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Providing Employment Job References: Not as Risky as It Sounds

by Jennifer Brown Shaw

Many employers hesitate to provide job references because they fear liability. Of course, a negative employment reference could give rise to many different types of claims, including defamation, interference with prospective advantage, blacklisting under Labor Code section 1050, or even retaliation.

That said, employers are afforded protection with respect to providing references by the “common-interest privilege” contained in California Civil Code section 47(c). A recent decision by the Fourth District Court of Appeal, *Noel v. River Hills Wilsons, Inc.*, clarifies and reaffirms this protection.

The Facts

The plaintiff, Brandon Noel, is a former employee of River Hills Wilsons, Inc. (“Wilson’s”). GTE hired Noel contingent on a successful background check. The company GTE retained to perform the background check contacted Wilsons for a job reference and was told Noel left Wilsons because of loss prevention issues, and his rehire status was “unfavorable.” The information conveyed by Wilsons was incorrect.

GTE withdrew its offer to Noel after receiving the background report. Noel then sued Wilsons asserting various theories, including defamation. The trial court dismissed the case before it reached a jury, finding Wilsons’ statements, although false, were privileged communications. The Court of Appeal affirmed the ruling and clarified the requirements necessary to establish the common-interest privilege.

The Common-Interest Privilege

In affirming the lower court’s ruling, the Court of Appeal analyzed the history of the common-interest privilege set forth in Civil Code section 47(c). Under the law, “defamation” is a false and “unprivileged” communication that causes injury to a person. The common-interest privilege is one of several privileges that may be asserted to defeat a defamation claim. The common-interest privilege applies to communications “made without malice” and “between interested parties.”

The courts have applied the common-interest privilege in the job reference context for several years. In addition, in 1994, the Legislature amended Civil Code section 47, subdivision (c), to expressly apply the privilege to statements current or former employers make to prospective employers when the statements are “based on credible evidence” and made “without malice.” Importantly, the current or former employer also is explicitly authorized to answer whether the employer would rehire the employee.

What Is a Protected Communication?

In evaluating Noel’s arguments that the common-interest privilege should not apply, the Court of Appeal offered the first judicial guidance on the requirement the communication be based on “credible evidence” to be protected. Noel argued a former employer who provides a false negative job reference is liable for defamation if there is no credible evidence to support the communication.

Noel argued Wilsons should be liable for defamation under this standard because there was no evidence Noel had loss prevention issues. It was undisputed the Wilsons’ manager who made the communication to GTE simply confused Noel with another former employee who did have loss prevention issues.

The court rejected Noel’s arguments and emphasized the common-interest privilege was meant to protect employers and managers in such situations. In the court’s view, the central issue is the state of mind of the person providing the job reference. If that person makes the communication “with malice” then no protection exists. In other words, if an individual is merely negligent or makes an unintentional misstatement in giving a false job reference, there can be no defamation. In this regard, the court noted the Legislature’s desire to encourage employers to provide job references and reduce employers’ fears of defamation claims.

The court noted the “based on credible evidence” language was included in the statute simply to emphasize it is not reasonable for employers to report mere rumors or unfounded gossip. If a communication was based on mere rumor, for instance, the privilege may be lost because there would be no reasonable grounds for believing the truth of the publication. This prong of the analysis is related to the malice standard referenced above.

Communications Must Be Made Without Malice

Noel claimed Wilsons' false communication should not be privileged because there was sufficient evidence the manager made the statements with malice. The court rejected the argument, and clarified the malice standard in this context.

The court ruled that a communication between interested parties, such as a job reference from a former employer to a prospective employer, loses its protection from a defamation claim if the communication was made with malice. A communication is made with malice if the communication was motivated by hatred or ill will. A communication also is deemed made with malice if the person making the communication lacked reasonable grounds for believing the information conveyed is true.

The court emphasized that providing a false job reference due to an oversight or unintentional error is not sufficient to constitute malice and therefore eviscerate the privilege. An employer can be liable for a false job reference only if it acts in "reckless disregard of the truth."

Considering the nature of the manager's mistake in Noel's case, the court concluded there was insufficient evidence to show the manager acted with malice or in reckless disregard for the truth. The court noted the manager apologized for the mistake as soon as he learned of it, and Wilsons offered to rehire Noel in an attempt to remedy the situation.

Policy Considerations

Even in light of the protection to employers confirmed in the *Noel* decision, the central question is whether providing a substantive job references (more than dates of employment, for instance) is a good practice for employers.

If the employer will be providing a negative reference with respect to a former employee, the employer will face the possibility of a

legal claim by the employee. As explained above, the protection from defamation claims is not absolute. Likewise, employers can incur significant legal defense costs in defeating even frivolous claims.

Moreover, employers who provide job references also face liability for claims other than defamation. For example, the California Labor Code prohibits employers from making a misrepresentation that prevents a former employee from obtaining employment. Under such circumstances, the former employee also can sue the employer and recover three times the amount of any actual damages.

If a job reference is misleading, the former employer could even face claims from the subsequent employer or third-parties. In one case, the California Supreme Court held an employer could be liable for recommending a former employee without limitation where there was a "foreseeable risk of harm to third persons." The court found that a student sexually molested by a teacher could maintain a fraud claim against a school district that previously employed the teacher. The former district gave the teacher a positive job reference without disclosing several prior sexual acts of misconduct by him.

Despite the potential liability associated with providing job references, employers should consider the significant benefits of offering feedback regarding former employees. Without job references, prospective employers are denied the opportunity to fully evaluate applicants. The Legislature and the judiciary have recognized the benefits to society when employers share job references, and they have attempted to strengthen the protections for employers to address the understandable reluctance to provide job references. Also, a neutral reference policy may prevent claims for defamation by self-compelled publication (i. e., a former employee claiming she was compelled to discuss her negative employment history with a prospective employer). Of course, no-reference policies also deny

good employees valuable assistance in obtaining employment.

Practical Tips for Employers

Most employers provide at least some information in response to reference requests. For example, it is not uncommon for employers to verify dates of employment, positions held and rates of pay. Some employers choose to go further and provide letters of recommendation or answer more substantive questions, such as whether the applicant is subject to rehire. Regardless of the specific practice chosen by employers, the following tips may help avoid many legal and practical problems:

1. Establish a reference policy and follow it consistently. Whatever reference practice an employer adopts, it should be memorialized in a formal policy. If the policy is well communicated, no one should have false expectations, and managers and supervisors are less likely to deviate from the employer's practices. Management employees should be instructed that "off-the-record" comments are strictly prohibited. In addition, the policy must be consistently enforced to avoid claims of discriminatory treatment.
2. Only certain individuals should be designated to respond to reference requests. Adopting this practice will help to ensure the employer's policy is being applied consistently. It also helps avoid contradicting references, as it is not unusual for management employees to have different opinions regarding what information should be communicated about a former employee.
3. Require written reference requests. This provides valuable documentation and strengthens any common-interest privilege claim; the common-interest privilege only applies if there is a request from one whom the employer reasonably believes is a prospective employer. Employers also should document all the communications and only provide the reference or verification in writing.

4. Obtain written authorizations and releases from employees. Written authorization and releases give the employer express permission to provide the reference, and prevent employees from suing for any information released. Some employers obtain a standard release from all departing employees, regardless of whether there is a pending reference request. The individual may even be made aware in advance of what information the employer intends to convey. This strengthens any authorization, and avoids the bad feelings that often arise with negative references.

5. Be honest. This is the most important tip, and often the most difficult for employers to follow. Truth is a defense to almost any claim. Employers sometimes provide false glowing references, and then are placed in the unenviable position of trying to defend their own adverse action against the employee. References also should be factual, rather than conclusory. For example, it is better to state a person failed to follow specific directives, as opposed describing the person as “insubordinate” or “incompetent.”

Although there is no perfect or “fool proof” method for dealing with job reference requests, following some of the foregoing tips will diminish the risks associated with such requests. The decision of how much, if any, information to provide, involves a careful risk assessment by employers. Employers are encouraged to speak with an employment expert in developing the appropriate policy language.

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