Employee References: Watch What You Say

by Perry Safran and Brannon Burroughs

Suppose one of your employees informs you that your foreman, call him "Joe," is taking building materials from your site and using them to build a state-of-the-art tree house for his children. Other employees can't substantiate the charge, and when you confront Joe with the allegation, he denies it. Still, it makes you uncomfortable, so you fire him. Several weeks later, you receive a call from a builder you know who is considering hiring Joe. He wants to know why Joe was fired.

If your heart isn't racing and your hands aren't sweating, they should be, because you're about to encounter the law of defamation. When asked to provide references for ex-employees, employers are frequently trapped between their desire for the employee to reenter the work force and their interest in providing a frank description of the employee's performance. Add to that the ever-present goal of avoiding lawsuits and you're faced with a difficult balancing act.

What Is Defamation?

Defamation occurs when, without legal justification, one person intentionally or negligently makes a false and negative statement about another person to a third party, causing that person harm. All elements of this definition must be present.

Defamation commonly occurs when employers discuss their former employees with prospective employers, either in writing (*libel*) or in conversation (*slander*). In the scenario described above, you may be liable if you tell the prospective employer that "Joe was fired for stealing." In the first place, since you were never sure Joe really did steal building products, your statement may be false. Additionally, if you didn't make a genuine effort to investigate the charge of theft, your statement may be considered negligent. And if you embellish your conversation with the prospective employer — talking, for example, about suspicions you may have had about Joe — you are adding fuel to the fire, staining Joe's reputation and jeopardizing his chances of securing employment.

Statements of opinion. Merely stating an opinion, such as "I think Joe is a thief," does not guarantee protection. Even though this statement is literally true, statements of opinion can constitute defamation if they imply the existence of undisclosed, defamatory facts as the basis of the opinion. In this case, your statement would lead the prospective employer to believe that you caught Joe in the act of stealing. Your statement is in essence a serious allegation that could lead the prospective employer to reasonably doubt Joe's integrity and prevent Joe's hiring. The effect of the statement of opinion "I think Joe is a thief" is the same as the statement "Joe is a thief." If your opinion happens to be wrong, you may be liable for defamation.

Self-defamation. It gets worse. The newest and most treacherous form of defamation is called "compelled defamation." This occurs when an employee is fired based on an untrue allegation of bad conduct, and is later forced to explain to a prospective employer why he was fired. If you told Joe he was fired for being a thief and a prospective employer required Joe to explain his recent termination, Joe's only honest answer is, "They fired me for being a thief." The courts treat this statement as if it were spoken by you, and if Joe was wrongly accused, you will be considered to have defamed him.

How to Protect Yourself

With the exception of some statements of opinion, an employer cannot be held liable for telling the truth. But with regard to defamation law, the axiom "Truth is the absolute defense" is the equivalent of Custer's last words. The objective truth of virtually any statement can be disputed or distorted. When "truth" is determined by a jury, after hearing witnesses with their own agendas and lawyers presenting evidence in the most favorable light, your understanding of "truth" may not always prevail. Trial testimony may reveal, for example, that the employee who reported Joe's theft recently lost the love of his life to the irresistible Joe. Seeking revenge, the employee lied to you about Joe. Because you fired Joe based upon an uncorroborated allegation and reported your suspicions to a prospective employer, a jury could easily find you to have carelessly defamed the innocent Joe, entitling him to bathtubs full of hundred-dollar bills.

Just the facts. While the law of defamation jealously protects the reputation of employees, it also allows employers to communicate truthful information for the purpose of doing business. Courts call this "qualified privilege," which says that an employer will not be held liable for defamation for a statement in which he has a good faith belief and which he makes at a proper time, to an appropriate person, and only for a legitimate business purpose. If any of the elements are missing, however, the privilege fails and the employer may be held liable.

To continue with our scenario, the conditions under which you spoke to a prospective employer about Joe's alleged theft may fulfill the requirements of qualified privilege. First, your statement was made in the course of business as a courtesy to the prospective employer, who is the hiring agent for his company. After all, you may need to call him for references some day. Second, the prospective employer also has a good reason to solicit the information, and a business hours telephone call is an appropriate time and manner of communication. Finally, as long as you limit your comments to the employment information requested and do not use the call to vent unpleasant feelings about Joe, your statements are probably protected as a business communication. However, if Joe were to bring a lawsuit, his lawyer might attack your less-than-extensive investigation of the alleged theft, since courts have held that an employer may be liable if he communicates information about which he has no firsthand knowledge and which consists largely of rumor. Unless you warn the prospective employer that Joe was merely *accused by another* of being a thief and that you have no other proof, the courts may hold that you do not have a good faith belief in your own statement.

Get a release. One form of protection is to require employees to sign a document releasing you from liability before you give out any information about them. It's important to consult with your attorney before drawing up a release because a well-drafted release has a better chance of surviving in the courtroom and may also dissuade unhappy ex-employees from even pursuing a defamation case. However, some courts treat broadly written releases as an attempt to escape liability for a genuine injury, refusing to enforce them because they run counter to good public policy.

Stay within the qualified privilege. Provide prospective employers with only the facts requested and exclude statements of opinion. Even though your ex-employee may have hurt you and your company, revenge through references is inappropriate and costly. Communicate the business-related facts, then be quiet.

If you can't refrain from offering opinions and advice, at least state the factual basis for your opinions, and alert the prospective employer to the limits of your knowledge. If you are merely expressing a gut feeling for which you have no factual substantiation, say so. Remember that if you lead the caller to believe that undisclosed facts support your opinion, you may be held liable. The best choice is to offer no opinion.

Adopt a company policy. Another way to protect yourself is to develop a policy of revealing only certain information about ex-employees. You could decide, for example, to confirm only employee terminations, and to deny requests for further information. In the case of Joe, such a policy would allow you to say, "Under our company policy, we will only reveal termination status and date. Joe was terminated involuntarily on August 2." The prospective employer might infer from these statements that the situation was less than cordial, but would be forced to accept your subsequent silence as a matter of company policy rather than as an implication of wrongdoing by Joe.

Consult your lawyer to develop a policy for routine use. You cannot afford to examine the elements of defamation each time someone requests employee information; you must know what you will say even before the phone rings. However, once you adopt a company policy, it must be *strictly* applied. Don't speak freely about some terminations while remaining tight-lipped about others, or the implication of wrongdoing may arise.

Employ "at will." In the case of self-defamation, if the allegation of misconduct is true and can be proven in court, the employer will prevail. But this still requires the employer to suffer the time, expense, and trauma of jury trial. One alternative is not to tell your employees the reason for termination. In many states, employment is "at will," meaning an employee can be terminated for any reason or no reason at all. When your motivation for firing someone is less than ironclad, the wisest course may be to avoid discussing it with the employee. This tactic is unavailable to government employers, but is probably acceptable in the private sector.

Resignation. Another option is to ask the employee to resign. Employees who resign avoid the blemish of a firing on their records and maintain their dignity. It eliminates one obstacle to reemployment because the employee doesn't have to explain a firing.

But in most states, employees who resign are not entitled to unemployment benefits. Some may refuse to resign, choosing confrontation and the chance to receive benefits over the prospect of an easier job search. But for higher-level employees with more reputation at stake, requesting resignation may be an intelligent first step. ■

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