

When Employers Get “Something for Nothing”: The Need to Impose a Limited Obligation to Disclose in Employment Reference Situations

One day at ABC Elementary School, Jim, the school’s principal, received a call requesting information on Bob, a former guidance counselor at ABC who had received five disciplinary warnings for inappropriate contact with students. Bob had applied for a new job at Private Elementary and Private was calling for a reference check. Despite the fact that Jim was protected against most lawsuits by a legal privilege that would allow him to divulge certain truthful information to an inquiring employer, Jim followed ABC’s reference policy and provided only Bob’s “name, rank, and serial number.” Bob was hired by Private, and within four months was arrested for the sexual abuse of a student. When the student’s family brought suit, ABC defended on the ground that, despite the protection of its legal privilege, it was under no obligation to warn an unknown third party of its former employee’s prior dangerous behavior.¹ ABC felt it was entitled to something for nothing.²

I. INTRODUCTION

The above fictional illustration, based loosely on the 1990 Michigan case *Moore v. St. Joseph Nursing Home, Inc.*,³ shows how an employer’s limited response to a reference check request can put unsuspecting third parties in harm’s way.⁴ This choice to refuse to give information that might protect innocent parties from harm derives from employers’ fear of lawsuits and is accomplished through their adoption of either “no comment” or “neutral” job

1. See *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990) (providing basis for fictional account of employer wanting “something for nothing”); see also *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997) (containing facts similar to fictional account). The court in *Moore* rejected the plaintiffs’ argument that allowing an employer protection under a qualified privilege without imposing a corresponding legal obligation to divulge deleterious information was giving the employer something for nothing. *Moore*, 459 N.W.2d at 102.

2. *Moore*, 459 N.W.2d at 102 (describing situation of employer receiving legal benefit without any corresponding obligation to prevent harm). While the court did not specifically reference the practice as wanting “something for nothing,” the court explained that “[t]here is . . . nothing about the conditional privilege which magically transposes it into a legal obligation.” *Id.*

3. 459 N.W.2d 100 (Mich. Ct. App. 1990).

4. See *supra* notes 1-2 and accompanying text (providing fictional account of potential for harm inherent in current reference system). While in the actual *Moore* case the new employer never contacted the former employer, the former employer admitted that if it had been contacted, it would have provided only the employee’s name, dates of employment, and position. *Moore*, 459 N.W.2d at 101.

reference policies.⁵ “No comment” or “non-disclosure” reference policies provide no information to an inquiring prospective employer regarding a former employee.⁶ Under so-called “neutral” reference policies, employers usually only provide information such as the employee’s name, title, and dates of employment.⁷ For this reason, these policies are often referred to as “name, rank, and serial number” reference policies.⁸

Fear of litigation is the primary reason why employers adopt “no comment” or “name, rank, and serial number” reference policies.⁹ Employers who provide references containing potentially negative information risk suit for defamation.¹⁰ Further, providing one-sided references that offer only positive information, despite the employer’s awareness of negative facts, could subject the employer to suit for negligent misrepresentation.¹¹ The corresponding fear of giving either positive or negative references has led employers to protect themselves against liability by crafting reference policies that offer little or no substantive information.¹²

5. Cf. Marci Alboher Nusbaum, *Executive Life: When a Reference is a Tool for Snooping*, N.Y. TIMES, Oct. 19, 2003, at 12 (describing fear of lawsuits based on negative references); Gregory Weaver, *Reference Checks Can Yield Little Data: Even with New Laws, Attorneys Often Advise Employers to Give as Little Info as Possible*, INDIANAPOLIS STAR, Aug. 16, 2002, at 1C (noting difficulty encountered by employers attempting to acquire substantive information on applicants). See generally David Bradley, *No Comment, No Legal Action*, FINANCIAL TIMES (LONDON), Mar. 11, 2002, sec. 3, at 18 (encouraging employers to avoid litigation by not responding to reference requests).

6. See Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their “No Comment” Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1468 (1996) (advocating need for employers to abandon “no comment” reference policies).

7. See Markita D. Cooper, *Beyond Name, Rank, and Serial Number: “No Comment” Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL’Y & L. 287, 294 (1998) [hereinafter Cooper, *Beyond*] (explaining reference policies that simply confirm dates, duties, and positions held).

8. *Id.* at 288-89 (noting employers use neutral policies to limit liability). These policies warn against providing any information that could be construed as derogatory, such as the employee not being eligible for rehire. *Id.* at 294.

9. See *infra* Part III (addressing various causes of action used by employees to sue former employers for giving references).

10. See *infra* Part III (describing tort of defamation and its application in employment context). Another potential cause of action exists under Title VII of the Civil Rights Act of 1964, which allows a former employee to sue an employer for retaliation, even if the retaliation occurred after the employee was terminated. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (ruling that word “employee” under Section 704(a) of Title VII includes former employees). The court’s holding in *Robinson* arguably offers employers another reason to refuse to provide references. See Susan Oliver, *Opening Channels of Communication Among Employers: Can Employers Discard Their “No Comment” and Neutral Job Reference Policies?*, 33 VAL. U. L. REV. 687, 724-27 (1999) (arguing *Robinson* will make former employers even more reluctant to warn prospective employers).

11. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997) (holding employer liable for unreservedly recommending employee with known history of sexual assault).

12. Oliver, *supra* note 10, at 688-90 (noting employer tendency to remain silent when posed with “dichotomy of conflicting tort doctrines”). This fear is far from irrational, because it is based on advice from employment lawyers as well as case law. See Bradley, *supra* note 5 (advocating reference policy of silence); see also *Randi M.*, 929 P.2d at 584 (ruling once employer offered positive information it could not withhold negative information); *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 103 (Mich. Ct. App. 1990)

When employers refuse to provide a substantive reference on a former employee, the entire employment system suffers because the free flow of information between employers is restricted.¹³ The current system often forces employers to refuse inquiries from other companies at the same time they attempt to pry for information themselves.¹⁴ What results is a variation of the prisoner's dilemma, in which the only truly safe route is silence.¹⁵ When most employers seek yet refuse to provide reference information, they are at a greater risk of hiring dangerous employees but have minimized their risk of liability for defamation.¹⁶

Even with its minimized risk of liability for defamation, the current reference system does not allow for the investigation of an employee's background, thus permitting the exact type of tragedy described in the earlier illustration.¹⁷ While employers who offer references are protected by a legal privilege, most nevertheless choose to maintain their "no comment" or "name, rank, and serial number" reference policies.¹⁸ These employers enjoy the benefit of a privilege that protects them from liability, yet are under no obligation to disclose information.¹⁹

(refusing to find employer liable for harm caused by refusal to provide reference); *Davis v. Bd. of County Comm'rs*, 987 P.2d 1172, 1178 (N.M. Ct. App. 1999) (holding employer who offers reference under duty to ensure reference information not misleading).

13. See Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 49 (1995) (calling free flow of information critical to employer's ability to make responsible hiring decisions). Saxton also notes that the present system might hurt employees by impeding their efforts to obtain new employment, if employers interpret a refusal to provide a reference as an implicit negative comment. *Id.* at 50.

14. Adler & Peirce, *supra* note 6, at 1425 (calling situation "Catch-22" for employers). Adler and Peirce note that those most threatened by the current situation are the "beneficent employers" that feel a moral commitment to warn others away from hiring dangerous employees. *Id.* at 1426; see also Terry Ann Halbert & Lewis Maltby, *Reference Check Gridlock: A Proposal for Escape*, 2 EMPL. RTS. & EMPLOY. POL'Y J. 395, 395 (1998) (describing difficult situation employers face when seeking, but refusing to provide, references).

15. Halbert & Maltby, *supra* note 14, at 395 (describing classic "prisoner's dilemma" situation). In the classic "prisoner's dilemma," two prisoners in separate rooms are made the same offer: "If you confess and implicate your friend, you will go free, but your friend will be convicted. If he confesses first, he will go unpunished and you will be convicted." *Id.* While prisoners realize that it would be best if they both said nothing, the pressure is on for each to confess. *Id.* The parties in the employment reference context benefit the most when they all trust and cooperate with each other by sharing reference information. *Id.* Given the great number of parties in the employment system, however, it is easier for employers to "free ride" by receiving the benefits of references while sharing none of the risks of offering them. *Id.*

16. Adler & Peirce, *supra* note 6, at 1427 (claiming current reference system encourages lack of cooperation between employers).

17. See *supra* notes 1-4 and accompanying text (providing fictional account of possible dangers inherent in current reference system).

18. See Halbert & Maltby, *supra* note 14, at 415 (urging employers to abandon current reference policies in favor of disclosure). The Restatement (Second) of Torts defines the "common interest" privilege as arising any time "any one of several persons having a common interest in a particular subject matter . . . or reason[] to believe that there is information that another sharing the common interest is entitled to know." RESTATEMENT (SECOND) OF TORTS § 596 (1977). This conditional privilege applies unless it is abused. See *id.* §§ 599-605A.

19. See *supra* notes 1-2 and accompanying text (arguing employers get "something for nothing" if no duty attached to their qualified privilege).

This Note proposes that courts impose a limited legal obligation on employers to respond to reference inquiries when the employer is protected by a legal privilege.²⁰ Part II explains the lack of a common-law duty to warn or protect third parties, and its relevance to the employment reference situations.²¹ In Parts III and IV, this Note explains the tort of defamation and its many defenses, including the qualified or conditional privilege available to employers in the employment reference setting.²² This Note contends that employers who refuse to provide references, despite the protection of their qualified immunity, essentially receive something for nothing.²³ Part V explains the tort of negligent misrepresentation, and Part VI surveys case law on how negligent misrepresentation applies when employers selectively omit negative information from employment references.²⁴ Part VII surveys some solutions to the reference dilemma posed by legal commentators.²⁵

The Note concludes that, while well intentioned, the proposals made by these commentators are insufficient.²⁶ Part VIII argues that courts should impose an affirmative duty upon employers, based on a combination of the foreseeability of the harm to third parties and the existence of a qualified privilege.²⁷ In applying the duty, courts should distinguish between physical (personal) harm and financial harm, with the duty being imposed to prevent only the former.²⁸

II. THE DUTY TO WARN (OR LACK THEREOF)

The common law imposes neither a duty to act for another's benefit nor liability for failing to act.²⁹ This general rule applies unless there is some special relationship between the actor and the person in danger.³⁰ Employment lawyers operate under the presumption that the law requires no duty to act and

20. See *infra* Parts VII, VIII (outlining argument for duty to disclose based on existence of qualified privilege).

21. See *infra* Part II (describing law's reluctance to impose affirmative duties).

22. See *infra* Parts III, IV (noting numerous defenses available to employers that minimize liability).

23. See *supra* note 2 and accompanying text (explaining "something for nothing" concept as applied to employer reference liability).

24. See *infra* Parts V, VI (analyzing liability for false or incomplete job references).

25. See *infra* Part VII (noting most proposals involve imposition of duty based on "special relationship" between employer and employee).

26. See *infra* Parts VIII, IX (rejecting other proposals).

27. See *infra* Part VIII (proposing limited affirmative duty tied to qualified privilege).

28. See *infra* Parts VIII, IX (describing limitations on proposed affirmative duty).

29. See RESTATEMENT (SECOND) OF TORTS § 314 (1965) (stating, absent special relationship, actor under no duty to aid or protect third party). This rule applies only where the actor did not cause the third party's peril. *Id.* § illus. d; see also *id.* § 302 cmts. a and c.

30. *Id.* § 314 (describing limited nature of duty). A special relationship, and thus a duty, is inferred when: the third party is under the control of the actor; the actor's own conduct caused the danger; the actor's own conduct caused injury creating danger of further harm; or, the actor begins then discontinues aid, leaving the third party in a worse position. *Id.* §§ 320-23, 324(b).

advise their clients accordingly.³¹ The law, they counsel, requires only that their clients do not harm others, not that their clients assist others to prevent harm by third parties.³² Employers' lack of duty has led to the imposition of "no comment" and "name, rank, and serial number" reference policies.³³ The fact that many employers have adopted "no comment" or "name, rank, and serial number" reference policies, however, is not a problem unto itself, unless the policies lead to other undesirable consequences.³⁴ According to law professor Bradley Saxton, limited reference policies hurt employers by restricting the free flow of information; employees, by impeding their efforts to obtain new employment; and society, by frustrating the social goal of protecting innocent third parties.³⁵

The two most common theories of employer liability arising in the employee references context are negligent hiring and defamation.³⁶ Ironically, employers who attempt to insulate themselves from defamation claims often increase the potential for negligent hiring claims brought by other employers.³⁷ While employers would be better served on both fronts if they cooperated with each other by both asking for and providing references, employers find themselves in a "prisoner's dilemma" in which they are rewarded for uncooperativeness.³⁸ It is unlikely that employers will provide substantive references without a legal obligation to do so, because silence is generally safer from a potential liability standpoint.³⁹

Under the tort of negligent hiring, companies are sued for breaching their common-law duty to exercise reasonable care under the circumstances in hiring.⁴⁰ In the past, employer liability for negligent hiring had applied only to the protection of fellow employees, but courts have since expanded it to include

31. See Saxton, *supra* note 13, at 48-49 (explaining employment attorney practice of advocating "no comment" reference policies for clients).

32. See J. Bradley Buckhalter, Note, *Speak No Evil: Negligent Employment Referral and the Employer's Duty to Warn (Or, How Employers Can Have Their Cake and Eat It Too)*, 22 SEATTLE U. L. REV. 265, 266 (1998) (noting employment lawyers' tendency to advise silence over affirmative action).

33. See Saxton, *supra* note 13, at 48 (explaining how attorneys claim limited reference policies reduce employers' potential exposure to liability).

34. See Saxton, *supra* note 13, at 49 (arguing limited reference policies have undesirable consequences).

35. See Saxton, *supra* note 13, at 49-51 (describing protection of third parties as most important goal of reference policies).

36. See Deborah A. Ballam, *Employment References—Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L.J. 445, 450 (2002) (noting prevalence of negligent hiring suits against companies failing to investigate applicants); Buckhalter, *supra* note 32, at 272 (explaining potential defamation liability employers face for providing references).

37. Ballam, *supra* note 36, at 450 (noting fear of defamation suits limits information shared between employers, thereby increasing negligent hiring claims).

38. Adler & Peirce, *supra* note 6, at 1425-26 (describing situation in which employers resist inquiries from other employers while prying for information themselves).

39. See *supra* notes 31-33 and accompanying text (explaining employment lawyers' advise their clients to give limited references to avoid liability).

40. Ballam, *supra* note 36, at 450 (arguing references most effective way of receiving information to prevent negligent hiring).

a duty to “exercise reasonable care for the safety of members of the general public.”⁴¹ The key issue in negligent hiring claims involves the employer’s investigation into the applicant’s background, and therefore employers can satisfy the “reasonable care” standard by making reasonable efforts to inquire into the background of applicants.⁴² This increases the importance of obtaining substantive references and highlights the predicament that is raised when former employers, for the various reasons discussed below, refuse to give them.⁴³

III. EMPLOYERS’ NUMBER ONE FEAR: DEFAMATION

In response to concerns over defamation claims, employers have crafted “no comment” and “name, rank, and serial number” reference policies.⁴⁴ Defamation occurs when a statement harms the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.⁴⁵ Defamation was originally a strict liability offense, with liability arising merely upon proof of the statement’s falsity, irrespective of the speaker’s degree of care in uttering it.⁴⁶

In the 1960s, however, in an effort to protect the free flow of ideas, the Supreme Court began applying First Amendment scrutiny to defamation claims.⁴⁷ The Court’s decision *New York Times Co. v. Sullivan*⁴⁸ provided that

41. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 910-11 (Minn. 1983) (citing majority rule of negligent hiring); see also RESTATEMENT (SECOND) OF AGENCY § 213(b) (1959) (declaring employer liable for negligent hiring of improper person involving risk of harm to others). In comparison, the doctrine of respondeat superior only subjects employers to liability for the acts of employees acting within the scope of employment. Buckhalter, *supra* note 32, at 273. Negligent hiring, conversely, imposes liability for all acts of employees, including those beyond the scope of their employment, if the plaintiff proves that the employer was negligent in choosing to hire the employee. *Id.*

42. Buckhalter, *supra* note 32, at 273 (noting employers effectively reduce negligent hiring liability by questioning applicant’s present or former employer); see also Ballam, *supra* note 36, at 450-51 (describing mere attempt to obtain references as insufficient). Professor Ballam also contends that outsourced background and criminal record checks are not as reliable as reference checks. Ballam, *supra* note 36, at 450-51.

43. See Oliver, *supra* note 10, at 691 (arguing employers unable to obtain substantive references put themselves at risk of hiring dangerous applicants).

44. See Part III (discussing tort of defamation). Interference with economic advantage is a tort related to defamation in which an employee may recover damages against an employer for giving “injurious falsehoods” to prospective employers of the plaintiff. See RESTATEMENT (SECOND) OF TORTS § 766 (1979). Employees typically use a claim for interference with economic advantage to buttress a defamation claim, thus it rarely serves as an independent cause of action. Adler & Peirce, *supra* note 6, at 1412-13; see also Scholtes v. Signal Delivery Serv., 548 F. Supp. 487, 496 (W.D. Ark. 1982) (considering case in which terminated employee brought claims for defamation and interference with economic advantage). But see Delloma v. Consol. Coal Co., 996 F.2d 168, 170 (7th Cir. 1993) (indicating example of interference suit brought independent of defamation claim).

45. RESTATEMENT (SECOND) OF TORTS § 559 (1977) (noting communication defamatory although it has no tendency to adversely affect personal or financial reputation).

46. Adler & Peirce, *supra* note 6, at 1395 (underscoring connection between strict liability and importance placed on protecting person’s reputation).

47. Adler & Peirce, *supra* note 6, at 1396 (pointing out Court reviewed state libel action for first time in

the Constitution prohibited a public official from recovering damages for a defamatory statement made regarding his official conduct unless the official proved the statement was made with "actual malice."⁴⁹ Under the "actual malice" standard, a public official cannot recover for defamation unless he proves that the speaker made the statement with knowledge that it was false or with reckless disregard of whether it was false or not.⁵⁰ While the standard in *New York Times* applied only to public officials, it signaled the beginning of a shift away from strict liability in defamation claims, toward an inquiry into the speaker's motives and degree of care in investigating the truth or falsity of the statement.⁵¹

While the shifting nature of defamation law away from a per se rule may have strengthened the free flow of ideas, it also heightened the confusion surrounding employee references.⁵² Today, defamation law provides liability for injurious falsehoods about individuals based on negligence or some greater degree of fault.⁵³ The Restatement (Second) of Torts sets forth the elements for a defamation cause of action as follows: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."⁵⁴

An employer would be liable for defamation if the employer makes an unprivileged false statement concerning an employee that injures the employee's reputation.⁵⁵ An allegedly false accusation, including a statement that the employee was fired for cause, will satisfy the first element.⁵⁶ The second element requires publication of the statement to an unprivileged third

its history).

48. 376 U.S. 254 (1964). *New York Times* involved a police commissioner who won a large libel suit by claiming a civil rights group had been libelous in alleging police misconduct in a Times advertisement. *Id.* at 256-58.

49. *Id.* at 279-80 (holding "actual malice" standard applies despite inaccuracy of advertisement's allegations).

50. *Id.* (announcing new federal rule for defamation claims).

51. *Id.* at 263 (rejecting Alabama's "libelous per se" standard). In the case of *Gertz v. Robert Welch, Inc.*, however, the Court held that, in order to recover actual damages, a plaintiff who is a private figure does not need to prove actual malice, but only that the defendant was negligent in publishing the defamatory statement. 418 U.S. 323, 346-47 (1974). While the *Gertz* standard is less demanding than the "actual malice" requirement of *New York Times*, the negligence standard in *Gertz* still allows for an inquiry into the speaker's motives and degree of care in uttering the statement. *Id.* at 347.

52. See Adler & Peirce, *supra* note 6, at 1396 (noting confusion despite fact constitutional privileges usually not applicable to reference cases involving private parties).

53. See Adler & Peirce, *supra* note 6, at 1396-97 (citing *New York Times*, Court overruled application of strict liability to defamation claims in mid-1960s).

54. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

55. See Adler & Peirce, *supra* note 6, at 1397-98 (describing false statements adversely reflecting on employee's abilities as defamatory).

56. Saxton, *supra* note 13, at 69-70 (explaining requirement of false and defamatory statement not difficult in employment reference cases).

party, which is usually undisputed in the employment reference context.⁵⁷ The third element requires some degree of fault, rather than strict liability, on the part of the former employer.⁵⁸ The final element of a defamation claim requires only that the statement have a general tendency to harm, not that the statement actually harmed the employee's reputation.⁵⁹

IV. EMPLOYER DEFENSES TO DEFAMATION: TRUTH, OPINION, CONSENT, AND QUALIFIED PRIVILEGE

Despite the possibility of defamation suits brought by former employees, employers have a substantial number of defenses to challenge them.⁶⁰ The first defense is truth, which is an absolute defense to a defamation claim.⁶¹ Truth, however, is difficult to establish when the facts surrounding the basis of the statement are in dispute, which is often the case in suits based on employee terminations.⁶² Opinion is another defense, because a statement based on pure opinion does not give rise to defamation liability.⁶³ Opinions based on a

57. Saxton, *supra* note 13, at 70 (defining inquiring prospective employer as "third party"). The publication element may be met under the "doctrine of self-publication" even if the statement is never communicated to a third party. Oliver, *supra* note 10, at 699. This exception applies when an employee feels compelled to reiterate defamatory remarks to prospective employers, usually in a subsequent job interview. *Id.* Almost all employment references are initially privileged, with publisher liability depending on whether they abuse the privilege. *Id.*; see also *infra* Part IV (detailing employers' qualified privilege in context of employee references).

58. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (prohibiting defamation liability without fault, but leaving states to determine specific standard). Despite the heightened liability requirement, a private plaintiff does not have to meet the rigorous *New York Times* "actual malice" standard. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

59. RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977) (noting defamation plaintiff not required to prove statement deterred third parties from associating with plaintiff). There is some difference, however, as to whether a communication is defamatory and whether damages can be recovered. *Id.* The common law rule is that a person who is actionable per se for defamation is liable for at least nominal damages. *Id.* §§ 620-21. Following *Gertz*, however, the constitutionality of the common law rule that plaintiffs may recover nominal damages absent proof of harm to their reputation is somewhat uncertain. *Id.* § 620 cmt. c. Nevertheless, it appears certain that courts will require actual harm to establish damages for defamation, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* (citing *Gertz*, 418 U.S. at 349).

60. See Part IV (outlining employer defenses to defamation).

61. See RESTATEMENT (SECOND) OF TORTS § 581 (1977) (stating one who publishes defamatory statement not subject to liability for truthful statement); *id.* § 581 cmt. d (declaring truth of defamatory statement of fact as complete bar to recovery); see also Oliver, *supra* note 10, at 705 (noting employers may defeat defamation claim by proving statement substantially true). *But cf.* *O'Brien v. Papa Gino's of Am., Inc.*, 780 F.2d. 1067, 1073 (1st Cir. 1986) (reasoning failure to tell whole truth tantamount to lie).

62. Adler & Peirce, *supra* note 6, at 1403 (noting disputable facts enable employees to allege defamation). In the reference context, where judgments about an employee's attitude and competence are subjective, the truth can be difficult to define. *Id.* at 1433. Thus, the critical question in most defamation lawsuits is not whether the statements were true, but rather the defendant's state of mind. *Id.* at 1449; see also David A. Barrett, *New Perspectives in the Law of Defamation*, 74 CAL. L. REV. 847, 855 (1986) (arguing fault-based rule of *New York Times* and *Gertz* transformed defamation liability).

63. See John W. Belknap, *Defamation, Negligent Referral, and the World of Employment References*, 5 J. SMALL & EMERGING BUS. L. 113, 118 (2001) (noting constitutional protection of opinions absolute unless

combination of false facts and opinion, however, are not protected.⁶⁴ Consent by the employee is also a defense to defamation, and applies if the employer obtains a written release by the employee before issuing a reference requested by a prospective employer.⁶⁵ Some courts have undermined this defense, however, under the theory that a party may not absolve itself from intentional tort liability.⁶⁶

In addition to the defenses of truth, opinion, and consent, a qualified privilege also protects employers.⁶⁷ Common-law qualified privilege, also known as conditional privilege, protects an employer by offering civil immunity from defamation liability.⁶⁸ In the employment reference context, the qualified privilege applies when: the statement is in the interest of the former employer to protect its own reputation; the statement is necessary to protect an important interest of a subsequent employer; and there is a common interest shared by the former and subsequent employers.⁶⁹ The common-interest privilege generally applies in employment reference situations based on the common interest between former and prospective employers in providing and obtaining detailed information on the employee/applicant.⁷⁰ The

based on false statement of fact).

64. *Id.* (defending opinion requires inquiry into whether opinion based on true background facts).

65. Oliver, *supra* note 10, at 708 (indicating consent defense seldom used).

66. See McQuirk v. Donnelley, 189 F.3d 793, 796 (9th Cir. 1999) (declaring signed employee release unenforceable as applied to intentional torts); Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816, 817 (Fla. Dist. Ct. App. 1985) (holding contractual clause absolving against intentional tort liability against public policy and thus unenforceable). *But see* Cox v. Nasche, 70 F.3d 1030, 1032 (9th Cir. 1995) (ruling under Alaska law signed release provides immunity for even malicious statements); Smith v. Holley, 827 S.W.2d 433, 436 (Tex. Ct. App. 1992) (holding executed authorization by employee serves as absolute defense for employer).

67. See *infra* notes 68-74 and accompanying text (explaining qualified privilege defense to defamation). In addition to the qualified privilege, "absolute privilege" and a "constitutional privilege" also protect employers in defamation cases. See Adler & Peirce, *supra* note 6, at 1404-07. Absolute privilege applies to all statements made before quasi-judicial boards, even those statements that are false or uttered with malice. *Id.* at 1404-05. Constitutional privilege to defamation—derived from *New York Times*, *Gertz*, and their progeny—is applicable for defamation's fault requirement, but is unlikely to apply in private employment reference cases. *Id.* at 1405-07.

68. See RESTATEMENT (SECOND) OF TORTS § 595 (1977) (setting forth elements required for protection of recipient of information). Section 595 provides that statements are conditionally privileged when:

- (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the recipient or a third person, and (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
- (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that (a) the publication is made in response to a request rather than volunteered by the publisher or (b) a family or other relationship exists between the parties.

Id.

69. Belknap, *supra* note 63, at 118-19 (noting common-interest exception usually applies in employment reference situations).

70. See RESTATEMENT (SECOND) OF TORTS § 596 (1977). Under section 596, a publication is conditionally privileged "if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the

defamatory statements are privileged if they are made for the purpose of enabling the prospective employer to protect its interests and connected to the work the person performed or will perform for the new employer.⁷¹

If an employer can demonstrate that the defamatory statement is eligible for a qualified privilege, the employer has an affirmative defense unless the plaintiff can show the employer abused the privilege.⁷² The protection provided by a qualified privilege is conditioned upon the manner in which the privilege is exercised, and therefore its protection is defeated by its abuse.⁷³ Employers abuse their qualified privilege when they knowingly or recklessly defame a former employee by disseminating false information or using the privilege for some purpose other than that which is intended.⁷⁴

V. NEGLIGENT MISREPRESENTATION LIABILITY FOR FALSE OR INCOMPLETE JOB REFERENCES

While most reference-based suits filed against employers are defamation claims, plaintiffs may use other causes of action against their former employers who provide unflattering references.⁷⁵ Under the common law, an individual has no duty to warn others who are threatened by a third party's conduct absent a special relationship between that individual and the third party.⁷⁶ Under the tort of negligent misrepresentation, a defendant with a duty must not misrepresent the truth.⁷⁷ This tort is negligence-based, however, therefore the plaintiff must prove that the defendant owed the plaintiff a duty.⁷⁸ While employers have no duty to warn absent a special relationship, they may be

common interest is entitled to know." *Id.* Under the common-interest privilege, defamatory statements are privileged when they are made "in furtherance of common property, business, or professional interests." *Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 552 (Wis. 1989) (allowing common-interest privilege defense for publication of reason for plaintiff's termination in employee newsletter).

71. RESTATEMENT (SECOND) OF TORTS § 595 cmt. i (1977) (declaring imputations unconnected to servant's work not within scope of privilege).

72. *See generally id.* §§ 599-605(a) (declaring one who publishes defamatory matter under conditional privilege liable if he abuses privilege).

73. *Id.* § 599 cmt. a (setting forth circumstances by which conditional privilege abused).

74. RESTATEMENT (SECOND) OF TORTS § 600 (1977) (noting balancing of competing interests accomplished by requiring fault to forfeit privilege). This rule follows the decision of the United States Supreme Court in *Gertz*, which imposed liability only upon a finding of knowledge or reckless disregard as to the falsity of the statement. *Id.* § cmt. a; *id.* § 603 (calling abuse use of privilege for purpose other than protecting interest for which privilege given). *But see id.* § 602(a) (permitting knowingly false publication if matter described as rumor or suspicion and not fact); *id.* § 604 (excepting "reasonable" mistakes as to publication to third parties outside privilege); *id.* § 605 (noting burden to prove abuse on plaintiff).

75. *See infra* Part V (analyzing torts of negligent misrepresentation and negligent hiring).

76. *See supra* notes 29-30 and accompanying text (describing "special relationship").

77. RESTATEMENT (SECOND) OF TORTS § 311 (1965) (defining negligent misrepresentation involving risk of physical harm).

78. *See Oliver, supra* note 10, at 719-20 (noting plaintiff must also prove reliance on statements and that statement proximately caused injuries). *See generally Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (establishing duty requirement in negligence suits).

liable for negligent misrepresentation even in the absence of a special relationship if they negligently make false or misleading representations regarding the employee.⁷⁹

A negligent misrepresentation claim arises in the employment reference context when injuries are sustained as a result of incorrect information in the references former employers provide.⁸⁰ In negligent misrepresentation cases, liability stems from either actual knowledge that the information provided was incorrect or a failure to make a reasonable investigation to determine the reliability of the information.⁸¹ In addition, some courts have begun to impose a duty of care on employers who disclose only positive information but remain silent about known negative facts.⁸² Courts may impose liability for negligent misrepresentation even in the absence of a special relationship between the employer and the harmed third party.⁸³ The major limitation of negligent misrepresentation, however, is that an employer is only liable when it either fails to adequately investigate the truth or falsity of a statement or selectively omits negative information in an otherwise positive reference.⁸⁴ Accordingly, an employer has no liability when it refuses, usually by way of a "no comment" or "name, rank, and serial number" reference policy, to make any representations regarding a former employee.⁸⁵

VI. SURVEY OF CASE LAW ON TOPIC

State courts, or federal courts acting pursuant to diversity jurisdiction, have developed the common law as it pertains to employment through interpretations of state laws.⁸⁶ Therefore, an effective way to study current trends in

79. See Oliver, *supra* note 10, at 721 (calling these instances "exceptions" to no-duty rule). It is important to note the difference between a duty to warn, imposed when a person is under a special relationship with the third party, and the prohibition against making a false or misleading statement about the third party. See *id.* at 719-22. The former applies when a defendant failed to warn and the latter applies when a defendant makes affirmative representations that are negligently false or misleading. *Id.*

80. See *infra* Part VI (discussing cases pertaining to duty to warn in employment reference context). A related tort is intentional misrepresentation, which imposes liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation. RESTATEMENT (SECOND) OF TORTS § 310 (1965). Liability for intentional misrepresentation requires that the actor "intends his statement to induce or should realize that it is likely to induce action, which involves an unreasonable risk of physical harm . . . and [] knows [] that the statement is false[.]" *Id.*

81. RESTATEMENT (SECOND) OF TORTS § 311 cmt. d (1965) (describing appropriate standard of care as reasonable person under circumstances).

82. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997) (holding employer liable for positive reference because it omitted known history of inappropriate sexual behavior).

83. See *supra* notes 29-30 and accompanying text (describing "special relationship" aspect of negligence law).

84. See *supra* notes 81-82 and accompanying text (explaining instances in which negligent misrepresentation applies).

85. See *generally* Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100 (Mich. Ct. App. 1990) (refusing to impose affirmative duty on employer who provided no reference on dangerous former employee).

86. See *infra* Part VI (analyzing state court decisions on employer reference liability).

employment reference law is to analyze important decisions on the topic from these courts.⁸⁷ With the incentives employers have to adopt limited reference policies, the important question becomes whether a former employer's silence could be grounds for deceit or misrepresentation when it has knowledge of particular facts about a former employee.⁸⁸

A. Randi W. and Other Decisions Dealing with Imposing a Duty of Care on Employers for Selective Omissions

While courts have refused to impose a blanket duty on employers to disclose negative information about a former employee, some have held employers liable to third parties when they give a favorable or neutral reference that selectively omits information about the employee's violent behavior.⁸⁹ In *Randi W. v. Muroc Joint Unified School District*,⁹⁰ a former employer—the Muroc School District (Muroc) in California—failed to disclose to a prospective employer—Livingston Middle School—that its former employee had been forced to resign because of sexual misconduct towards female students.⁹¹ In fact, Muroc gave a reference that was only positive, which caused Livingston to hire the employee as a vice-principal.⁹² After being hired, the employee molested a thirteen year-old female student, Randi W., who filed a lawsuit against Muroc claiming negligent and intentional misrepresentation.⁹³

Muroc argued that it owed no duty to the student because there was no special relationship between itself and the student.⁹⁴ The court, however, expanded the tort of negligent misrepresentation to impose a duty of care on former employers to use reasonable care toward third parties upon giving an incomplete recommendation.⁹⁵ The court imposed a four-part duty test which

87. See *infra* Part VI (surveying important state court decisions); see also *supra* notes 13-16 and accompanying text (explaining undesirable effects of “no comment” and “name, rank, and serial number” reference policies).

88. See Alex B. Long, Note, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177, 184 (1997) (noting employers have no affirmative duty to provide references); see also Moore, 459 N.W.2d at 102 (refusing to impose duty on employer to provide references).

89. See Part VI.A (surveying cases dealing with liability for selective omissions).

90. 929 P.2d 582 (Cal. 1997).

91. *Id.* at 585 (setting forth facts of case). The school took disciplinary actions against the employee for giving female students back massages and making sexual remarks to them. *Id.* While the school forced the employee to resign because of his misbehavior, it gave him a positive reference when he applied for a position at Livingston. *Id.*

92. *Id.* at 588. The reference claimed the employee “relates well to the students.” *Id.* at 585.

93. *Id.* at 585. The student also sued Livingston for negligent hiring, which, while not as important for the purposes of this Note, does draw attention to the detrimental effects that occur when potential employers are unable to receive complete references. *Id.* at 586 (alleging negligent hiring); see Oliver, *supra* note 10, at 734-36 (noting potential for negligent hiring claims when employers unable to obtain necessary information on applicants).

94. *Randi W.*, 929 P.2d at 588.

95. *Id.* at 588-90 (relying on four-part test to establish duty of care).

looked at: the foreseeability and causality of the harm; the moral blame of the defendants; the availability of insurance or alternative courses of conduct; and public policy considerations.⁹⁶ The court ruled that the assault was a reasonably foreseeable event, that Muroc could foresee Livingston's reliance on the positive recommendation, and that Livingston would not have hired the former Muroc employee absent the positive recommendation.⁹⁷ The court also claimed that Muroc was morally blameworthy for its misleading and one-sided reference, and that it could have chosen an alternative course of conduct such as a "full disclosure" reference revealing both good and bad information or a "no comment" letter.⁹⁸ Finally, the court claimed that the public policy of preventing child molestation was sufficient to warrant expanding the former employer's duty of care.⁹⁹

The solution offered by the *Randi W.* court to employers' reference liability problems was writing a "no comment" letter, thereby omitting any affirmative representations, or merely verifying basic employment dates and details.¹⁰⁰ While *Randi W.* carves out an exception to the general "no duty" rule, it has the unfortunate effect of exacerbating the reference problem.¹⁰¹ By imposing liability only when the employer chooses to speak about the employee, *Randi W.* had the paradoxical effect of encouraging employers to remain silent.¹⁰²

In *Gutzan v. Altair Airlines*,¹⁰³ an airline hired an applicant after relying on the referral of an employment agency, which contained the applicant's false account of his prior rape conviction.¹⁰⁴ The court held the employment agency liable for negligent misrepresentation, contending that the defendant had reason to believe that Altair would rely on the agency's reassurances by refraining

96. *Id.* (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)) (calling foreseeability of particular type of harm "very significant").

97. *Id.* at 589.

98. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997) (noting availability of insurance to Muroc expanded its ability to choose alternative course of conduct). One alternative suggested by the court was responding to the reference request with a "no comment" letter. *Id.*

99. *Id.* at 589-90 (rejecting defendants' argument that imposing liability for partial disclosures would encourage employers to remain silent). The opinion cited the court of appeal's characterization of Muroc's conduct as "affirmative misrepresentations" and not "mere nondisclosure." *Id.* at 591.

100. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997) (indicating no liability for "mere nondisclosure or other failure to act" absent special relationship).

101. Oliver, *supra* note 10, at 743-44 (arguing *Randi W.* decision frustrates employers' efforts to obtain applicants' employment history).

102. Oliver, *supra* note 10, at 744 (contending court's *Randi W.* decision encourages employers to say nothing or give only neutral information). *But cf.* Anthony J. Sperber, Comment, *When Nondisclosure Becomes Misrepresentation: Shaping Employer Liability for Incomplete Job References*, 32 U.S.F. L. REV. 405, 412-13 (advocating adoption of expanded tort duty to prevent "selective omissions" as in *Randi W.*).

103. 766 F.2d 135 (3d Cir. 1985).

104. *Id.* at 137 (stating applicant told agency he had been incarcerated for rape in Germany while in military). In *Gutzan*, the applicant told his employment agency that while stationed in Germany, his German girlfriend had accused him of rape, and that it was the policy of the military courts to appease foreign women who made such charges. *Id.* Without verifying whether this version of events was accurate, the employment agency represented that the applicant's explanation had been verified by military officials. *Id.*

from exercising its own proper care in investigating the applicant's past.¹⁰⁵ In *Golden Spread Council, Inc. v. Akins*,¹⁰⁶ a non-employment case with similar issues, a Boy Scout was molested by his scoutmaster, who was recommended by the local Boy Scout Council despite its knowledge that he posed a potential danger.¹⁰⁷ The court imposed a duty on the council based on the foreseeability of the harm and the risk and likelihood of injury.¹⁰⁸

Likewise, in *Davis v. Board of County Commissioners of Dona Ana County*,¹⁰⁹ the court held that an employer who gave a positive reference to a prospective employer, without mention of the employee's history of inappropriate sexual behavior, owed a duty of care not to make negligent misrepresentations when a substantial risk of harm to a third party was foreseeable.¹¹⁰ The *Davis* court, relying in part on the California Supreme Court's decision in *Randi W.* and the Restatement (Second) of Torts § 311, held that misrepresentations may breach a duty of care owed not only to the person to whom they are addressed, but also to third persons who the speaker can reasonably foresee.¹¹¹ The court quoted Professor Prosser in noting that, "half of the truth may obviously amount to a lie, if it is understood to be the whole."¹¹² These decisions indicate that those giving a substantive reference may be held liable for selective omissions that cause harm to third parties.¹¹³

Despite the decisions in *Randi W.*, *Gutzan*, *Golden Spread*, and *Davis*, there is no universal rule imposing liability on employers for selective omissions in

105. *Id.* at 140-41 (noting employment agency's assurances encouraged Altair to "lower its guard").

106. 926 S.W.2d 287 (Tex. 1996). While the cause of action in *Golden Spread* was a simple negligence action, the opinion had all the characteristics of a negligent misrepresentation case. Sperber, *supra* note 102, at 417; see also *Golden Spread*, 926 S.W.2d at 295 (Enoch, J., concurring in part and dissenting in part) (citing Restatement § 311 and *Randi W.* to support argument that negligent misrepresentation should apply).

107. *Golden Spread*, 926 S.W.2d at 289 (noting Boy Scout Council omitted mention of prior molestation from recommendation).

108. *Id.* at 290-91 (imposing duty on employer to disclose former employee's potential for harm). In imposing the duty, the court also weighed the social utility of the council's conduct, the magnitude of the burden of imposing a duty, and the consequences of placing such a burden on the council. *Id.* at 291.

109. 987 P.2d 1172 (N.M. Ct. App. 1999).

110. *Id.* at 1179 (accepting principles set forth in RESTATEMENT (SECOND) OF TORTS § 311). The referring employer in *Davis* had investigated the employee, a mental health technician, based on allegations of inappropriate sexual behavior and recommended that he be suspended without pay, demoted, and reassigned. *Id.* at 1175-76.

111. *Id.* at 1180 (noting plaintiff has claim pursuant to duty unless defendant can persuade duty should not apply). See generally John K. Ziegler, Note, *An Employer's Duty to Third Parties When Giving Employment Recommendations—Davis v. Board of County Commissioners of Dona Ana County*, 30 N.M. L. REV. 307 (2000) (providing detailed analysis of *Davis* decision).

112. *Davis*, 987 P.2d at 1180 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 738 (5th ed. 1984)).

113. See Oliver, *supra* note 10, at 748 (stating duty not to act negligently includes duty not to omit important details); Sperber, *supra* note 102, at 418-19 (noting duty derives from defendant's knowledge of potential danger rapist posed to plaintiff). *Gutzan*, *Golden Spread*, and *Davis*, however, only apply to selective omissions, and, as in *Randi W.*, employers would still be protected from liability if they remain totally silent. See *supra* notes 100-02 and accompanying text (discussing inadequacy of *Randi W.* "solution").

references that cause harm to third parties.¹¹⁴ For instance, in *Cohen v. Wales*,¹¹⁵ a school district recommended a former employee for a position as an elementary school teacher without disclosing that the teacher had been charged with sexual misconduct.¹¹⁶ Eleven years later, the teacher molested the minor plaintiff, who sued the recommending school district for negligence in recommending the teacher without disclosing his history of sexual misconduct.¹¹⁷ Despite a similar fact pattern to *Randi W.*, the *Cohen* court held that the district owed no duty to the plaintiff in the absence of a special relationship.¹¹⁸ The court explained that the "mere recommendation" of a person is not a proper basis for a negligence claim where another party is responsible for the actual hiring.¹¹⁹

*B. The Refusal to Impose a Duty to Warn When No Representations are Made—Moore v. St. Joseph Nursing Home, Inc.*¹²⁰

The decisions in *Randi W.*, *Gutzan*, *Golden Spread*, and *Davis* can be understood as imposing a duty of care upon employers, when they offer recommendations, not to misrepresent facts about the employee's qualifications.¹²¹ While these decisions appear to protect innocent third parties from dangerous employees by imposing a duty on employers not to selectively omit negative information from their references, in actuality they have the opposite effect.¹²² Most companies have responded to the tort of negligent misrepresentation by choosing the course of action suggested by the *Randi W.* court: the adoption of either "no comment" or "name, rank, and serial number"

114. See *infra* notes 115-19 and accompanying text (describing case refusing to impose liability for selective omission); see also *Richland Sch. Dist. v. Mabton Sch. Dist.*, 45 P.3d 580, 587 (Wash. Ct. App. 2002) (refusing to apply Restatement § 311 to selective omission due to lack of foreseeability of harm).

115. 518 N.Y.S.2d 633 (App. Div. 1987).

116. *Id.* at 633 (stating facts).

117. *Id.*

118. *Id.* at 634 (noting victim was also not foreseeable to defendant).

119. *Cohen*, 518 N.Y.S.2d at 634 (claiming no policy reason to expand duty since plaintiff could pursue claim against hiring school). *Id.*

120. 459 N.W.2d 100 (Mich. Ct. App. 1990); accord *Murdock v. Higgins*, 559 N.W.2d 639, 644 (Mich. 1994) (relying on *Moore* in refusing to impose duty to warn on employer). In *Murdock*, an employee with a history of inappropriate sexual involvement with minors was recommended for intra-company transfer. *Murdock*, 559 N.W.2d at 641. After being molested by the employee, the plaintiff sued the referring employer for breaching its duty to transmit adverse employment information. *Id.* at 642. The court relied heavily on *Moore* in refusing to impose such a duty to warn on the employer. *Id.* at 642-43. Despite some similarities, *Murdock* is distinguishable from *Moore* because the case involved intra-company referrals and the alleged accusations were never substantiated. See generally Emily Weinberger, Note, *No Duty to Protect a Minor Endangered by a Third Party or a Duty for a Former Employer to Disclose Dangerous Actions or Violent Tendencies of a Past Employee to a Prospective Employer Absent a Showing of a Strong Special Relationship*. *Murdock v. Higgins*, 559 N.W.2d 639 (Mich. 1997), 78 U. DET. MERCY L. REV. 147 (2000) (offering detailed analysis of *Murdock* decision).

121. See *supra* Part VI.A (describing duty not to misrepresent when offering recommendation).

122. See *infra* Part VI.B (explaining how *Randi W.* duty inhibits sharing of information by encouraging "no comment" reference policies).

reference policies.¹²³ In the absence of a special relationship, the common law does not impose a general duty to warn, and therefore innocent third parties are put in harm's way by "no comment" reference policies.¹²⁴ Nevertheless, employers are protected by these policies from liability for negligent misrepresentation or defamation.¹²⁵

In the case of *Moore v. St. Joseph Nursing Home, Inc.*,¹²⁶ the Court of Appeals of Michigan addressed whether an employer who provides no reference on a dangerous former employee should be subject to liability for harm done to innocent third parties when the employee is hired by a subsequent employer.¹²⁷ In *Moore*, St. Joseph Nursing Home discharged St. Clair, an employee who had received twenty-four disciplinary warnings for acts ranging from alcohol and drug use to outright violence.¹²⁸ When the employee later applied for another job, he listed St. Joseph Nursing Home as a reference.¹²⁹ Although the new employer never contacted the nursing home for a reference, St. Joseph conceded that it would have provided no further information other than St. Clair's dates of employment.¹³⁰ After St. Clair was hired, he savagely beat and murdered a security guard at a facility serviced by St. Clair's new company.¹³¹ Plaintiffs, representatives of the decedent's estate, alleged that St. Joseph Nursing Home was negligent for its failure to disclose St. Clair's record of extremely violent behavior.¹³² The plaintiffs argued that a special duty existed between the former employer and new employer, and that such a duty arose from a moral and social duty implied in the qualified privilege protecting employers from liability.¹³³

The *Moore* court rejected the plaintiffs' argument and held that the qualified privilege imposes no corresponding legal obligation to disclose negative information about a former employee.¹³⁴ The qualified privilege, the court

123. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997) (suggesting "no comment" letter or verifying dates and details as valid "alternative course of conduct").

124. See *supra* notes 29-30 and accompanying text (explaining special relationship requirement for duty to warn, aid, or protect).

125. See *infra* notes 126-38 and accompanying text (analyzing case law showing lack of liability for employers who use "no comment" reference policies).

126. 459 N.W.2d 100 (Mich. Ct. App. 1990).

127. See *infra* notes 128-38 and accompanying text (discussing and analyzing *Moore* case).

128. *Moore*, 459 N.W.2d at 101-02.

129. *Id.* at 102.

130. *Id.*

131. *Id.* at 101.

132. *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 102 (Mich. Ct. App. 1990) (addressing as issue of first impression plaintiffs' contention that employer be under duty to disclose).

133. *Moore*, 459 N.W.2d at 102 (stating plaintiffs' argument that existence of qualified privilege requires employers to divulge deleterious information).

134. *Id.* (highlighting societal interest in ensuring confidentiality of employment records). While *Moore* dealt with Michigan's qualified privilege statute, the same legal arguments apply to the common-law qualified privilege. See *supra* notes 67-74 and accompanying text (explaining and analyzing common-law qualified privilege).

reasoned, only allows or permits employers to divulge information concerning a former employee; it does not legally obligate them to do so.¹³⁵ Indeed, the court went so far as to declare that "there is . . . nothing about the conditional privilege which magically transposes it into a legal obligation."¹³⁶

While the decisions in *Randi W.*, *Gutzan*, *Golden Spread*, and *Davis* encouraged employers to adopt "no comment" and "name, rank, and serial number" reference policies to avoid liability for selective omissions, *Moore* stands for the proposition that employers will not be held liable for their silence.¹³⁷ As the *Moore* court made clear, silence is permitted regardless of a qualified privilege protecting employers from liability.¹³⁸ When former employers receive the protection of a qualified privilege yet refuse to provide deleterious information about former employees, they are getting something for nothing at the expense of future employers and innocent third parties.¹³⁹

VII. SOME PROPOSED SOLUTIONS

Numerous legal commentators have proposed changes to address the dilemma inherent in the current employment reference system, which rewards employers for their silence at the expense of society.¹⁴⁰ These proposals range from an argument that defamation law functions reasonably well in its present form to mandatory disclosure statutes.¹⁴¹ The vast majority of commentators, however, propose imposing some type of affirmative obligation on employers to disclose information in references, but disagree as to the source of the duty.¹⁴²

As noted earlier, the common law imposes no general duty to aid or protect

135. *Moore*, 459 N.W.2d at 102 (rejecting plaintiffs' argument that duty inherently corresponds with privilege).

136. *Id.* (calling former employer's limited duty an "imperfect obligation of a moral or social character").

137. *Id.* at 103 (imposing no duty to disclose "malefic" information about former employee to former employee's prospective employer).

138. *Id.* at 102 (contending duty should derive from legislature rather than qualified privilege); *see also supra* note 133 and accompanying text (explaining *Moore* plaintiffs' argument, and court's rejection, that obligation to disclose should accompany qualified privilege).

139. *See supra* notes 1-2 and accompanying text (arguing employers get something for nothing when they refuse to provide references despite qualified privilege).

140. *See infra* Part VII (surveying legal commentators' proposals to solve employment reference problem).

141. *See* J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 116 (1998) (concluding current defamation law sufficient and reforms should focus only on "high-risk" occupations); John Ashby, Note, *Employment References: Should Employers Have an Affirmative Duty to Report Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117, 149 (2004) (arguing affirmative disclosure duty would place heavy burden and liability risk on employers); Kimberly Smith, Comment, *A Plea for Mandatory Disclosure: Urging Michigan's Legislature to Protect Employees Against Increasing Phenomena of Workplace Violence*, 79 U. DET. MERCY L. REV. 611, 634 (2002) (advocating creating duty of mandatory disclosure of employee's propensities toward violence to prospective employees).

142. *See infra* notes 143-58 and accompanying text (analyzing various proposals calling for affirmative duty to disclose).

others.¹⁴³ Accordingly, any affirmative duty to disclose would have to be based on an exception to the “no duty” rule.¹⁴⁴ Some commentators have suggested that the answer is reference immunity statutes, which would ease employers’ fears regarding reference liability.¹⁴⁵ Others have advocated a change in the common-law qualified privilege to protect employers giving references by making plaintiffs prove abuse of the privilege using the “actual malice” definition in *New York Times*.¹⁴⁶

The most common solution offered by commentators would impose a limited affirmative duty on employers based on the “special relationship” principles set forth in *Tarasoff v. Regents of the University of California*.¹⁴⁷ In *Tarasoff*, a patient, Prosenjit Poddar, confided to his therapist, a psychologist at the University of California, that he intended to kill an unnamed girl, readily identifiable from the context as Tatiana Tarasoff.¹⁴⁸ The psychologist requested that the campus police detain Poddar, but they released him when he appeared rational.¹⁴⁹ No one warned Tarasoff or her parents about the danger, and Poddar subsequently killed Tarasoff.¹⁵⁰ Tarasoff’s parents sued the Regents of the University of California, claiming that the Regents were liable for their daughter’s death because of their failure to warn of the danger.¹⁵¹

While acknowledging that the common law of torts generally imposes no duty on a person to protect or warn third persons, the *Tarasoff* court reasoned that the common law has created an exception to this rule when there is a “special relationship” between the defendant and the dangerous person, or between the defendant and the dangerous person’s foreseeable victim.¹⁵² The

143. See RESTATEMENT (SECOND) OF TORTS § 314 (1965) (describing limits of duty to protect others). Section 314 states: “[t]he fact that an actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” *Id.*

144. See *id.* § 315 (describing “special relationship” exception to “no duty” rule); see also *infra* notes 145-58 and accompanying text (surveying other proposals revolving around exceptions to “no duty” rule).

145. See Cooper, *Beyond*, *supra* note 7 (proposing “disclosure-shield” statutes with obligation to disclose facts relating to past violent behavior); Oliver, *supra* note 10 (proposing “model-statute” imposing limited duty to disclose information regarding violence and sexual misconduct). But see Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 CORNELL J.L. & PUB. POL’Y 1, 65-66 (2001) [hereinafter Cooper, *Job*] (arguing reference immunity statutes appear to have little, if any, impact on employers’ practices).

146. See Adler & Peirce, *supra* note 6, at 1458 (proposing use of “actual malice” standard to prove abuse of qualified privilege). While the “actual malice” standard in *New York Times* only applied to public figures, Adler and Peirce argue that extending it to employers would increase the flow of information. *Id.* at 1459; see also *supra* notes 48-50 and accompanying text (describing “actual malice” standard from *New York Times*).

147. 551 P.2d 334, 343 (Cal. 1976) (reasoning “special relationship” creates exception to common-law “no duty” rule); see also Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 102 (1994) (describing doctrinal implications of *Tarasoff*’s challenge to “no duty” rule as “staggering”).

148. *Tarasoff*, 551 P.2d at 339.

149. *Id.* (noting victim’s parents claimed psychologist’s supervisor directed no action be taken to detain Poddar).

150. *Id.*

151. *Id.* at 343 (alleging failure to notify or warn Tarasoff’s parents of danger).

152. *Tarasoff*, 551 P.2d at 343 (citing Restatement § 315’s “special relationship” exception to “no duty” rule).

court held that the special relationship between a psychotherapist and his client provided the basis for imposing an affirmative duty to warn for the benefit of third persons.¹⁵³ The *Tarasoff* duty to warn, however, only applies in cases where the victim is foreseeable and identifiable, and this usually depends on the specificity of the threat.¹⁵⁴

Many commentators have argued that the *Tarasoff* exception to the "no duty to warn" rule of tort law should be applied to the employment reference context, thereby imposing an affirmative duty on employers to warn of an employee's dangerous propensities.¹⁵⁵ These commentators generally contend that the relationship between a former and subsequent employer, as well as the relationship between the employer and its former employee, are akin to the therapist-patient "special relationship" in *Tarasoff*.¹⁵⁶ Yet unlike *Tarasoff*, where the foreseeability requirement to a third party was undisputed, the foreseeability of harm in reference liability cases is often at issue.¹⁵⁷ *Tarasoff* is further distinguished in the employment context if the victim is a fellow employee or customer of the subsequent employer because it is unlikely that these victims would be considered "identifiable."¹⁵⁸

VIII. ANALYSIS

The most commonly offered solution to the reference dilemma—the imposition of an affirmative duty based on *Tarasoff* principles—is flawed in many respects.¹⁵⁹ In efforts to impose an affirmative duty to disclose on

153. *Id.* at 347 (noting limited nature of disclosure requirement in order to protect doctor-patient confidentiality).

154. *Id.* at 343 (arguing foreseeability of harm alone insufficient to invoke duty to warn). While the *Tarasoff* court related foreseeability with an "identifiable" victim, it refused to define "identifiable." See Buckhalter, *supra* note 32, at 281-82.

155. See Saxton, *supra* note 13, at 96 (calling arguments in favor of *Tarasoff*-style "duty of disclosure" strong). Professor Saxton argues that the policy concerns surrounding a doctor-patient duty, including the issue of patient confidentiality, are greater than those in a "properly defined and limited" duty of disclosure in the employment context. *Id.* at 95-96; see also Buckhalter, *supra* note 32, at 297-307 (advocating application of *Tarasoff* duty to employment reference context); Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645, 1667-71 (1991) (proposing *Tarasoff* duty based on public interest of protecting workplace and society from unnecessary risks).

156. See Swerdlow, *supra* note 155, at 1660-63 (contending both employment relationships should constitute "special relationship" sufficient to give rise to duty). At least one court has imposed upon an employer a duty to warn its employees of workplace dangers. *Molsbergen v. United States*, 757 F.2d 1016, 1024 (9th Cir. 1085) (imposing duty on employer to warn identifiable employee of serious workplace hazards).

157. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 341 (Cal. 1976) (stating Poddar even told his therapist when he would kill Tarasoff). In the employment reference context, because there is often no specific threat, the foreseeability of the potential victim is often disputed. See Swerdlow, *supra* note 155, at 1663 (arguing foreseeability requires "case-by-case" analysis).

158. See Swerdlow, *supra* note 155, at 1663-64 (noting large group of potential targets not defined as "identifiable" victims). *But cf.* *Myers v. Quesenberry*, 193 Cal. Rptr. 733, 735 (Ct. App. 1983) (holding when "reasonable step" to warn, do not need "readily identifiable" victim if harm foreseeable).

159. See *infra* notes 169-70 and accompanying text (arguing duty should derive from *Tarasoff's* stated policy considerations rather than its three-prong test).

employers, commentators generally overstate the similarities between the facts in *Tarasoff* and the paradigm reference case.¹⁶⁰ Under *Tarasoff*, the imposition of a duty to warn requires a special relationship, foreseeable harm, and an identifiable victim.¹⁶¹ In the typical employee reference situation, however, the special relationship and identifiable victim are usually lacking.¹⁶² Instead of trying to fit the square peg of employee references into the round hole of *Tarasoff* by overstating their similarities, a better solution would identify the differences between the two and explain why those differences strengthen, rather than weaken, the arguments for the imposition of an affirmative duty to warn on employers.¹⁶³

Although *Tarasoff* is perhaps best known for its precise holding, one commentator has described it as “the *Palsgraf* of its generation, a case with meta-significance, which endures past its jurisdiction, time, place, and perhaps its particular holding.”¹⁶⁴ Its holding has been extended to situations other than the therapist-patient relationship, including the employer-employee context.¹⁶⁵ Legal commentators’ discussions of *Tarasoff* usually begin with the court’s three-prong requirement: a special relationship, foreseeable harm, and an identifiable victim.¹⁶⁶ Generally stated, these commentators argue that the “special relationship” between therapists and their patients is closely analogous to the relationship between employers and their employees, and therefore the same duty to warn should apply to both.¹⁶⁷ If this “special relationship,” however, is based on the employer’s knowledge of its employee’s dangerous propensities, then the employer-employee relationship becomes less important

160. Compare *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100, 101-02 (Mich. Ct. App. 1990) (stating defendant received twenty-four warnings for actual violence and drug use), with *Tarasoff*, 551 P.2d at 339 (describing Poddar’s single verbal threat made while in therapy).

161. See *Tarasoff*, 551 P.2d at 343 (declaring foreseeability alone insufficient to establish duty without special relationship and identifiable victim).

162. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584 (Cal. 1997) (describing factual situation with obvious danger but lacking special relationship and identifiable victim). But see *Swerdlow*, *supra* note 155, at 1660-63 (arguing employer-employee relationship should constitute special relationship).

163. See *supra* notes 161-62 and accompanying text (contending differences between therapist-patient and employee reference situations favors different legal standard).

164. Lake, *supra* note 147, at 97-99 (calling *Tarasoff* one of most celebrated cases in recent history of American tort law).

165. See *Molsbergen v. United States*, 757 F.2d 1016, 1024 (9th Cir. 1985) (imposing limited duty to warn on employer to warn its employee of workplace dangers).

166. See Saxton, *supra* note 13, at 91-96 (claiming *Tarasoff* applicable in employment reference context because of similarity to patient-therapist circumstances); *Swerdlow*, *supra* note 155, at 1657-66 (arguing for extension of *Tarasoff* duty to employment reference context). While *Tarasoff* also required an “identifiable” victim, a subsequent California case minimized the importance of this requirement. *Myers v. Quesenberry*, 193 Cal. Rptr. 733, 735 (Ct. App. 1983). In *Myers*, the court held that, when warning would be a reasonable exercise of due care, the foreseeability of harm is more important than an identifiable victim. *Id.*

167. See Saxton, *supra* note 13, at 94 (contending two relationships “so analogous that no further doctrinal support may be deemed necessary”). Saxton argues that a “special relationship” exists between a job applicant’s former employer and the prospective new employer who contacts that former employer for a reference. *Id.* at 94-95.

than the knowledge, and courts could impose "special relationship" status on anyone who becomes aware of the danger.¹⁶⁸

Rather than focusing on *Tarasoff's* three-prong test, courts should instead focus on its stated considerations justifying the imposition of a duty to warn.¹⁶⁹ Among those considerations were the social policy of preventing future harm, the extent of the burden on the defendant of imposing liability, and, most importantly, the foreseeability of the harm.¹⁷⁰ Foreseeability is necessary to impose this duty to warn, but it is likely that the possibility that the dangerous employee would harm again would be deemed foreseeable.¹⁷¹

While the *Tarasoff* court refused to decide whether foreseeability alone would be sufficient to impose a duty in the absence of a special relationship, that question is unimportant in the employment context because of other considerations that are unique to employee reference situations.¹⁷² The societal interest in preventing the molestation of an unsuspecting student in *Randi W.*, for example, is certainly a significant social policy goal.¹⁷³ Nonetheless, because the law is generally hesitant to impose affirmative legal obligations on individuals, the extent of the potential burden on the defendant becomes important.¹⁷⁴

The employer's qualified privilege, however, separates employment reference cases from other instances in which courts have refused to impose an affirmative duty to warn.¹⁷⁵ The qualified privilege protects employers who make good faith references to subsequent employers and significantly lessens the burden imposed on them by reducing their potential liability.¹⁷⁶ It is the employer's qualified privilege that differentiates the employer in the typical

168. See Adler & Peirce, *supra* note 6, at 1446 (criticizing application of "special relationship" label to employment relationships). Adler and Peirce note that such an interpretation of "special relationship" would impose tort liability on citizens who passively acquire information about another's dangerousness and fail to warn third parties. *Id.* at 1446-47. Such a broad definition would essentially render the "special relationship" requirement meaningless. *Id.*

169. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (listing factors to be balanced).

170. *Id.* (calling foreseeability "most important" consideration, but not deciding whether foreseeability alone warrants imposition of duty).

171. See *supra* notes 90-102 and accompanying text (describing facts and reasoning in *Randi W.*). In *Randi W.*, a prototypical reference case, the court reasoned that the defendants could foresee that the former employee might molest or injure a student at his subsequent job. *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997).

172. See *Tarasoff*, 551 P.2d at 343 (refusing to decide whether "foreseeability alone" sufficient to establish duty yet not ruling out possibility).

173. See *id.* at 342 (noting importance of society's interest in preventing future harm).

174. See *id.* (stating importance of burden on defendant in determining whether to impose duty); see also *supra* note 29 and accompanying text (describing law's general refusal to impose duty to warn).

175. See *infra* text accompanying notes 176-79 (arguing employers' qualified privilege lessens their burden).

176. See *Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 552 (Wis. 1989) (reasoning qualified privilege protects employer in defamation suit brought by terminated employee); see also *supra* notes 67-74 and accompanying text (analyzing qualified privilege).

reference case from the therapist in *Tarasoff*.¹⁷⁷ Unlike the therapist's doctor-patient privilege, which generally requires a doctor to keep patient communications confidential, the employer's qualified privilege encourages employers to share information.¹⁷⁸

Within the qualified privilege is a duty to refrain from non-malicious conduct that is inherent in the non-absolute nature of the privilege.¹⁷⁹ If courts intended to grant employers total immunity to divulge reference information, the privilege would be absolute rather than qualified.¹⁸⁰ The qualified nature of the privilege is an attempt to balance the competing interests of the speaker and the person about whom the communication is made.¹⁸¹

When applied to the typical employee reference case, the balancing between the interests of the referencing employer and its former employee is accomplished by making the qualified privilege conditioned on the absence of its abuse.¹⁸² Accordingly, the non-absolute nature of the privilege protects the employee against defamation, and imposes an obligation upon the employer to act within the scope of the privilege.¹⁸³ While the qualified privilege does not specifically require employers to protect third parties from foreseeable physical harm, courts should construe the non-absolute nature of the privilege, and its corresponding obligation to refrain from abusive conduct, as imposing such a duty.¹⁸⁴ When employers are able to benefit from the protection of their qualified privilege, without any responsibility to refrain from conduct that could harm foreseeable third parties, the nature of the privilege they enjoy is beyond the intended scope of a conditional privilege.¹⁸⁵ Employers who receive the benefits of a qualified privilege, while refusing to warn subsequent employers about a former employee's dangerous propensities, are not meeting the conditions inherent in the non-absolute nature of the qualified privilege.¹⁸⁶

177. Compare *Zinda*, 440 N.W.2d at 552 (holding privilege applies due to common interest of parties in employment situation), with *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 339-40 (showing therapist-patient relationship discourages sharing of information).

178. See *supra* text accompanying notes 67-74 (explaining employers' protected by qualified privilege unless privilege abused).

179. See RESTATEMENT (SECOND) OF TORTS § 599 cmt. a (1977) (noting privilege conditioned upon manner in which holder of privilege exercises it).

180. See *id.* §§ 599-605A (detailing ways in which qualified privilege abused).

181. See *id.* § 600 cmt. a (explaining conditional nature of privilege designed to balance competing interests in accordance with facts).

182. See *id.* §§ 596, 599-605A (describing ways qualified privilege abused).

183. See *infra* text accompanying note 184 (arguing protection of employee should be extended to foreseeable third parties).

184. See RESTATEMENT (SECOND) OF TORTS §§ 596, 599-605A (1977) (explaining ways qualified privilege protects unless abused).

185. See *supra* note 181 and accompanying text (noting importance of balancing interests in nature of qualified privilege).

186. See *supra* text accompanying note 184 (arguing courts should treat refusal to warn third parties as abuse of privilege).

Instead, employers are, in effect, getting something for nothing.¹⁸⁷

IX. CONCLUSION

When an employer is asked to provide a reference on a former employee, that employer faces various types of potential liability. If the employer chooses to provide a substantive reference, the employer may be subject to liability for defamation if it represents the employee negatively. If the employer gives a purely positive reference that omits any mention of known negative traits, the employer may be subject to liability for negligent misrepresentation. Fear of defamation and negligent misrepresentation liability prompts many employers to institute "no comment" and "name, rank, and serial number" reference policies, which purposefully omit any substantive information on the former employee. The result is a new type of danger in which former employers' refusal to warn new employers of the dangerous propensities of their former employees puts innocent third parties in danger. Further exacerbating this problem, current case law encourages this type of behavior and rewards the silence of former employers by refusing to impose upon them an affirmative legal duty to warn.

In references cases when there is foreseeable physical harm to third parties, courts should impose upon employers a limited affirmative duty to warn an inquiring subsequent employer of a former employee's dangerous propensities. The existence of a common-law or statutory qualified privilege protects employers providing this information to the extent that the privilege is not abused. Without the imposition of an affirmative duty, employers will likely continue their "no comment" or "name, rank, and serial number" reference policies, leaving innocent and foreseeable third parties in harm's way. Courts should not permit employers to enjoy the protection of their qualified privilege at the same time they refuse to provide references on dangerous former employees. An affirmative duty is necessary to ensure that employers act within the purpose of a qualified privilege that is conditioned on the absence of malicious conduct. Only by imposing an affirmative duty to warn upon employers can the law ensure that innocent third parties are protected and employers are not getting something for nothing.

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187. See generally *Moore v. St. Joseph Nursing Home, Inc.*, 459 N.W.2d 100 (Mich. Ct. App. 1990) (providing example of employer refusing to warn of known dangers and suffering no legal consequences); see also *supra* note 1 and accompanying text (providing fictional account of privileged employer escaping liability despite refusal to warn of foreseeable danger).