West Coast.(***Kadlec Medical Center v. Lakeview Medical Center***, 5th Cir., No. 06-30745 (May 8, 2008).

The doctor's malpractice at the second hospital left a young mother in a permanently vegetative state.

After the young woman's husband recovered a verdict against the West Coast hospital, that hospital sued his previous employer for failing to warn it about the doctor's problems.

It was proven at trial that the first hospital knew that the doctor was a substance abuser whose professional competence was seriously compromised by his addiction, but it said nothing to the person doing the reference check.

The first hospital merely filled out a form confirming some basic facts of employment and declined to provide any more information, citing the volume of inquiries and the burden of responding more fully.

The employer learned the hard way that the law required more. Under the circumstances, it was obligated to disclose information about the former employee's performance problems so the prospective employer would be fully and accurately informed about him when making the hiring decision.

While the $4.1 million verdict against the hospital may be the largest of its kind, it isn't the first time an employer has been held liable for failing to disclose important information about a former employee.

Other cases have involved school employees whose patterns of sexually abusing students have been covered up so they can be quietly moved on to another unsuspecting employer. See *Randi W. v. Muroc Joint Unified School Dist.*, 929 P.2d 582 (Cal. 1997) (victim of sexual molestation by vice principal had claim against school districts that formerly employed him, because they had recommended him without disclosing disciplinary actions for inappropriate conduct)

Lessons for employers

Lesson one: Do your homework. When you're hiring someone, don't just do a cursory background check. Call the applicant's references, and get as much information as you can. If the job involves tasks like working with children, the elderly, or other vulnerable populations, be especially thorough.

Negligent hiring cases also can involve hotel night clerks, cable television linemen, and other jobs that might put the employee in a one-on-one situation with customers. Check for criminal records in addition to calling former employers and references.

If the West Coast hospital hadn't tried to do a thorough background check, it wouldn't have had a claim against the previous employer that concealed important information and would have been stuck with the verdict against it.

Lesson two: Think twice before you give the name, rank, and serial number response to an inquiry from a prospective employer. If the employee it's asking about has a violent streak or a substance abuse problem that could present a danger to coworkers or the public, you seriously should consider passing that information along if it is truthful and factual and documented.

Of course, before revealing anything negative, double-check your information to be as certain as you can that you're correct. Some defamation cases have merit because the employer was too quick to pass along false information.

EMPLOYER ARE LIABLE FOR FALSE AND MALICIOUS STATEMENTS

In almost every case in which an employer has been found liable for statements made during a reference check the statements were false, made with malice, or made by someone lacking sufficient knowledge of the plaintiff's employment.

Once you're satisfied that the negative information is both accurate and important for the prospective employer to know, choose a smart way to pass it along. That may be the hardest thing to do.

WHY EMPLOYEES SELDOM WIN

The reality of the threat of defamation from employer references is often well exaggerated. The reason employees seldom win these cases is because they must prove malice. In essence, they have to show not only that the statements made in the reference were defamatory and false, but also that they were unusually reckless and malicious and that the employer had no basis for making the statements at all.

HOW EMPLOYERS LOSE

Those employers that are found liable for defamation in the context of giving references have usually made statements that a reasonable person would not have made. e.g. Yeah Joe worked for me and I think he is a no good drunk. There are situations in which even a reasonable and careful employer can find themselves on the wrong end of a liability judgment. Reference checking is not one of these types of situations. An employer who sets up a proper system of guidelines, training and controls is generally protected from liability.

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