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## DEFAMATION AND THE WORKPLACE: A SURVEY OF THE LAW AND PROPOSALS FOR REFORM

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### I. INTRODUCTION

Few areas of the law have been subject to as much analysis and criticism during the past twenty-five years as the law of defamation.<sup>1</sup> While

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1. There is a vast amount of literature analyzing and criticizing the developments in defamation law over the past twenty-five years. Recent books and articles include: L. FORER, *A CHILLING EFFECT* (1987); C. LAWHORNE, *THE SUPREME COURT AND LIBEL* (1981); *Defamation and the First Amendment: New Perspectives*, 25 WM. & MARY L. REV. 743 (1984); *The Law of Libel Continues to Develop*, 90 DICK. L. REV. 539 (1986); *Libel*, 38 MERCER L. REV. 767 (1987); *New Perspectives in the Law of Defamation*, 74 CALIF. L. REV. 677 (1986); Sheer & Zardkoohi, *An Analysis of the Economic Efficiency of the Law of Defamation*, 80 NW. U.L. REV. 364 (1985); Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303 (1987); Comment, *American Defamation Law: From Sullivan, Through Greenmoss, and Beyond*, 48 OHIO ST. L.J. 513 (1987); Abrams, *Why We Should Change the Libel Law*, N.Y. Times, Sept. 29, 1985, (Magazine), at 34.

most commentary has focused on the impact of court decisions dealing with media defendants,<sup>2</sup> defamation actions by employees against their employers and former employers have become increasingly common. One study indicates that between 1982 and 1987 employees filed as many as 8,000 such suits and that these suits now account for approximately one-third of all defamation actions.<sup>3</sup> Verdicts of more than \$1 million in these cases are not unusual and some verdicts have reached as high as \$6 million.<sup>4</sup>

Articles about workplace defamation have generally focused on statements resulting in the discharge of an employee and negative references

2. For a discussion of defamation suits involving the media, see R. BEZANSON, G. CRANBERG & J. SOLOSKI, *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (1987); R. LABUNSKI, *LIBEL AND THE FIRST AMENDMENT* (1987); N. ROSENBERG, *PROTECTING THE BEST MAN* (1986); R. SMOLLA, *SUING THE PRESS* (1986); *Is It Time To Change The Libel Doctrine For Public Figures?*, 71 A.B.A. J., July 1985, at 39; LeBel, *Reforming the Tort of Defamation: An Accommodation of the Competing Interests Within the Current Constitutional Framework*, 66 NEB. L. REV. 249 (1987); *Libel Law: Good Intentions Gone Awry*, TIME, Mar. 4, 1985, at 93; *Rewriting Libel Law*, AM. LAW., July-Aug. 1985, at 6-34. A 1988 study by the Society of Professional Journalists found that the number of libel suits against news organizations, which rose steadily throughout the early 1980's, has declined 17 percent since 1985 due to the failure of plaintiffs to recover in three highly publicized cases: Gen. Ariel Sharon's suit against Time Magazine; Gen. William Westmoreland's suit against CBS; and William Tavoulares' suit against The Washington Post. *Libel Suits Wane, Press Study Finds*, N.Y. Times, Dec. 3, 1988, at 52, col. 4. The Sharon and Westmoreland trials have fueled widespread debate over whether protection should be afforded the media against defamation actions. See R. ADLER, *RECKLESS DISREGARD* (1986); B. BREWIN & S. SHAW, *VIETNAM ON TRIAL: WESTMORELAND v. CBS* (1986); U. DAN, *BLOOD LIBEL* (1987).

3. These figures are taken from a study conducted by Jury Verdict Research, Inc. and quoted in *Fired Employees Turn the Reason for Dismissal Into a Legal Weapon*, Wall St. J., Oct. 2, 1986, at 33, col. 2. The results of a recent survey quoted in U.S. News & World Report indicate that almost one third of all libel cases come from employees who sue former employers over bad references. The survey also indicated that defending a defamation action can cost up to \$250,000, even if the employer wins. U.S. NEWS & WORLD REPORT, Oct. 16, 1989, at 125.

4. In *Rady v. Forest City Enter.*, 27 Ohio Misc. 2d 36, 501 N.E.2d 688 (C.P. 1986), a jury awarded a Cleveland woman \$2 million in a slander action against her former employer after she was accused of forgery and fired. See *Fired Woman Wins \$2 Million*, Cleveland Plain Dealer, June 4, 1985, at 1A, col. 1. The case was later settled on appeal for an undisclosed amount. See *Mum's the Word on References as Suits Flourish*, Dallas Times Herald, Feb. 22, 1987, at K1, col. 1. In *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. Ct. App. 1984), cert. denied, 472 U.S. 1009 (1985), the plaintiff recovered \$1.9 million from his former employer for describing him as a "classical sociopath," a "zero," and as "lacking in compunction [sic] or scruples" to a private investigator posing as a new employer. In *In re IBP Confidential Business Documents Litig.*, 491 F. Supp. 1359 (N.D. Iowa 1980), aff'd in part, rev'd in part and remanded, 755 F.2d 1300 (8th Cir. 1985), the jury awarded the plaintiff \$1 million in compensatory damages and \$5 million in punitive damages. The Court of Appeals ordered a new trial.

given by former employers.<sup>5</sup> A defamation claim, however, may result whenever an employer makes statements about its employees, including statements in performance evaluations,<sup>6</sup> notices of disciplinary action,<sup>7</sup> references,<sup>8</sup> and communications to persons outside the company.<sup>9</sup> Employees may also base defamation claims upon statements made during union organizing campaigns,<sup>10</sup> labor disputes,<sup>11</sup> and grievance resolution proceedings held pursuant to collective bargaining agreements.<sup>12</sup> While employers are the most frequent targets of this litigation, defamation suits have also been brought against employees and against unions.<sup>13</sup>

The recent trend toward greater awareness of the rights of white collar and other non-unionized employees has led to the use of defamation suits as weapons in employees' arsenal to challenge discharges and company conduct perceived to be arbitrary or discriminatory.<sup>14</sup> Frequently, a desire

5. See W. HOLLOWAY & M. LEECH, *EMPLOYMENT TERMINATION* 307-29 (1985); L. LARSON & P. BOROWSKY, *UNJUST DISMISSAL* § 4.06 (1987); J. MCCARTHY, *PUNITIVE DAMAGES IN WRONGFUL DISCHARGE CASES* §§ 4.16, 4.17 (1985); H. PERRITT, *EMPLOYEE DISMISSAL LAW AND PRACTICE*, 207-09 (1984); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 767-70 (2d ed. 1983); Duffy, *Defamation and Employer Privilege*, 9 *EMPLOYEE REL. L.J.* 444 (1983). Defamation in the workplace has recently become a topic for discussion in the press. See *Revenge of the Fired*, *NEWSWEEK*, Feb. 16, 1987, at 46; *Boss Can Be Sued For Saying Too Much*, *N.Y. Times*, Nov. 27, 1987, at B26, col. 3; *Mum's the Word on References as Suits Flourish*, *supra* note 4; *Fired Employees Turn the Reason for Dismissal Into a Legal Weapon*, *supra* note 3; *Why References Aren't 'Available on Request'*, *N.Y. Times*, June 9, 1985, at F8, col. 4.

6. See *infra* notes 205-15 and accompanying text.

7. See *infra* notes 216-25 and accompanying text.

8. See *infra* notes 248-54 and accompanying text.

9. See *infra* notes 226-47 and accompanying text.

10. See *infra* notes 274-85 and accompanying text.

11. See *infra* notes 295-96 and accompanying text.

12. See *infra* notes 297-311 and accompanying text.

13. See *Jeffers v. Screen Extras Guild*, 107 Cal. App. 2d 253, 237 P.2d 51 (1951) (suit by labor leader against union news letter); *Teare v. Local Union 295*, 98 So. 2d 79 (Fla. 1957) (suit by nonunion plumber against union for defamatory statement to employer); *Cline v. McLeod*, 180 Ga. App. 286, 349 S.E.2d 232 (1986) (suit by nonunion member and former union member against union for statements in a letter to union members); *Jamison v. Rebenson*, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1959) (suit by union organizer against officers and an employee of a union); *Hanlon v. Davis*, 76 Md. App. 339, 545 A.2d 72 (1988) (suit by former union president against member for statements posted and distributed through employer's interoffice mail system); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550 (1986) (suit by former union member against union official); *Lang v. Poffenbarger*, 31 Ohio App. 2d 239, 287 N.E.2d 827 (1972) (suit by union members against union and union officers for statements during campaign for union office); *Lyons v. Rhode Island Pub. Employees Council*, 559 A.2d 130 (R.I. 1989) (suit by union president and union based on distribution of article by another union during labor election campaign).

14. See *Cuenca v. Safeway San Francisco Employees*, 180 Cal. App. 3d 985,

to remedy adverse personnel actions, rather than simply to vindicate the employees' reputation, motivates these actions. This is particularly true in those states that have not adopted significant exceptions to the employment-at-will doctrine and permit few, if any, common law actions specifically directed at wrongful discharge.<sup>15</sup>

The issues raised in workplace defamation suits are as important as those presented in the more widely debated media cases. For employees, the paramount concern is the damage that can result from false accusations or statements. A defamation suit is often the only means to clear the record or to remedy the financial injury caused by the loss of a promotion or job.

Still, the flow of personnel information, like information communicated by the media, is vital. Employers must regularly evaluate, counsel, and discipline their employees; report that information to others inside and outside the organization; and take appropriate action regarding that information. Both businesses and society suffer if unqualified or undesirable employees are hired or promoted.<sup>16</sup> Under federal labor law and the terms

225 Cal. Rptr. 852 (1986) (manager of credit union); *Nowik v. Mazda Motors of Am. (East)*, 523 So. 2d 769 (Fla. Dist. Ct. App. 1988) (district parts manager); *St. Clair v. Trustees of Boston Univ.*, 25 Mass. App. Ct. 662, 521 N.E.2d 1044 (1988) (university employee); *Murphy v. Herfort*, 528 N.Y.S.2d 117, 140 N.E.2d 415 (1988) (anesthesiologist); *Goralski v. Pizzimenti*, 115 Pa. Commw. 210, 540 A.2d 595 (1988) (teacher).

15. Many commentators have discussed the employment-at-will doctrine and common law limitations upon the right of employers to fire their employees. *See, e.g.,* Abbasi, Hollman, & Murrey, *Employment at Will: An Eroding Concept in Employment Relationships*, 38 LAB. L.J. 21 (1987); Ballam, *Intentional Torts in the Workplace: Expanding Employee Remedies*, 25 AM. BUS. L.R. 63 (1987); Hames, *The Current Status of the Doctrine of Employment-At-Will*, 39 LAB. L.J. 19 (1988); Korotkin, *Damages in Wrongful Termination Cases*, 75 A.B.A. J., May 1989, at 84; Larson, *Why We Should Not Abandon the Presumption that Employment is Terminable At Will*, 23 IDAHO L. REV. 219 (1986); Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983); Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional Dilemma*, 23 VAL. U.L. REV. 33 (1988); Peck, *Unjust Discharge of Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 277 (1983); *Wrongful Discharge and the Unionized Employee*, 12 EMPLOYEE REL. L.J. 18 (1986); Note, *Employers Beware: The Implied Contract Exception to the Employment-At-Will Doctrine*, 28 B.C.L. REV. 327 (1987); Note, *Khan v. Microdata Corp.-The Continuing Evolution of Wrongful Discharge*, 17 PAC. L.J. 1013 (1986); Note, *Public Policy Limitations on Retaliatory Discharge*, 14 U. CAL. DAVIS L. REV. 811 (1981); Note, *Challenging the Employment-at-Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J.L. REF. 449 (1983); Note, *Reaffirming the Employer's Right to Fire at Will: Patton v. J.C. Penney Co.*, 23 WILLAMETTE L. REV. 179 (1987).

16. If the flow of information concerning employees is restricted, prospective employers may not be able to learn of employees' prior criminal acts or misconduct.

of most collective bargaining agreements, union officials also take part in employee discipline and are privy to the most damaging information about employees. Finally, during organizational campaigns and labor disputes, unions and employers alike have a strong interest in placing their positions on employment issues before the workers involved. Unfettered communication is necessary to the workplace and is in the public's interest.

Because of the diverse litigants and issues, the goal of defamation law should be to balance the protection of the employees' reputations against the business and societal interests in the communication of necessary employee information and the labor and public policy encouraging free and uninhibited discussion. Further, the growing importance of national and international businesses and communications dictates that some degree of uniformity and certainty exist.

Nevertheless, at least three separate bodies of law govern workplace defamation actions: the common law, constitutional law, and federal labor law. These diverse sources of law produce uncertainty and a lack of uniformity which serve neither the business and societal interests nor the states' interests.

While federal labor and employment legislation has sought to create a uniform body of law throughout the nation on many essential subjects, the peculiarities of state defamation law create unexpected distinctions. Differing state requirements for publication, opinion, and malice and the divergent application of the qualified and absolute privileges may render companies liable for defamation in one state and protected in another based on the same statement.

This Article examines the development of workplace defamation law and the manner in which federal and state laws shape and sometimes distort that law. It also proposes judicial and legislative reforms to promote greater efficiency, uniformity, and certainty. These reforms include proposals to abolish the distinction between libel and slander,<sup>17</sup> abolish presumed damages and limit punitive damages,<sup>18</sup> adopt a uniform theory of publication<sup>19</sup> and a uniform standard for recovery,<sup>20</sup> and broaden the concepts of consent and invited publication.<sup>21</sup> The Article suggests consideration of a uniform

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This may result in a suit for negligent hiring if an employee commits another criminal act or engages in serious misconduct. *See Lear Siegler, Inc. v. Stegall*, 184 Ga. App. 27, 360 S.E.2d 619 (1987); *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907 (Minn. 1983); *Wood ex rel Doe v. Astleford*, 412 N.W.2d 753 (Minn. Ct. App. 1987); *Valdez v. Warner*, 106 N.M. 305, 742 P.2d 517 (1987); *Welch Mfg. v. Pinkerton's*, 474 A.2d 436 (R.I. 1984); *see also Silver, Negligent Hiring Claims Take Off*, 73 A.B.A. J., May 1987, at 72.

17. *See infra* notes 377-82 and accompanying text.

18. *See infra* notes 387-92 and accompanying text.

19. *See infra* notes 398-401 and accompanying text.

20. *See infra* notes 402-03 and accompanying text.

21. *See infra* note 404 and accompanying text.

statute for workplace defamation.<sup>22</sup> It also proposes arbitral and administrative remedies as alternative methods to hasten the resolution of these claims while lowering the high cost of litigation, which the parties must now bear.<sup>23</sup>

## II. THE DEVELOPMENT OF WORKPLACE DEFAMATION LAW

Many of the weaknesses in the application of defamation law to suits between employers and employees are the result of the historical development of American and English defamation law, in which the employment relationship played no part.<sup>24</sup> There were few defamation actions arising out of the employment relationship until the nineteenth century.<sup>25</sup> Defamation suits between employees and employers require three interrelated conditions: the legal recognition of the right of workers to sue their employers; the legal recognition of an employee's reputation as important enough to merit judicial protection; and an employment relationship and socio-economic environment creating the possibility of labor mobility. It was only after the employment environment met these three conditions in the middle of the eighteenth century that the courts in England began to entertain defamation cases arising out of the workplace.

### A. *The Origins of Defamation Law*

The law of defamation developed from ecclesiastical origins with the church courts initially claiming exclusive jurisdiction.<sup>26</sup> While the manorial

22. See *infra* notes 407-41 and accompanying text.

23. See *infra* notes 442-48 and accompanying text.

24. Among the books and articles dealing with the development of the law of defamation in England and the United States are: 101 R. HELMHOLZ, *SELECT CASES ON DEFAMATION TO 1600* (Selden Society 1985); H. POTTER, *AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS* 368-74 (1943); B. SANDFORD, *LIBEL AND PRIVACY—THE PREVENTION AND DEFENSE OF LITIGATION* ch. 2 (1985); Carr, *The English Law of Defamation* (pts. 1 & 2), 78 *LAW Q. REV.* 255, 388 (1982); Eaton, *The American Law of Defamation Through Gertz v. Welch, Inc. and Beyond: An Analytical Primer*, 61 *VA. L. REV.* 1349 (1975); Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries* (pts. 1-3), 40 *LAW Q. REV.* 302, 397 (1924), 41 *LAW Q. REV.* 13 (1925); Merin, *Libel in the Supreme Court*, 11 *WM. & MARY L. REV.* 371 (1969); Lovell, *The 'Reception' of Defamation by the Common Law*, 15 *VAND. L. REV.* 1051 (1962); Veeder, *The History and Theory of the Law of Defamation* (pts. 1 & 2), 3 *COLUM. L. REV.* 546 (1903), 4 *COLUM. L. REV.* 33 (1904).

25. Among the few reported cases are: *Weatherstone v. Hawkins*, 99 *Eng. Rep.* 1001 (K.B. 1786); *Edmonson v. Stephenson*, Buller's Nisi Prius 8 (1766); *Lowry v. Aikenhead*, 8 *Geo.* 3 (1768); *Bell v. Thatcher*, 86 *Eng. Rep.* 184 (K.B. 1669); *Burr v. Chappell*, Selden Society Vol. 101, p. 89 (1595).

26. Helmholtz, *Canonical Defamation in Medieval England*, 15 *AM. J. LEGAL HIST.* 255 (1971). Thirty defamation cases heard in the church courts and a discussion of ecclesiastical defamation are found in 101 R. HELMHOLZ, *supra* note 24, at 1-26.

and other local courts also entertained defamation actions for a considerable period during the Middle Ages,<sup>27</sup> the common law courts provided no remedy for libel or slander before the middle of the sixteenth century.<sup>28</sup> Servants and tenants who worked on manors brought many of the early actions in the manorial courts, but not against lords.<sup>29</sup> The position of the lord in the manorial court was that of a sovereign who enjoyed immunity from all litigation, including slander suits.<sup>30</sup>

The absence of slander actions was also due to the economic and social relationship between a lord and his servants and tenants. It was a life-long status rather than an employment relationship based upon contract.<sup>31</sup> The relationship resulted in an absence of physical, social, and economic mobility,<sup>32</sup> precluding the situations that ultimately produced libel and slander suits by employees against employers. Since servants and tenants were not "fired" and did not quit to seek other positions, lords did not have to give or respond to requests for references from other prospective lords.

The breakdown of the manor system in the fourteenth century and the shortage of labor produced by the Black Death resulted in competition for workers. This competition increased wages and caused many tenants and servants to abandon their holdings and leave their manors.<sup>33</sup> Parliament attempted to substitute the dependent status of tenure with a dependency mandated by statute. The Statute of Labourers<sup>34</sup> ordered unemployed ser-

27. Slander cases heard in the manorial courts are reprinted in 101 R. HELMHOLZ, *supra* note 24, at 27-37; 2 F. MAITLAND, *SELECT PLEAS IN MANORIAL COURTS* 19, 36, 82, 95, 109, 116, 143, 170 (Selden Society 1888); 4 F. MAITLAND & W. BAILDON, *THE COURT BARON* 48, 57, 61, 125, 133, 136 (Selden Society 1890).

28. See J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 364 (1979); P. CARTER-RUCK & R. WALKER, *CARTER-RUCK ON LIBEL AND SLANDER* 20 (3d ed. 1985).

29. For a discussion of the origins and operation of the manor system, see 1 E. LIPSON, *AN INTRODUCTION TO THE ECONOMIC HISTORY OF ENGLAND*, 1-77 (1926); see also W. HASBACH, *A HISTORY OF THE ENGLISH AGRICULTURAL WORKER* (1908); P. VINOGRADOFF, *VILLAINAGE IN ENGLAND* (1892).

30. See 1 E. LIPSON, *supra* note 29, at 40-41; 1 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 361 (2d ed. 1968).

31. For a discussion of feudal tenure and the legal relationship between lord and tenant, see J. BAKER, *supra* note 28, at 192-98; C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 8-25 (1962); 1 F. POLLACK & F. MAITLAND, *supra* note 30, at 232-40.

32. A villain, for example, was bound to the land and could not live away from the manor unless he paid a fine. His son could not learn to read, be educated at school, be apprenticed to a free craft, or enter the church without his lord's consent. 1 E. LIPSON, *supra* note 29, at 39-40.

33. See R. LACHMANN, *FROM MANOR TO MARKET* 52-55 (1987); 1 E. LIPSON, *supra* note 29, at 77-114.

34. 25 Ed. III (1351). For a discussion of this statute, see R. LACHMANN, *supra* note 33, at 58-60; 1 E. LIPSON, *supra* note 29, at 96-100.



vants and tenants with no income from land to appear in the market towns for public hiring at wages prevailing before the Black Death.<sup>35</sup> Later statutes provided that fugitive laborers should be branded on the forehead if captured, returned to their employers, or put in stocks.<sup>36</sup>

With the decline of the manor and manorial courts, jurisdiction over slander cases remained only in the ecclesiastical courts.<sup>37</sup> This marked a hiatus in the development of slander law since the ecclesiastical courts treated slander as a sin punishable by excommunication rather than by money damages.<sup>38</sup> Ecclesiastical courts' lack of authority to award monetary damages, coupled with a growing dislike of religious courts, led the common law courts to begin hearing slander cases on a regular basis in the sixteenth century.<sup>39</sup>

Once the common law courts took jurisdiction of slander cases, they tried to stem the flood of such suits by allowing recovery in only four situations.<sup>40</sup> One of these was an imputation of a lack of skill for a trade, business, or profession. Although the courts meant to protect a person "in his calling or function by which he gains his living,"<sup>41</sup> the category did not cover defamation of ordinary laborers. Instead, the courts limited its application to the protection of the emerging middle class, whose members were concerned about their commercial reputations.<sup>42</sup>

Courts limited slander suits in this manner because they considered the types of jobs held by most workers as being either temporary employment or simply too menial to support an action for slander based upon an

35. 1 E. LIPSON, *supra* note 29, at 97.

36. See W. ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY, pt. II, at 333-35 (1906).

37. See H. POTTER, *supra* note 24, at 370.

38. See *id.* at 370-72; Veeder, *The History and Theory of the Law of Defamation* (pt. 1), 3 COLUM. L. REV. 546, 550 (1903).

39. The reception of slander cases by the common law courts is discussed by J. BAKER, *supra* note 28, at 364-73. Twenty defamation cases heard in the King's Bench and Common Pleas between 1507 and 1595 are set out in 101 R. HELMHOLZ, *supra* note 24, at 41-74. For a discussion of damages in early defamation cases, see Helmholz, *Damages in Actions for Slander at Common Law*, 103 LAW Q. REV. 624 (1987).

40. The four situations in which the courts would allow recovery were: (1) imputations of an indictable offense; (2) imputations of diseases which tended to exclude the person affected from society, (3) imputations of lack of skill or ability in a trade, profession or business, and (4) any defamatory statement actually causing damages which was alleged and proved by the plaintiff. *E.g.*, Veeder, *supra* note 38, at 558.

41. J. MARCH, ACTIONS FOR SLAUNDER 10 (1648). This was the first treatise on the law of defamation.

42. All of the cases March used to illustrate the phrase "in his calling or function by which he gains his living" dealt with allegations that an attorney was corrupt or that a merchant was bankrupt. *Id.* at 48-50.

imputation of unfitness. In *Bell v. Thatcher*,<sup>43</sup> a letter carrier lost his job because of an accusation of theft. The King's Bench reversed a judgment for the plaintiff, finding that his employment was not "such an employment that an action should lie for scandalizing . . . . [T]he plaintiff does not declare, that he was retained for a year and seems to be little more than a common porter."<sup>44</sup> Hale agreed with this view "principally from the quality of the employment,"<sup>45</sup> and stated that "a man should not speak disparagingly of a man's cook or groom, but an action would be brought, if such actions as these should be maintained."<sup>46</sup> There are no reports of any such actions.

*Bell v. Thatcher* was not simply part of the effort by the judiciary to limit the number of slander suits. It was also a natural result of the economic and social conditions that governed England in the sixteenth and seventeenth centuries. The vast majority of persons still were engaged in agriculture and were economically self-sufficient.<sup>47</sup> Most labor consisted of families working small holdings.<sup>48</sup> Much of the wage labor was part-time and involved only a small minority of the population.<sup>49</sup> Manufacturing typically involved a village artisan or a small landowner. Since few of these people were employers or employees, there were few opportunities for slander and libel.

The sixteenth and seventeenth centuries also saw a sharp rise in unemployment.<sup>50</sup> Fear of unrest led Parliament to enact statutes prohibiting certain workers from leaving their employment,<sup>51</sup> compelling others to work in their crafts,<sup>52</sup> and requiring agricultural laborers to buy a ticket of release from their previous employer before they could bargain with another employer.<sup>53</sup> This legislation expressed the official attitude that "day labourers, poor husbandmen, yea merchants or retailers which have no free land, copyholders, and all artificers . . . have no voice nor authority in our commonwealth, and no account is made of them but only to be ruled."<sup>54</sup> Despite the large scale migration from rural areas to cities during the late seventeenth century,<sup>55</sup> the attitudes expressed by the legislation created an

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43. 86 Eng. Rep. 184 (K.B. 1669).

44. *Id.*

45. *Id.*

46. *Id.*

47. See C. HILL, REFORMATION TO INDUSTRIAL REVOLUTION 17-22 (1967); R. LACHMANN, *supra* note 33, at 118-24.

48. See R. LACHMANN, *supra* note 33, at 124-27.

49. See C. HILL, *supra* note 47, at 175.

50. See 3 E. LIPSON, *supra* note 29, at 294-318.

51. The principal example of this legislation is the Statute of Artificers (1563). C. HILL, *supra* note 47, at 92-96.

52. *Id.* at 57.

53. *Id.*

54. *Id.* at 56-57.

55. R. PORTER, ENGLISH SOCIETY IN THE EIGHTEENTH CENTURY 52 (1982).

economic and social structure that prevented opportunities for further advancement with an employer. It also hampered the ability of laborers to leave one employer legally and seek employment elsewhere. This, in turn, delayed the development of employment relationships which made a laborer's reputation valuable enough to require judicial protection.

During this period, the guilds, which governed nearly every branch of industry and trade, regulated employment in the towns.<sup>56</sup> An integral part of the guilds was the apprenticeship system, which the Statute of Apprentices made compulsory.<sup>57</sup> The apprenticeship, however, was not an employment relationship. Instead, the master, who was responsible for the apprentice's welfare, considered an apprentice part of the family.<sup>58</sup> The master could discipline his apprentices for negligence or other misbehavior.<sup>59</sup> He could also discharge an apprentice for reasonable cause, but only with approval of a court.<sup>60</sup> Although Blackstone discussed the rights and duties of masters and servants, the liability of third parties to a master for harming a servant, and the master's liability to third parties for harm caused by a servant,<sup>61</sup> he did not mention litigation by servants against masters or former masters.

### B. Recognition of Claims by Employees

With the coming of the Industrial Revolution during the eighteenth century, England changed rapidly from an agricultural society to one of wage labor.<sup>62</sup> In his treatise *The Law of Libel*, published in 1812, Francis Holt wrote:

Every man has a right to the fruits of his industry, and by a fair reputation and character in his particular business, to the means of making his industry fruitful. At common law therefore an action lies for words which slander a man in his trade, or defame him in an honest calling.<sup>63</sup>

While this paragraph paralleled statements made about slander a century and a half earlier, Holt added an important qualification:

An action will not lie by a servant against his former master, for a letter written by him, in giving a character of the servant, unless the latter prove the malice, as well as falsehood of the charge; even though the master

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56. For a discussion of the guild system, see 1 E. LIPSON, *supra* note 29, at 279-390.

57. *Id.* at 286.

58. 2 E. LIPSON, AN INTRODUCTION TO THE ECONOMIC HISTORY OF ENGLAND 37-43 (1926).

59. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 428 (3d ed. 1768).

60. *Id.* at 426.

61. *Id.* at 429-32.

62. See E. HOBSBAWN, INDUSTRY AND EMPIRE 56-108 (1968).

63. F. HOLT, THE LAW OF LIBEL 187 (1812).

makes specific charges of fraud. So communications which respect a man's trade, when confidential, are not actionable. Thus A may lawfully state to B, in an unreserved manner, his opinion of C's conduct and character provided it be done bona fide, whatever may be the charges which are imputed to him.<sup>64</sup>

This qualification was significant because it is the first explicit recognition that English courts were hearing defamation actions between employees and employers. Sometime between the 1676 decision in *Bell v. Thatcher* and the 1776 decision in *Edmonson v. Stephenson*, the date of the earliest case cited by Holt,<sup>65</sup> courts came to recognize that the status of a wage earner was not a bar to a defamation action based upon an imputation of unfitness. Unfortunately, the reports during those ninety years do not reveal when and why the courts changed their opinion to permit ordinary workers to sue for defamation.<sup>66</sup> The cases cited by Holt do not explain this shift in attitude but accepted it as fact in 1812.

In support of his statement about the "qualified privilege" over evaluations, Holt cited *Weatherston v. Hawkins*.<sup>67</sup> In *Weatherston*, a servant brought an action against his former employer based upon a letter written to his present employer accusing him of overcharging for goods and keeping the extra amount while he had been his employee. Without citing any authority, Lord Mansfield wrote simply that he had "held more than once that an action will not lie by a servant against his former master for words spoken by him in giving a character of the servant."<sup>68</sup> Since the servant was unable to prove the necessary malice, the court found for the employer.

Lord Mansfield had twice previously addressed the reference issue, in *Edmonson v. Stephenson*<sup>69</sup>, decided in 1766, and *Lowry v. Aikenhead*,<sup>70</sup> decided in 1768. *Edmonson* was an action by a servant against her mistress for a statement concerning her character which had been given to a prospective employer. Lord Mansfield held that "malice should not be implied from the occasion of speaking, but should be directly proved" by the servant.<sup>71</sup> In *Lowry*, Lord Mansfield held:

[W]here a person intending to hire a servant applies to his former master for a character, the master is not bound to prove the truth of the character which he gives; for what he speaks of the servant he does not speak

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64. *Id.* at 189 (citations omitted).

65. See F. HOLT, *supra* note 63, at 189.

66. The authors examined the reports for the 90 year period 1676 to 1766 and found no reported decisions permitting workers to sue their employers for defamation.

67. 99 Eng. Rep. 1001 (K.B. 1786).

68. *Id.* at 1002.

69. Cited in F. HOLT, *supra* note 63, at 189 and *Rogers v. Clifton*, 127 Eng. Rep. 317, 319-21 (C.P. 1803).

70. 8 Geo. 3 (1768), cited in *Rogers*, 127 Eng. Rep. at 321.

71. *Rogers*, 127 Eng. Rep. at 321.

officially, but only discloses that which rests in his own knowledge alone; but that where a master speaks ill of a servant who has quitted his place, without any previous application having been made to him, there he must plead and prove the truth of the character in justification.<sup>72</sup>

The nineteenth century saw an increase in the number of defamation actions by domestic servants,<sup>73</sup> commercial employees,<sup>74</sup> agricultural workers,<sup>75</sup> and "white collar" employees<sup>76</sup> over references and statements leading to their discharge. A significant increase in the size of the legal profession between 1820 and 1830 partly made these suits possible.<sup>77</sup> The attorneys and judges in those cases, however, did not question the application of the established rules of defamation to suits by employees against their employers or former employers. Since most of the actions involved references and statements concerning the discharge of employees, they focused their attention on the requirements of the privilege given to employers in such situations.

### C. American Courts Adopt English Law

English courts already had formulated the basic structure of defamation law by the time courts in the United States began to hear litigation between employees and employers. Early on, the United States Supreme Court accepted the English common law principles applicable to defamation suits brought by employees.<sup>78</sup> The few defamation actions entertained by state

72. *Id.*

73. See *Aberdein v. Macleay*, 9 T.L.R. 539 (Q.B. 1893); *Pattison v. Jones*, 108 Eng. Rep. 1157 (K.B. 1828); *King v. Waring*, 170 Eng. Rep. 721 (C.P. 1803); *Rogers v. Clifton*, 127 Eng. Rep. 317 (C.P. 1803).

74. See *Jackson v. Hopperton*, 143 Eng. Rep. 1352 (1864); *Force v. Warren*, 143 Eng. Rep. 1002 (1864); *Amann v. Damm*, 141 Eng. Rep. 1300 (1860); *Dixon v. Parsons*, 175 Eng. Rep. 609 (1858); *Somerville v. Hawkins*, 138 Eng. Rep. 231 (1851).

75. See *Webb v. East*, 5 Ex. D. 108 (1880); *Toogood v. Spyring*, 149 Eng. Rep. 1044 (Ex. 1834); *Cockayne v. Hodgkisson*, 172 Eng. Rep. 1091 (1833).

76. See *Lawless v. The Anglo-Egyptian Cotton & Oil Co.*, 4 Q.B. 262 (1868-69); *Pullman v. Hill & Co.*, 1 Q.B. 524 (1891); *Harris v. Thompson*, 93 Rev. Rep. 560 (1853); *Roberston v. Wylde*, 174 Eng. Rep. 228 (1838).

77. See A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW 183-85* (1973); see also WADE, *THE EXTRAORDINARY BLACK BOOK 259-60* (1831), reprinted in A. MANCHESTER, *SOURCES OF ENGLISH LEGAL HISTORY 1750-1950*, at 50 (1984).

78. In *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), the Supreme Court recognized a qualified privilege for "[a]nything said or written by a master in giving the character of a servant who has been in his employment." *Id.* at 287. In support of this position, the Court cited English decisions, including *Weatherston v. Hawkins*. *Id.*

courts during the nineteenth century did not cause them to modify those principles.<sup>79</sup>

Because the principles of English and American defamation law did not develop in response to cases involving the employment relationship, the same general common law principles that apply to other areas of defamation governed workplace defamation actions. Legal commentators have roundly criticized these principles and, as this Article will show, they do not function well in the employment setting for which they were never intended. It is these long-standing principles that create inequities, spawn expensive and lengthy litigation, and are ill-adapted to an environment in which entities must communicate massive amounts of personnel information. Chilling workplace communication stifles the free flow of evaluations, ratings, and assessments and may ultimately harm the very interests the law of defamation should protect.

### III. COMMON LAW AND CONSTITUTIONAL PRINCIPLES APPLICABLE TO DEFAMATION IN THE WORKPLACE

#### A. *Basic Elements of a Defamation Claim*

A claim of defamation arising out of the employment relationship must meet the common law standards necessary for any other type of defamation claim. To establish a cause of action, the employee must prove a false and defamatory statement of fact about him; publication of that statement to a third party; and either that the statement is actionable irrespective of special harm or that the publication caused the special harm.<sup>80</sup> Once an employee has established a prima facie case, several defenses are available to an employer. These include the truth of the statement,<sup>81</sup> the employee's

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79. See *Ware v. Clowney*, 24 Ala. 707 (1854); *Obaugh v. Finn*, 4 Ark. 110 (1842); *Butler v. Howes*, 7 Cal. 87 (1857); *Howe Mach. Co. v. Souder*, 58 Ga. 64 (1877); *Hake v. Brames*, 95 Ind. 161 (1884); *McCauley v. Elrod*, 16 Ky. L. Rptr. 291, 27 S.W. 867 (1894); *Wiel v. Israel*, 42 La. Ann. 955, 8 So. 826 (1890); *Fresh v. Cutter*, 73 Md. 87, 20 A. 774 (1890); *Gassett v. Gilbert*, 72 Mass. (6 Gray) 94 (1856); *Rammel v. Otis*, 60 Mo. 365 (1849); *Brown v. Orvis*, 6 How. Pr. 376 (N.Y. 1851); *Cole v. Neustadter*, 22 Or. 191, 29 P. 550 (1892).

80. See RESTATEMENT (SECOND) OF TORTS § 558 (1977). This section also states that there must be "fault amounting at least to negligence on the part of the publisher." *Id.* The Supreme Court's decision in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), can be interpreted to mean that the first amendment "fault" requirement is inapplicable when a plaintiff is a private figure and the defamatory statement does not concern a matter of public interest. Under this interpretation, the states may now return to a standard of strict liability. See *infra* notes 115-24 and accompanying text.

81. See *infra* notes 157-61 and accompanying text.

consent to it,<sup>82</sup> and the existence of an absolute or qualified privilege.<sup>83</sup>

### B. Which Statements Are Defamatory?

A statement is defamatory if "it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from desiring to associate or deal with him."<sup>84</sup> Central to this test is the distinction between statements of fact and opinion.<sup>85</sup> Although courts usually recognize statements of opinion as not actionable,<sup>86</sup> they have had difficulty in determining whether a statement is fact or opinion.

Statements of "pure opinion," meaning those not accompanied by a recitation of facts, are not actionable while statements that are a mixture of fact and opinion are.<sup>87</sup> The distinction between the two, however, is not clear, as a court may consider a statement "mixed" even when no facts are recited if the statement implies that the facts are the basis of the opinion.<sup>88</sup>

82. See *infra* notes 162-80 and accompanying text.

83. See *infra* notes 181-201 and accompanying text.

84. RESTATEMENT (SECOND) OF TORTS § 559 (1977). According to comment d of Section 559:

Actual harm to reputation [is] not necessary to make communication defamatory. To be defamatory, it is not necessary that the communication actually cause harm to another's reputation or deter third persons from associating or dealing with him. Its character depends upon its general tendency to have such an effect. In a particular case it may not do so either because the other's reputation is so hopelessly bad or so unassailable that no words can affect it harmfully, or because of the lack of credibility of the defamer. There is a difference in this respect between determining whether a communication is defamatory and determining whether damages can be recovered.

*Id.* § 559 comment d; see also W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 773 (5th ed. 1984) [hereinafter PROSSER & KEETON].

85. See Gleason, *The Fact/Opinion Distinction in Libel*, 10 HAST. INT'L & COMP. L. REV. 763 (1988); Comment, *The Fact/Opinion Distinction: An Analysis of the Subjectivity of Language and Law*, 70 MARQ. L. REV. 673 (1987); Comment, *Allegations of Criminal Conduct: Application of the Fact-Opinion Dichotomy in Defamation Actions*, 49 OHIO ST. L.J. 293 (1988); Note, *The Fact-Opinion Determination in Defamation*, 88 COLUM. L. REV. 809 (1988); Note, *The Fact-Opinion Dilemma in First Amendment Defamation Law*, 13 WM. MITCHELL L. REV. 545 (1987).

86. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court stated: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40.

87. See *Kirkland v. City of Peekskill*, 634 F. Supp. 950 (S.D.N.Y. 1986); *Burns v. Supermarkets Gen. Corp.*, 615 F. Supp. 154 (E.D. Pa. 1985); *Adler v. American Standard Corp.*, 538 F. Supp. 572 (D. Md. 1982), *aff'd in part, rev'd in part*, 830 F.2d 1303 (4th Cir. 1987).

88. RESTATEMENT (SECOND) OF TORTS § 566 comment c (1977).

Courts have developed two tests to separate statements of fact or mixed opinions from pure opinions. The first approach is simply to examine the "totality of the circumstances."<sup>89</sup> The second method looks for specific features, most commonly, whether the statement has a precise meaning as opposed to being vague or ambiguous; whether one can objectively characterize the statement as true or false; the entire context in which the statement appears; and the social setting in which the speaker made the statement with an eye towards facts that would lead a listener to understand that the statement was one of opinion.<sup>90</sup>

The line between a statement of fact and opinion is often difficult to draw in the employment setting, particularly when it relates to job performance. Because an employer will often base his opinion of an employee upon facts, the defense generally will apply only when the statements involve rhetoric, name-calling, or personal dislike. For example, in *Stanley v. Taylor*,<sup>91</sup> a school teacher accused her principal of being "not qualified to be a principal," a "disgrace to the profession," and "a Lee Harvey Oswald and a Jack Ruby."<sup>92</sup> Although some of the accusations went beyond merely colorful language, the court looked to the nature of the words and the circumstances under which they were spoken and concluded they were no more than heated "name-calling" which those within hearing would not consider as literally true.<sup>93</sup> Courts have applied an extremely broad definition of opinion in actions arising out of strikes or union organizing campaigns.

In many cases, courts have held employer statements not to be opinions even when the employer did not give any facts to the listener. In *Davis v. Ross*,<sup>94</sup> singer Diana Ross circulated a letter she had written containing

89. See *Capan v. Daugherty*, 402 N.W.2d 561 (Minn. Ct. App. 1987); *Henry v. Halliburton*, 690 S.W.2d 770 (Mo. 1985); *Dunlap v. Wayne*, 105 Wash. 2d 529, 716 P.2d 842 (1986).

90. See *Ollman v. Evans*, 750 F.2d 970, 979-84 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). In *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980), the court examined three factors to determine whether a statement was an unactionable opinion: (1) how the allegedly defamatory words were understood; (2) the facts surrounding the publication; and (3) any cautionary terms used by the publisher. *Id.* at 783-84.

91. 4 Ill. App. 3d 98, 278 N.E.2d 824, *cert. denied*, 409 U.S. 983 (1972).

92. *Id.* at 100-01, 278 N.E.2d at 825-26.

93. According to the court:

This is not a situation where defendant made a deliberate communication to someone other than plaintiff such as the superintendent of schools or a similar individual with the direct intention of doing injury to [plaintiff] in his position and profession. As the record shows, the outburst was spontaneous and made directly to plaintiff and was obviously more thoughtless than anything else, and a considered evil intention to defame is not easily imputed therefrom.

*Id.* at 105, 278 N.E.2d at 829.

94. 754 F.2d 80 (2d Cir. 1985).



names of seven former employees. In the letter she said: "If I let an employee go, it's because either their work or their personal habits are not acceptable to me. I do not recommend these people. In fact, if you hear from these people, and they use my name as a reference, I wish to be contacted."<sup>95</sup> Davis, one of the former employees named in the letter, had resigned voluntarily from her position with Ross. She sued for \$2 million, claiming that, when read as a whole, the letter falsely asserted that Ross had fired her because of inadequate work or personal habits that were of a magnitude to warrant Ross' specific recommendation to recipients of the letter that they not hire her.<sup>96</sup> The district court dismissed the complaint on the grounds that while one could read the letter as falsely asserting that Ross had fired Davis, one could not read it as asserting that she was incompetent or that her personal habits were such that she could not function in her position. According to the court, the letter expressed only Ross' "personal dissatisfaction . . . rather than a general lack of capacity or unfitness."<sup>97</sup>

The Second Circuit reversed, finding that the letter was not merely an expression of opinion but was susceptible to several interpretations, one of which was that Ross "had knowledge of facts supporting her claim of Davis' unacceptable work and personal habits."<sup>98</sup> Since a jury could find that Ross based her statements upon "false facts" within her knowledge, they would be actionable even if they were an expression of her opinion.<sup>99</sup>

As the *Davis* case illustrates, many statements about an employee are ambiguous, further complicating the courts' determination of whether they are defamatory. To resolve this problem, the early common law courts adopted the "mitior sensus" doctrine, which required that courts interpret ambiguous words not in their natural sense, but in their best possible sense.<sup>100</sup> This doctrine was replaced later by a reasonable construction test under which the court determines whether the statement is capable of a defamatory meaning.<sup>101</sup> If it is, the jury then determines whether the persons who received it in fact understood the statement as defamatory.<sup>102</sup>

95. *Id.* at 81-82.

96. *Id.* at 82.

97. *Id.*

98. *Id.* at 83-86.

99. *Id.* at 86.

100. The development of the mitior sensus doctrine is discussed in G. BOWER, *ACTIONABLE DEFAMATION* 332-35 (1908); P. CARTER-RUCK & R. WALKER, *supra* note 28, at 21; Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 40-41 (1904).

101. RESTATEMENT (SECOND) OF TORTS §§ 563, 614 (1977); *see also* Davis v. Costa-Gravas, 619 F. Supp. 1372, 1375-76 (S.D.N.Y. 1985); Thomas Merton Center v. Rockwell Int'l Corp., 497 Pa. 460, 464-65, 442 A.2d 213, 216 (1981), *cert. denied*, 457 U.S. 1134 (1982); Stones River Motors, Inc. v. Mid-Southern Publishing Co., 651 S.W.2d 713, 717-19 (Tenn. Ct. App. 1983).

102. RESTATEMENT (SECOND) OF TORTS § 563 comments c, d (1977).

In interpreting ambiguous statements, a minority of courts adhere to a modern version of the mitior sensus doctrine known as the "innocent construction rule."<sup>103</sup> Under that rule, a statement must "be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."<sup>104</sup>

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103. For a discussion of the states which follow this doctrine, see Youm, *The U.S. "Innocent Construction" Rule and the English Mitior Sensus Doctrine Reexamined*, 10 B.C. INT'L & COMP. L. REV. 285 (1987). The doctrine is most fully developed and applied in Illinois. See M. POELLE & B. OTTLEY, *ILLINOIS TORT LAW* 126-34 (1985); Malone & Smolla, *The Future of Defamation in Illinois After Colson v. Steig and Chapski v. Copley Press, Inc.*, 32 DE PAUL L. REV. 219, 274-97 (1983); Poelle, *The Guilt of the "Innocent Construction Rule" in Illinois Defamation Law*, 1 N. ILL. L. REV. 181 (1981); Comment, *The Illinois Doctrine of Innocent Construction: A Minority of One*, 30 U. CHI. L. REV. 524 (1963).

In *England v. Automatic Canteen Co.*, 349 F.2d 989, 991 (6th Cir. 1965), the Sixth Circuit applied the Illinois innocent construction rule to a cause of action arising out of Ohio. See also *Smith v. Huntington Publishing Co.*, 410 F. Supp. 1270, 1274 (S.D. Ohio 1975), *aff'd*, 535 F.2d 1255 (6th Cir. 1976). In *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 372, 453 N.E.2d 666, 669 (1983), the Ohio Supreme Court cited *England* and although it did not hold that the innocent construction rule was the appropriate standard to be used in Ohio, it affirmed the court of appeals finding which was based on the rule.

104. *John v. Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962). Without always articulating a clear reason, courts in Illinois have interpreted the innocent construction rule in such a way that many defamation actions by employees against employers are dismissed as a matter of law. The extent to which Illinois courts have carried the innocent construction rule is illustrated by *Roemer v. Zurich Ins. Co.*, 25 Ill. App. 3d 606, 323 N.E.2d 582 (1975). In this case, the plaintiff brought a defamation action against both his former employer, who had discharged him, and his former secretary, who had alleged that she had been forced to leave her job because the plaintiff had been making "sexual advances" toward her. *Id.* at 611, 323 N.E.2d at 586. The court held that under the innocent construction rule "[t]he words might be construed to describe generally accepted social conduct such as a gesture or a wink or even the use of words with double meaning as a form of jest." *Id.* at 612, 323 N.E.2d at 586-87. Illinois courts have interpreted the comment "he was a lousy agent" to have an innocent meaning when made by an employer in response to being asked why an insurance agent was fired. *Valentine v. North Am. Co. for Life & Health Ins.*, 60 Ill. 2d 168, 170, 328 N.E.2d 265, 267 (1974). Similarly, statements that a former employee's work record was not satisfactory because of a "lack of achievement in basic goals" and that he would not be reemployed because he "did not have the qualifications needed to achieve the objective of the profession" were held capable of an innocent construction. *Kakuris v. Klein*, 88 Ill. App. 3d 597, 600, 410 N.E.2d 984, 986-87 (1980). However, a statement by a former employer to a prospective employer that after an employee left the company it was "discovered there was a substantial amount of money owed the company," *Zeinfeld v. Hayes Freight Lines*, 41 Ill. 2d 345, 347, 243 N.E.2d 217, 219-20 (1968), and a memorandum stating that an employee had been fired because of "alcoholism, inefficiency, lack of punctuality, and unreliability," *Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d

## C. Publication

In addition to showing that the statement was false and defamatory, an employee must prove that the employer published the statement. Publication is defined as "communication intentionally or by a negligent act to one other than the person defamed."<sup>105</sup> Thus, an employer who makes a defamatory statement directly to an employee, with no third person in proximity who might foreseeably hear the statement, does not defame the employee.<sup>106</sup> An employer may be liable, however, for "continued publi-

1046, 1049, 340 N.E.2d 539, 541 (1975), were held incapable of an innocent construction. The Illinois Supreme Court refined the innocent construction rule in *Chapski v. Copley Press*, 92 Ill. 2d 344, 442 N.E.2d 195 (1982), in which it said:

[A] written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff, it cannot be actionable per se. This preliminary determination is properly a question of law to be resolved by the court in the first instance; whether the publication was in fact understood to be defamatory or to refer to the plaintiff is a question for the jury should the initial determination be resolved in favor of the plaintiff.

*Id.* at 352, 442 N.E.2d at 199. For a discussion of *Chapski*, see Kohn, *Chapski and the Loss of Innocence*, 65 CHI. B. REC. 212 (1984); Mallone & Smolla, *supra* note 103.

Decisions since *Chapski* indicate that Illinois courts have continued to apply the innocent construction rule in much the same manner in workplace defamation cases. See *Powers v. Delnor Hosp.*, 148 Ill. App. 3d 844, 499 N.E.2d 666 (1986); *Heying v. Simonaitis*, 126 Ill. App. 3d 157, 466 N.E.2d 1137 (1984); *Crinkley v. Dow Jones & Co.*, 119 Ill. App. 3d 147, 456 N.E.2d 138 (1983). In *Meyer v. Allen*, 127 Ill. App. 3d 163, 468 N.E.2d 198 (1984), a hospital issued a statement that its dietician was "professionally unreliable" because she quit her job without reason at a time when she was needed and because she failed to properly maintain the kitchen in a "clean and hygienic manner." *Id.* at 164, 468 N.E.2d at 199. The court held the statement did not impute to the dietician an inability to perform the duties of her employment or prejudice her in her profession. *Id.* at 165, 468 N.E.2d at 200.

105. RESTATEMENT (SECOND) OF TORTS § 577(1) (1977). However, "the mere act of an employer escorting an employee from the building after termination of employment, without more [does not] constitute . . . a defamatory publication." *Gay v. William Hill Manor*, 74 Md. App. 51, 56, 536 A.2d 690, 693, *cert. denied*, 312 Md. 601, 541 A.2d 964 (1988). The employee has the burden of proving publication of the defamatory matter to a third person. *Walton v. Bromberg & Co.*, 514 So. 2d 1010, 1011 (Ala. 1987).

106. In *DeAngelo v. W.T. Grant Co.*, 64 Ohio L. Abs. 366, 111 N.E.2d 773 (1952), the court found there was no publication when an employee overheard a statement while standing thirty feet down the hall from a personnel director's office. See also *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Moye v. Gary*, 595 F. Supp. 738 (S.D.N.Y. 1984); *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373 (D. Mass.), *aff'd*, 636 F.2d 1199 (1st Cir. 1980), *cert. denied*, 454 U.S. 821 (1981); RESTATEMENT

ation” or the intentional or unreasonable failure to remove defamatory matter that a person knows is exhibited on land or chattels in his possession or under his control.<sup>107</sup> An employer who failed to paint over a defamatory sign spray-painted on a plant wall for seven or eight months may have adopted it and a court may hold the employer liable for its publication.<sup>108</sup>

The issue of publication frequently arises when a statement has been communicated within a corporation. The states are divided on whether this constitutes publication. Some states take the view that a corporation is not liable for routine internal communications between its agents made in the course of the corporation’s business because the corporation is communicating with itself.<sup>109</sup> States that follow the Restatement position<sup>110</sup> and the commentators<sup>111</sup> who reject the single entity theory take the opposite

(SECOND) OF TORTS § 577 comment b (1977). However, in *Lewis v. Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876 (Minn. 1986), a company was held liable for defamatory material communicated only to four employees as the reason for their discharge. The statement was later repeated by the employees to prospective employers in job applications. For a discussion of *Lewis* and “compelled self-publication,” see *infra* notes 263-69 and accompanying text.

107. RESTATEMENT (SECOND) OF TORTS § 577(2) (1977).

108. *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir. 1987). According to the court:

A person is responsible for statements he makes or adopts, so the question is whether a reader may infer adoption from the presence of a statement. That inference may be unreasonable for a bathroom wall or the interior of a subway car in New York City but appropriate for the interior walls of a manufacturing plant, over which supervisory personnel exercise greater supervision and control. The costs of vigilance are small (most will be incurred anyway) and the benefits potentially large (because employees may attribute the statements to their employer more readily than patrons attribute graffiti to barkeeps).

*Id.* at 1046-47.

109. See *Halsell v. Kimberly-Clark*, 683 F.2d 285 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Mims v. Metro. Life Ins. Co.*, 200 F.2d 800 (5th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953); *Burney v. Southern Ry.*, 276 Ala. 637, 165 So. 2d 726 (1964); *Farris v. Tvedten*, 274 Ark. 185, 623 S.W.2d 205 (1981); *Jackson v. Douglas County Elec. Membership Corp.*, 150 Ga. App. 523, 258 S.E.2d 152 (1979); *Hellesen v. Knaus Truck Lines*, 370 S.W.2d 341 (Mo. 1963); *Jones v. Golden Spike Corp.*, 97 Nev. 24, 623 P.2d 970 (1981); *Magnolia Petroleum Co. v. Davidson*, 194 Okla. 115, 148 P.2d 468 (1944); *Prins v. Holland-North American Mortgage Co.*, 107 Wash. 206, 181 P. 680 (1919).

110. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

111. See Note, *Libel-No Publication by Dictation to Corporate Stenographer*, 2 BUFFALO L. REV. 338 (1953); Note, *Tort-Defamation-Dictation to Corporate Stenographer as Publication*, 27 TEMP. L.Q. 127 (1953); Note, *Libel and Slander-Intracorporate Communications as Publication to Third Persons*, 33 U. KAN. L. REV. 759 (1985); Recent Decisions, *Tort-Libel and Slander-Communications Between Employees of Company Concerning Company Business Held Sufficient Publication to Subject Company to Liability*, 38 VA. L. REV. 400 (1952).

view.<sup>112</sup> Still other courts have held that the publication element was satisfied when material about the employee was circulated within the corporation to persons with no responsibility for it.<sup>113</sup>

The issue of publication within a corporation is important because it may drastically alter the complexion of an employee's defamation case. If the communication does not constitute publication, a central element of the employee's prima facie case is absent and the suit cannot go forward. Even if courts hold that the corporation has published this material, frequently a qualified privilege protects it. Although such a privilege is not a complete bar to recovery, it significantly increases the employee's burden of proof and decreases his chances of recovery since he must prove some type of malice to overcome the privilege.<sup>114</sup>

#### D. Fault: The Impact of *Dun & Bradstreet*

At early common law, defamation was essentially a strict liability tort, later mitigated in part by the recognition of privileges.<sup>115</sup> To recover, a plaintiff need only prove the publication of a false and defamatory statement, even if the defendant had an honest belief in its truth, no ill will, and no intent to defame.<sup>116</sup> In *Gertz v. Robert Welch, Inc.*,<sup>117</sup> the United States Supreme Court imposed constitutional requirements, and created a distinction between public officials and public figures on the one hand and private individuals on the other.<sup>118</sup> The Court in *Gertz* recognized that public officials and public figures must prove "actual malice" to recover.<sup>119</sup>

112. In *Pirre v. Printing Devs., Inc.*, 468 F. Supp. 1028 (S.D.N.Y.), *aff'd*, 614 F.2d 1290 (2d Cir. 1979), the court stated the rationale for this as follows: While corporate officers may be . . . the embodiment of the corporation, they remain individuals with distinct personalities and opinions, which . . . may be affected just as surely as those of other employees by the spread of injurious falsehoods. It is this evil that the law of defamation is designed to remedy. To find no inter-personal [sic] communication when a corporate employee speaks to a corporate officer would be to ignore the distinct personalities of the human beings involved.

*Id.* at 1041; *see also* *Luttrell v. United Tel. Sys.*, 9 Kan. App. 2d 620, 683 P.2d 1292 (1984), *aff'd*, 236 Kan. 710, 695 P.2d 1279 (1985); *Frankson v. Design Space Int'l*, 394 N.W.2d 140 (Minn. 1986).

113. *See Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046, 340 N.E.2d 539 (1975).

114. *See Gaines v. CUNA Mutual Ins. Soc'y*, 681 F.2d 982 (5th Cir. 1982); *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373 (D. Mass. 1980); *Fawcett v. G. C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

115. *See Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936); *E. Hulton & Co. v. Jones*, 1910 App. Cas. 20 (H.L. 1909); *Bromage v. Prosser*, 4 B. & C. 247, 107 Eng. Rep. 1051 (1825).

116. *Cassidy v. Daily Mirror Newspapers, Ltd.*, 2 K.B. 331, 338-40 (1929).

117. 418 U.S. 323 (1974).

118. *Id.* at 342-44.

119. *Id.* at 342.

In the earlier case of *New York Times v. Sullivan*,<sup>120</sup> the Court defined "actual malice" as knowledge that the statement was false or a reckless disregard of whether it was false or not. The Court in *Gertz* recognized that, for private individuals, states could define their own standard "so long as they do not impose liability without fault."<sup>121</sup>

The Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>122</sup> raises questions about the continuing validity of the *Gertz* standard of fault for private figures. Many commentators believe that one can interpret *Gertz* as holding that its first amendment "fault" requirement is inapplicable when the plaintiff is a private figure and the defamatory statement does not involve a matter of public interest.<sup>123</sup> Under this interpretation, the states may now choose as their standard "actual malice," negligence, or a return to the pre-*Gertz* standard of strict liability.

While a negligence or strict liability standard could make it easier for employees to recover in some cases, *Dun & Bradstreet* will not have a significant impact on workplace defamation actions. Although the vast majority of these cases involve employees who are private individuals and statements that are of no public interest, most workplace defamation actions arise in situations giving rise to a common law qualified privilege, thus requiring the employee to prove malice to recover.<sup>124</sup> A return to a strict liability standard would have an impact only in those workplace defamation cases not subject to a qualified privilege.

#### *E. Damages: The Libel/Slander Distinction*

Three types of damages are available to an employee in a defamation action: compensatory, nominal or punitive.<sup>125</sup> Within compensatory damages are two subcategories, general and special. General damages are "the proved, actual harm caused to the reputation of the person defamed."<sup>126</sup> Special damages require a showing of "special harm" which is defined as "the

120. 376 U.S. 254, 279-80 (1964).

121. *Gertz*, 418 U.S. at 347-48. For a discussion of the different approaches taken by the states under *Gertz*, see R. SMOLLA, *LAW OF DEFAMATION* §§ 3.10-12, at 3-22 to 3-31 (1986).

122. 472 U.S. 749 (1985).

123. See F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 5.0, at 20-22 (1986); R. SMOLLA, *supra* note 121, § 3.01[4], at 3-4.

124. See *Gaines v. CUNA Mutual Ins. Soc'y*, 681 F.2d 982 (5th Cir. 1982); *Arsenault v. Allegheny Airlines, Inc.*, 468 F. Supp. 1373 (D. Mass. 1980); *Hardee v. N.C. Allstate Servs., Inc.*, 537 F.2d 1255 (4th Cir. 1976).

125. Damages in defamation cases are discussed in PROSSER & KEETON, *supra* note 84, § 116A, at 842-48; R. SMOLLA, *supra* note 121, §§ 9.01-9.10, at 9-3 to 9-21.

126. RESTATEMENT (SECOND) OF TORTS § 621 (1977). For a discussion of general damages, see PROSSER & KEETON, *supra* note 84, § 116A, at 843.

loss of something having economic or pecuniary value."<sup>127</sup> An employee's discharge from employment or the denial of employment as a result of a defamatory statement are examples of special harm.<sup>128</sup> Whether an employee can recover general damages or must show special harm depends initially upon whether the alleged defamatory statement constitutes slander or libel.<sup>129</sup>

Originally, a plaintiff could not recover for slander without proving special harm.<sup>130</sup> Later, courts came to recognize situations in which they presumed damages from the character of the language. In those situations, the statement constitutes slander "per se."<sup>131</sup>

According to the Restatement, there are four categories of slander per se for which a person will be liable for general damages without proof of special harm: an imputation of a serious crime involving moral turpitude;<sup>132</sup> an imputation of a loathsome disease (for example venereal disease);<sup>133</sup> an

127. RESTATEMENT (SECOND) OF TORTS § 575 comment b (1977). According to comment b, this requirement has its origins in the ancient conflict of jurisdiction between the royal and ecclesiastical courts, in which the former acquired jurisdiction over some kinds of defamation only because they could be found to have resulted in "temporal" rather than "spiritual" damage. The more modern decisions have shown some tendency to liberalize the old rule and to find pecuniary loss when the plaintiff has been deprived of benefit which has a more or less indirect financial value to him. Thus, the loss of society, companionship and association of friends may be sufficient when their hospitality or assistance has been such that it can be found to have a monetary value. The tendency has been in the direction of finding an indirect benefit to be sufficient.

For a discussion of special damages, see F. HARPER, F. JAMES & O. GRAY, *supra* note 123, § 5.14, at 114-18; PROSSER & KEETON, *supra* note 84, § 116A, at 844; R. SMOLLA, *supra* note 121, § 9.07, at 9-15 to 9-16.

128. RESTATEMENT (SECOND) OF TORTS § 622 illustrations 1, 2 (1977); *see also* Cook v. Safeway Stores, Inc., 266 Or. 77, 511 P.2d 375 (1973).

129. The RESTATEMENT (SECOND) OF TORTS § 568 (1977) defines slander and libel as follows:

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

(3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

*See also* F. HARPER, F. JAMES & O. GRAY, *supra* note 123, § 5.9, at 71-81; PROSSER & KEETON, *supra* note 84, § 112, at 787-97.

130. *See* PROSSER & KEETON, *supra* note 84, § 112, at 793-95.

131. *See* R. SMOLLA, *supra* note 121, §§ 7.01-.08, at 7-2 to 7-17.

132. *See* RESTATEMENT (SECOND) OF TORTS § 571 (1977); R. SMOLLA, *supra* note 121, § 7.05[2], at 7-7 to 7-8.

133. *See* RESTATEMENT (SECOND) OF TORTS § 572 (1977); R. SMOLLA, *supra* note 121, § 7.05[4], at 7-9 to 7-10.

imputation of inability to perform or lack of integrity in the discharge of the duties of a business, trade, profession or office;<sup>134</sup> or an imputation of serious sexual misconduct.<sup>135</sup> In the workplace, most cases of slander per se arise when an employer accuses an employee or former employee of committing a crime, such as theft, or of an inability to perform a job.<sup>136</sup>

If a statement does not fall within one of the categories of slander per se, it may still constitute slander per quod.<sup>137</sup> Since courts do not presume damages in cases of slander per quod, an employee must plead and prove that special harm resulted from the defamatory statement.<sup>138</sup> If special harm did result from the publication, the employee may recover general damages as well.<sup>139</sup>

To recover special damages, an employee must also prove that the defamatory statement was "the legal cause of special harm."<sup>140</sup> In *Benassi*

134. See RESTATEMENT (SECOND) OF TORTS § 573 (1977); R. SMOLLA, *supra* note 121, § 7.05[3], at 7-8 to 7-9.

135. See RESTATEMENT (SECOND) OF TORTS § 574 (1977); R. SMOLLA, *supra* note 121, § 7.05[5], at 7-10 to 7-11. In *Moricoli v. Schwartz*, 46 Ill. App. 3d 481, 361 N.E.2d 74 (1977), an Illinois appellate court refused to treat an imputation of homosexuality, given as the reason for firing a singer, as a fifth per se category of defamation. In *Moricoli*, one of the defendant's employees was alleged to have said, in the presence of others, "Tommy Lane is a fag and we don't want any fag working for us." *Id.* at 482, 361 N.E.2d at 75. Another employee later repeated, "The [employment] contract is being cancelled because Mr. Schwartz says Tommy Lane is a fag." *Id.* The court held that, "in view of the changing temper of the times, such presumed damage to one's reputation . . . is insufficient to mandate creation of such a category." *Id.* at 484, 361 N.E.2d at 76.

136. See *Rodriguez v. North Am. Aviation, Inc.*, 252 Cal. App. 2d 889, 61 Cal. Rptr. 579 (1967) (incompetence); *Dorr v. C.B. Johnson, Inc.*, 660 P.2d 517 (Colo. Ct. App. 1983) (drunkenness); *Bobenhausen v. Cassat Ave. Mobile Homes, Inc.*, 344 So. 2d 279 (Fla. Dist. Ct. App. 1977) (stealing from employer); *Savage v. Seed*, 81 Ill. App. 3d 744, 401 N.E.2d 984 (1984) (dishonesty); *Jamison v. Rebenson*, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1959) (unfitness for job); *Weenig v. Wood*, 169 Ind. App. 413, 349 N.E.2d 235 (1976) (embezzlement); *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972) (padding timesheets); *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655 (Minn. Ct. App. 1987) (theft); *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 377 A.2d 807 (1977) (untrustworthy), *modified on other grounds*, 164 N.J. Super. 465, 397 A.2d 334 (1979); *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (unfitness for job), *aff'd in part, rev'd in part on other grounds*, 298 N.C. 715, 260 S.E.2d 611 (1979); *Newton v. Family Fed. Sav. & Loan Ass'n*, 48 Or. App. 373, 616 P.2d 1213 (1980) (administrative incompetence); *Capps v. Watts*, 271 S.C. 276, 246 S.E.2d 606 (1978) ("paranoid sonofabitch"); *Bolling v. Baker*, 671 S.W.2d 559 (Tex. Ct. App. 1984) (dishonesty), *cert. denied*, 474 U.S. 824 (1985).

137. See F. HARPER, F. JAMES & O. GRAY, *supra* note 123, §5.9A, at 82-87; R. SMOLLA, *supra* note 121, § 7.06[3], at 7-12 to 7-13.

138. See *Battista v. United Illuminating Co.*, 10 Conn. App. 486, 523 A.2d 1356 (1987); *Henderson v. Ripperger*, 3 Kan. App. 2d 303, 594 P.2d 251 (1979).

139. See *Gomez v. Hug*, 7 Kan. App. 2d 603, 645 P.2d 916 (1982).

140. See RESTATEMENT (SECOND) OF TORTS §§ 575, 621 comment a (1977).



v. *Georgia-Pacific*,<sup>141</sup> an employer made a defamatory statement to its employees concerning the reasons for plaintiff's discharge. The court held that the employer was entitled to a directed verdict on the claim for special damages. It would have been mere speculation to permit the jury to infer that plaintiff's inability to get a new job for five months was due to the defamatory statement to the employees.<sup>142</sup> In *Calero v. Del Chemical Corp.*,<sup>143</sup> however, an employee established the necessary legal cause against his former employer whose defamatory statements to new or prospective employers after his discharge made it difficult for him to find or keep work.<sup>144</sup>

Under the Restatement view, the maker of a libelous statement is subject to general damages even though "no special harm results from the publication."<sup>145</sup> Because of the distinction between slander per se and slander per quod, some states have developed similar categories for libel.<sup>146</sup> Although the effect of the distinction between "per se" and "per quod" on the need for proof of damages is identical to that involving slander, the two are defined differently in the libel context. A statement is libel per se only if its defamatory meaning is apparent on its face and without reference to extrinsic facts.<sup>147</sup> Such statements need not fit into any of the four categories of slander per se. In recent years, many courts have merged the categories of words that constitute libel per se with the four that, at common law, are slander per se.<sup>148</sup> As with cases of slander per quod, states that recognize libel per quod require proof of special harm.<sup>149</sup>

Instead of compensatory damages, a jury may award an employee nominal damages<sup>150</sup> "when the insignificant character of the defamatory

141. 62 Or. App. 698, 662 P.2d 760, *modified on other grounds*, 63 Or. App. 672, 667 P.2d 532, *petition denied*, 295 Or. 730, 670 P.2d 1035 (1983).

142. *Id.* at 709, 662 P.2d at 765.

143. 68 Wis. 487, 228 N.W.2d 737 (1975).

144. *Id.* at 494, 228 N.W.2d at 742.

145. RESTATEMENT (SECOND) OF TORTS § 569 (1977).

146. RESTATEMENT (SECOND) OF TORTS § 569 comment b (1977); *see* Lawrence v. Bauer Publishing & Printing Ltd., 89 N.J. 451, 446 A.2d 469 (1982).

147. *See* Leese v. Baltimore County, 64 Md. App. 442, 497 A.2d 159, *cert. denied*, 305 Md. 106, 501 A.2d 845 (1985); *Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1 (Minn. 1984); *Murphy v. Johns-Manville Prod. Corp.*, 45 N.J. Super. 478, 133 A.2d 34 (1957); *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562 (Tex. Ct. App. 1983), *rev'd in part*, 704 S.W.2d 742 (Tex. 1986).

148. *See* Hollander v. Pan Am. World Airways, Inc., 382 F. Supp. 96 (D. Md. 1973); *Battista v. United Illuminating Co.*, 10 Conn. App. 486, 523 A.2d 1356 (1987); *Smith v. UAW-CIO Fed. Credit Union*, 728 S.W.2d 679 (Mo. Ct. App. 1987).

149. *See* *Georgia-Pacific Corp. v. First Wisconsin Fin. Corp.*, 625 F. Supp. 108 (N.D. Ill. 1985); CAL. CIV. CODE § 45a (West 1982) ("A libel which is defamatory . . . without the necessity of explanatory matter . . . is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves . . . special damage").

150. RESTATEMENT (SECOND) OF TORTS § 620 (1977). For a discussion of nominal damages, *see* R. SMOLLA, *supra* note 121, § 9.02, at 9-4 to 9-6; PROSSER & KEETON, *supra* note 84, § 116A, at 845.

matter, or the plaintiff's bad character, leads the jury to believe that no substantial harm has been done to his reputation, and there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation."<sup>151</sup> Nominal damages are important because they may result in an award of costs and vindication of an employee's character and may support an award of punitive damages.<sup>152</sup>

Supreme Court decisions have altered the requirements for recovering punitive damages in defamation cases. In *Gertz*, the Court prohibited states from allowing recovery of "presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."<sup>153</sup> The Court in *Dun & Bradstreet*, however, held that a plaintiff may recover presumed and punitive damages without a showing of "actual malice" in cases in which the defamatory statement does not involve a matter of public concern.<sup>154</sup> Since most workplace defamation actions involve purely private issues, *Dun & Bradstreet* may open the door to the award of punitive damages in more cases.

Notwithstanding the general categories of damages, the tort of defamation is concerned with injury to the plaintiff's reputation and all damage must result from the injury to that reputation. An employee must suffer injury due to his impaired reputation and not from his own reaction to hearing the statement.<sup>155</sup> Thus, evidence of reputation may be admissible when a court would exclude it in other types of actions.<sup>156</sup> Since the employee is recovering for damage to his reputation, evidence about his reputation before and after publication will affect recoverable damages.

#### F. Defenses: Truth, Consent, and Privileges

Once an employee has established a prima facie case of libel or slander, several defenses may be available to the employer. These include the truth of the statement, the employee's consent to the making of it, and the existence of an absolute or qualified privilege. The validity, definition, and extent of these defenses vary widely from state to state.

151. RESTATEMENT (SECOND) OF TORTS § 620 comment a (1977).

152. See PROSSER & KEETON, *supra* note 84, § 116A, at 845.

153. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), *appeal after remand*, 680 F.2d 527 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

154. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

155. See *Shirley v. Freuncht*, 303 Or. 234, 735 P.2d 600 (1987); *Handley v. May*, 588 S.W.2d 772 (Tenn. Ct. App. 1979).

156. In *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982), the court stated that "damages to one's reputation is the essence and gravamen of an action for defamation" and that "plaintiff in an action for defamation must first offer proof of harm to reputation." *Id.* at 6-7, 649 P.2d at 1243-44.

## 1. Truth

At common law, truth is an absolute defense in defamation actions.<sup>157</sup> If an employee brings an action based upon an accusation of theft, proof of the theft provides an absolute bar to recovery. An important limitation on this defense is that an employer's good faith belief in the truth of the statement is not sufficient since the statement must in fact be true.<sup>158</sup> Conversely, truth is an absolute defense even if the employer believed the statement to be false when he or she made it.<sup>159</sup>

While in the past courts required that the statement be completely, and not just partially, true, the modern trend is toward finding that substantial truth is sufficient.<sup>160</sup> Nevertheless, an employer is not protected by qualifying a statement, attributing it to another, or stating a disbelief in it.<sup>161</sup> Because truth is often difficult to prove to the satisfaction of a jury, especially if the statement concerned a subjective evaluation of the employee's abilities, it is, in reality, an imperfect defense.

## 2. Consent

An employee's consent to the publication of defamatory material is also a bar to recovery.<sup>162</sup> Courts have held that union membership and

157. See *Watkins v. Laser/Print Atlanta, Inc.*, 183 Ga. App. 172, 358 S.E.2d 477 (1987); RESTATEMENT (SECOND) OF TORTS § 581A (1977); Youm, *Truth as a Libel Defense in the United States: Its Judicial Origin and Statutory Status*, 16 ANGLO-AM. L. REV. 38 (1987). Some states also provide by statute that truth is an absolute defense in a defamation action. *E.g.*, OHIO REV. CODE ANN. § 2739.02 (Page 1988). Article I, section 4 of the Illinois State Constitution qualifies the absolute defense of truth by stating: "In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense." ILL. CONST. art. I, § 4. In *Farnsworth v. Tribune Co.*, 43 Ill. 2d 286, 253 N.E.2d 408 (1969), the Illinois Supreme Court held this qualification to be unconstitutional when the plaintiff is a public official or public figure. That decision was interpreted in *Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046, 340 N.E.2d 539 (1975), and held to be inapplicable to a purely private plaintiff. If *Dun & Bradstreet* means that the first amendment is of lesser importance in defamation actions involving private individuals, then the Illinois constitutional limitation on the defense of truth could be applied in most workplace defamation cases. *But see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (common law rule that defendant bears burden of proving truth unconstitutional in an action by a private figure against a media defendant regarding a matter of public concern).

158. See RESTATEMENT (SECOND) OF TORTS § 581A comment h (1977); *Rainey v. Shaffer*, 8 Ohio App. 3d 262, 456 N.E.2d 1328 (1983).

159. RESTATEMENT (SECOND) OF TORTS § 581A comment h (1977).

160. PROSSER & KEETON, *supra* note 84, § 116, at 842; R. SMOLLA, *supra* note 121, at 5.08, at 5-9 to 5-11.

161. *Theiss v. Scherer*, 396 F.2d 646 (6th Cir. 1968); *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *cert. denied sub nom. Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985).

162. RESTATEMENT (SECOND) OF TORTS § 583 (1977), states that "the consent <https://scholarship.law.missouri.edu/mlr/vol54/iss4/1>

the terms of a collective bargaining agreement constitute consent to a statement of the reasons for an employee's dismissal sent by the employer to the union.<sup>163</sup> Similarly, some employment contracts require that an employer send written notices of an employee's performance to those with the responsibility for making decisions for retention, promotion, discharge, or discipline. An employee who is a party to the contract may be held to have consented to the publication of those notices.<sup>164</sup>

Closely allied to the defense of consent is that of "invited publication" which, depending upon the jurisdiction, a court may view either as negating the element of publication in the employee's prima facie case or as constituting a separate affirmative defense.<sup>165</sup> Although a court cannot hold an employer liable if the employee invited publication of the statements, the courts disagree about the exact nature of the invitation necessary to preclude recovery.

Most courts require that the employee not only have invited the publication, but also that he knew or should have known that the statement would be defamatory. In *Georgia Power Co. v. Busbin*,<sup>166</sup> the plaintiff was discharged after a company audit disclosed some discrepancies in the handling of funds. Later, the plaintiff met with a former co-worker and, in the presence of his wife, asked him about a staff meeting at which the audit was discussed. The co-worker responded that the audit report showed a "misappropriation of company funds."<sup>167</sup>

The Supreme Court of Georgia found that the statements were not actionable since an employee cannot recover for an invited publication.<sup>168</sup> The court stated that "it is enough that the complainant requests or consents to the presence of a third party and solicits the publication of matter which he knows or has reasonable cause to suspect will be unfavorable to him."<sup>169</sup> Since the plaintiff must have known about the unfavorable cir-

of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation." *Id.*; see *Morton v. Hartigan*, 145 Ill. App. 3d 417, 495 N.E.2d 1159 (1986).

163. *Holloman v. Rutman Wine Co.*, 11 Ohio App. 3d 257, 464 N.E.2d 180 (1983).

164. *Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247 (1986), *aff'd*, 516 Pa. 291, 532 A.2d 399 (1987).

165. See *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549 (11th Cir. 1984) (no publication), *superseded by*, 825 F.2d 1506 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988); *Georgia Power Co. v. Busbin*, 249 Ga. 180, 289 S.E.2d 514 (1980) (affirmative defense), *appeal on removal*, 162 Ga. App. 255, 191 S.E.2d 260 (1982); *Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 671 P.2d 662 (Ct. App.) (affirmative defense), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612 (Tex. Ct. App. 1984) (no publication), *cert. denied*, 472 U.S. 1009 (1985).

166. 249 Ga. 180, 289 S.E.2d 514 (1982).

167. *Id.* at 181, 289 S.E.2d at 515.

168. *Id.*

169. *Id.* at 182, 289 S.E.2d at 515.

cumstances surrounding his discharge, the court held that he had consented to the publication and, therefore, could not recover.<sup>170</sup>

In *Frank B. Hall & Co. v. Buck*,<sup>171</sup> a discharged employee hired a private detective to pose as an investigator for another firm which was considering hiring him to discover the true reasons for his termination. The defendant employer informed the investigator that the plaintiff was "a classic sociopath," "a zero," and "a Jekyll and Hyde person" who was "lacking in compuncture or scruples."<sup>172</sup> The Texas court found that the plaintiff could recover for the comments since he did not know that they would be defamatory. Moreover, he did not use the investigator to create a cause of action.<sup>173</sup> The court further stated that "a statement is not published if it was authorized, invited or procured and [the plaintiff] knew in advance the contents."<sup>174</sup>

In a minority of jurisdictions, an employee who permits the publication of any statement consents to the publication of even defamatory material of which he was unaware. In *Litman v. Massachusetts Mutual Life Insurance Co.*,<sup>175</sup> an employee discharged by the company authorized prospective employers to check on his past work record. The company told these prospective employers that the employee had not paid his business debts.<sup>176</sup> Although it found the former employer's statements to be slanderous, the Eleventh Circuit denied recovery. It stated that the employee had invited the defamatory publication by giving prospective employers the right to investigate his work record.<sup>177</sup>

Similarly, in *Williams v. School District*,<sup>178</sup> the school district denied a non-tenured teacher reemployment. After she requested the reasons at a Board of Education meeting, the defendant stated "that plaintiff had disobeyed school rules and regulations; that plaintiff was insufficient and inadequate with her students."<sup>179</sup> Although it found that the statements were slanderous per se, the Supreme Court of Missouri held that the plaintiff could not recover. She had requested a statement of the reasons

170. *Id.* at 182-83, 289 S.E.2d at 515; see also *Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 671 P.2d 662 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983); *Duncantell v. Universal Life Ins.*, 446 S.W.2d 943 (Tex. Ct. App. 1969).

171. 678 S.W.2d 612 (Tex Ct. App. 1984), *cert. denied*, 472 U.S. 1009 (1985).

172. *Id.* at 617.

173. *Id.* at 617-18.

174. *Id.* at 617; see also *Lee v. Paulsen*, 273 Or. 103, 539 P.2d 1079 (1975); *Christensen v. Marvin*, 273 Or. 97, 539 P.2d 1082 (1975).

175. 739 F.2d 1549 (11th Cir. 1984).

176. *Id.* at 1555-56.

177. *Id.* at 1560-61.

178. 447 S.W.2d 256 (Mo. 1969).

179. *Id.* at 268.

for her discharge and, therefore, had consented to the defamatory material.<sup>180</sup>

### 3. Privileges

From an employer's standpoint, the most important defense to an employee's defamation action is a privilege. A privilege permits an employer to avoid liability in certain circumstances even though its statements were false and defamatory. Privileges may be either "absolute" or "qualified," and although absolute privileges give the employer better protection, qualified privileges are more common. The type of privilege that applies, if any, depends upon who made the statement, to whom it was made, and the circumstances under which it was made.

An absolute privilege is a complete bar to recovery.<sup>181</sup> Absolutely privileged statements are not actionable no matter how false they might be or how innocent or malicious the publication.<sup>182</sup>

An absolute privilege arises only in those narrow instances in which public policy dictates that a communication be completely free from the threat of liability.<sup>183</sup> Because of the complete bar to recovery, employers often argue that the importance of their activities justifies such an absolute privilege. Courts usually limit the absolute privilege, however, to communications made during legislative, judicial or administrative proceedings, official acts of chief executive officers of governmental bodies, and acts performed by the military.<sup>184</sup>

While courts generally limit an absolute privilege to certain essential governmental functions, when a private employer's cooperation is an integral part of that function, the employer also enjoys the absolute privilege. Thus, statements made to the Equal Employment Opportunity Commission<sup>185</sup> or

180. *Id.* at 269.

181. See PROSSER & KEETON, *supra* note 84, § 114, at 815-16.

182. *Id.*

183. For a discussion of the sources and application of this policy, see Bigelow v. Brumley, 138 Ohio St. 574, 579, 37 N.E.2d 584, 588 (1941); L. ELDRIDGE, THE LAW OF DEFAMATION § 72 (1978).

184. See RESTATEMENT (SECOND) OF TORTS §§ 585-591 (1977); PROSSER & KEETON, *supra* note 84, § 114, at 816-23; R. SMOLLA, *supra* note 121, §§ 8.03-8.06, at 8-6 to 8-19. In Kalish v. Illinois Educ. Ass'n, 157 Ill. App. 3d 969, 510 N.E.2d 1103, *appeal denied*, 116 Ill. 2d 559, 515 N.E.2d 109 (1987), the court held that a letter from a former employer to the Character and Fitness Committee of the Illinois Supreme Court concerning an applicant for admission to the bar was absolutely privileged because the Character and Fitness Committee is a quasi-judicial body. Similarly, in Webster v. Byrd, 494 So. 2d 31 (Ala. 1986), the court held that a letter written by a college president to serve notice of the proposed termination of a tenured professor was absolutely privileged as communication made in the course of a quasi-judicial proceeding.

185. See Paros v. Hoemako Hosp., 140 Ariz. 335, 681 P.2d 918 (1984); Thomas v. Petrulis, 125 Ill. App. 3d 415, 465 N.E.2d 1059 (1984).

during an appeals proceeding before the United States Civil Service Commission<sup>186</sup> have been held absolutely privileged.

A qualified privilege arises from the need to balance the interest of protecting an individual's reputation against the interest of the person making the statement.<sup>187</sup> The common law recognizes a qualified privilege for statements made for the protection of the publisher's interest,<sup>188</sup> the protection of interests of third parties,<sup>189</sup> the protection of a common interest,<sup>190</sup> and communications to a person who may act in the public interest.<sup>191</sup>

#### a. Abuse of Privilege

If absolute privilege applies, the statement cannot be the basis of liability in a defamation action, regardless of the motive or lack of good faith of the maker.<sup>192</sup> By contrast, an employer will lose a qualified privilege if the employee can show that the employer made the statement with the requisite malice<sup>193</sup> or communicated the statement to a person who did not have a corresponding interest or duty in receiving the information.<sup>194</sup>

States differ on whether the malice required to overcome a qualified privilege is the actual malice standard of *New York Times Co. v. Sullivan*<sup>195</sup>

186. *Love v. Snyder*, 184 F.2d 840 (6th Cir. 1950).

187. See L. ELDRIDGE, *supra* note 183, at 448-50.

188. See RESTATEMENT (SECOND) OF TORTS § 594 (1977).

189. See *Troxler v. Charter Mandala Center, Inc.*, 89 N.C. App. 268, 365 S.E.2d 665, *review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988); RESTATEMENT (SECOND) OF TORTS § 595 (1977). In *Judge v. Rockford Memorial Hosp.*, 17 Ill. App. 2d 365, 150 N.E.2d 202 (1958), a hospital had a qualified privilege to report to a nurses' professional registry that a former nurse at the hospital had been discharged after narcotics had been lost while she was on duty. The court said the hospital had an interest or duty to inform the organization of its good faith belief about the nurse's conduct since the registry assigned its members to patients care. *Id.* at 377, 150 N.E.2d at 209.

190. *Price v. Conoco, Inc.*, 748 P.2d 349 (Colo. Ct. App. 1987); RESTATEMENT (SECOND) OF TORTS § 596 (1977).

191. RESTATEMENT (SECOND) OF TORTS § 598 (1977); see *Buechele v. St. Mary's Hosp. Decatur*, 156 Ill. App. 3d 637, 509 N.E.2d 744 (1987), in which the court held that an allegedly defamatory statement contained in a report on a nurse sent to the Illinois Department of Registration and Education was protected by a qualified privilege.

192. *Wrenn v. Ohio Dep't of Mental Health & Mental Retardation*, 16 Ohio App. 3d 160, 474 N.E.2d 1201 (1984).

193. See *Babb v. Minder*, 806 F.2d 749 (7th Cir. 1986); *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655 (Minn. 1987); *Arnold v. Sharpe*, 37 N.C. App. 506, 246 S.E.2d 556 (1978), *rev'd*, 296 N.C. 533, 251 S.E.2d 452 (1979).

194. See *Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046, 340 N.E.2d 539 (1975); *Marathon Oil Co. v. Salazar*, 682 S.W.2d 624 (Tex. Ct. App. 1984); RESTATEMENT (SECOND) OF TORTS § 604 (1977); R. SMOLLA, *supra* note 121, § 8.09[1], at 8-31.

195. 376 U.S. 254 (1964).

or the standard used at common law. Some states use the *New York Times* standard of actual malice, which requires that the employee prove the employer's knowledge of the defamatory falsehood or reckless disregard of the truth or falsity of the statement.<sup>196</sup>

The common law, however, historically followed a broader definition of the type of malice necessary to defeat a qualified privilege, a definition that goes beyond the narrow scienter limitations of *New York Times*.<sup>197</sup> The Illinois Supreme Court, for example, has stated that mere negligence in making a defamatory statement, that is, making a defamatory statement with "no reasonable grounds for believing it to be true" is sufficient to defeat a qualified privilege even though mere negligence does not rise to the level of the *New York Times* standard.<sup>198</sup> Illinois courts also have held that "ill-will, evil motive, intention to injure without just cause or excuse, or by a wanton disregard of another's rights,"<sup>199</sup> knowledge of the falsity of a statement, and recklessness are all sufficient to defeat a qualified privilege.<sup>200</sup>

A second means by which an employee may overcome a qualified privilege is to show that the employer communicated the statement to persons with no legitimate interest in receiving it or that it included unprivileged defamatory matter.<sup>201</sup> For example, in *Dillard Dep't Stores, Inc. v. Felton*<sup>202</sup> the employee introduced evidence that a company supervisor told certain other employees that he was "fired because he was caught stealing." The court held the privilege was inapplicable because the other employees did not have "an important interest affected by the investigation."<sup>203</sup>

### b. Privileges Arising in the Workplace

#### i. Statements to an Employee's Supervisor

A privilege may cover statements made, within a corporation, to an employee's supervisor because of the superior's interest in the employee's

196. See *Snodgrass v. Headco Indus., Inc.*, 640 S.W.2d 147 (Mo. Ct. App. 1982); *Hahn v. Kotten*, 43 Ohio St. 2d 237, 331 N.E.2d 713 (1975); RESTATEMENT (SECOND) OF TORTS § 600 (1977).

197. See PROSSER & KEETON, *supra* note 84, § 115, at 833-35.

198. *Zeinfeld v. Hayes Freight Lines*, 41 Ill. 2d 345, 350, 243 N.E.2d 217, 221 (1968).

199. *Bloomfield v. Retail Credit Co.*, 14 Ill. App. 3d 158, 167, 302 N.E.2d 88, 95 (1973).

200. *Coffey v. Mackay*, 2 Ill. App. 3d 802, 808-09, 277 N.E.2d 748, 752-53 (1972).

201. RESTATEMENT (SECOND) OF TORTS § 595 (1977); see *Benassi v. Georgia-Pacific*, 62 Or. App. 698, 662 P.2d 760 (1983).

202. 276 Ark. 304, 309, 634 S.W.2d 135, 137-38 (1988).

203. *Id.* at 309, 634 S.W.2d at 137-38.



conduct and performance.<sup>204</sup> Because of the essential nature of such information, a qualified privilege for statements to supervisors is a virtual necessity.

Employee performance evaluations are a frequent source of defamation litigation. Since no employer can evaluate all of its employees perfectly, the threat of defamation actions could easily stifle any meaningful assessment of employee performance. In *Petroni v Board of Regents*,<sup>205</sup> the Court of Appeals of Arizona found that negative statements made in a report evaluating the plaintiff, an instructor at a state university, were absolutely privileged because public officials made the statements in the course of their duties.<sup>206</sup> The court set out the policy behind this privilege:

Decisions on the granting of academic tenure necessarily have a long range effect on the character of the state's educational institutions. If the officials responsible for recommending whether a permanent position should be granted are exposed each time they made a negative evaluation to the possibility of a jury trial on their motives and the truthfulness of their statements or the accuracy of their opinions, the risk inherent in all but the most extreme cases would tend to deprive the governing body of the candor essential to an accurate appraisal of the applicant's qualifications.<sup>207</sup>

Although this justification is equally applicable to employee performance evaluations in private enterprise, courts have held that only a qualified privilege exists. In *Caslin v. General Electric Co.*,<sup>208</sup> an employee objected to below-average ratings given him in various performance appraisals. The Kentucky Court of Appeals found that the plaintiff knew the evaluations were a condition of employment and that the company would rate him periodically on his efficiency.<sup>209</sup> The court concluded that a qualified privilege protected the appraisals and noted that "these reports are communications within the employing company which are necessary to its functioning and, therefore, do not incur a liability to [the employee]."<sup>210</sup>

The policy considerations which give rise to a qualified privilege for job evaluations support such a privilege for other types of statements to

204. See *Cashio v. Holt*, 425 So. 2d 820 (La. Ct. App. 1982), writ denied, 430 So. 2d 94 (La. 1983); *Evely v. Carlon Co.*, 4 Ohio St. 3d 163, 447 N.E.2d 1290 (1983); *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934 (Tex. Ct. App. 1969).

205. 115 Ariz. 562, 566 P.2d 1038 (1977).

206. *Id.* at 565, 566 P.2d at 1042. The court noted that even if not absolutely privileged, the evaluation would be subject to a qualified privilege since it was relied upon by the university in deciding to deny the plaintiff tenure. *Id.*

207. *Id.* at 565, 566 P.2d at 1041; accord *Benson v. Hall*, 339 So. 2d 570 (Miss. 1976).

208. 608 S.W.2d 69 (Ky. Ct. App. 1980).

209. *Id.* at 70.

210. *Id.*; accord *Southland Corp. v. Garren*, 138 Ga. App. 246, 225 S.E.2d 920, rev'd, 237 Ga. 484, 228 S.E.2d 870 (1976); *Noble v. Creative Technical Serv., Inc.*, 126 A.D.2d 611, 511 N.Y.S.2d 51 (1987).

persons having responsibility for the performance and discipline of employees. These have included communications to personnel departments,<sup>211</sup> internal investigations of suspected misconduct,<sup>212</sup> crucial inter-office memoranda,<sup>213</sup> and accusations made by a doctor to an in-hospital peer group review committee.<sup>214</sup> Courts have also applied this privilege to a local union officer's report to the executive board of the international union which included charges against a local union organizer.<sup>215</sup>

## ii. Statements to an Employee's Co-Workers

The application of a qualified privilege to a communication by an employer to his employees about the reasons for a co-employee's discharge depends upon whether the employer made the statement to protect his legitimate interests.<sup>216</sup> Courts have recognized a limited privilege of disclosure to co-workers who need to know because they are affected directly by the employee's termination or by the investigation which led to the discharge.<sup>217</sup>

Employee morale was insufficient to justify statements to co-workers in *Sias v. General Motors Corp.*<sup>218</sup> in which the corporation accused a plant guard of "misappropriation" of company property. The guard agreed to resign. To stop rumors that the corporation had discharged the guard for economic reasons, it disclosed the true cause to several other guards.<sup>219</sup> Although the statements served the employer's interests in restoring employee morale, the Supreme Court of Michigan held that interest was not sufficient to justify extending the privilege to persons who were not supervisors, personnel department representatives, or company officials and who did

211. See *Fawcett v. G. C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976).

212. See *Porterfield v. Burger King Corp.*, 540 F.2d 398 (8th Cir. 1976); *Fascian v. Bratz*, 96 Ill. App. 3d 367, 421 N.E.2d 409 (1981); *McBride v. Sears, Roebuck & Co.*, 306 Minn. 93, 235 N.W.2d 371 (1975).

213. *Kamberos v. Schuster*, 132 Ill. App. 2d 392, 270 N.E.2d 182 (1971).

214. See *Spencer v. Community Hosp.*, Ill. App. 3d 214, 408 N.E.2d 981 (1980); *Atkins v. Walker*, 3 Ohio App. 3d 427, 445 N.E.2d 1132 (1981).

215. *Jamison v. Rebenson*, 21 Ill. App. 2d 364, 158 N.E.2d 82 (1959).

216. See *McKenna v. Mansfield Leland Hotel Co.*, 55 Ohio App. 163, 168, 9 N.E.2d 166, 169 (1936).

217. See *Gonzalez v. Avon Prods., Inc.*, 648 F. Supp. 1404 (D. Del. 1986), *aff'd*, 822 F.2d 53 (3d Cir. 1987); *Krochalis v. Insurance Co. of N. Am.*, 629 F. Supp. 1360 (E.D. Pa. 1985); *Deaile v. General Tel. Co.*, 40 Cal. App. 3d 841, 115 Cal. Rptr. 582 (1974); *Jones v. J. C. Penney Co.*, 164 Ga. App. 432, 297 S.E.2d 339 (1982); *Vlasaty v. Pacific Club*, 4 Haw. App. 556, 670 P.2d 827 (1983); *Poledna v. Bendix Aviation Corp.*, 360 Mich. 129, 103 N.W.2d 789 (1960); *Zuniga v. Sears, Roebuck & Co.*, 100 N.M. 414, 671 P.2d 662 (Ct. App.) *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983); *Kroger Co. v. Young*, 210 Va. 564, 172 S.E.2d 720 (1970).

218. 372 Mich. 542, 127 N.W.2d 357 (1964).

219. *Id.* at 547, 127 N.W.2d at 360.

not have a significant right to know the facts behind the guard's departure.<sup>220</sup>

The court in *Garziano v. E.I. Du Pont De Nemours & Co.*,<sup>221</sup> reviewed, in detail, the reasons for a qualified privilege for statements to co-workers. In *Garziano*, an employer discharged an employee for sexual harassment. In response to rumors that began as a result of the firing, the company issued a memorandum to 140 supervisors who were told to relay the key points to all employees. The memorandum referred to the firing but did not mention the employee by name. It called the incident "a serious act of employee misconduct" that involved "deliberate, repeated, and unsolicited physical contact as well as significant verbal abuse."<sup>222</sup> It also discussed the Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment.<sup>223</sup>

The Fifth Circuit held that a qualified privilege protected the memorandum. The court found that the employer believed it had a legal duty to issue the memorandum; that the memorandum was necessary to inform the employees about its policy against sexual harassment; that co-workers had a legitimate interest in learning the reasons why the employer discharged a fellow worker; and that the employer had a legitimate interest in maintaining employee morale and protecting its business.<sup>224</sup> While the communication to the supervisors was reasonable, it was unclear whether their discussions of the memorandum with employees were reasonable since the discussions were not raised at trial. Thus, the court remanded the case to determine whether there was excessive publication which would amount to an abuse of the privilege.<sup>225</sup> The decision in *Garziano* demonstrates that even when an employer's or the public's interest justifies some publication to co-workers, the employer still must limit the number of persons informed and the amount of information given.

### iii. Statements to Outsiders

In some situations an employer may provide information about employees to persons outside the company. Whether a privilege protects these statements, and the scope of such a privilege, depends upon the type of employment, the nature of the communication, to whom the employer makes the statement, and whether the employer was under a duty to make it.

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220. *Id.*; see also *Drennen v. Westinghouse Elec. Corp.*, 328 So. 2d 52 (Fla. Dist. Ct. App. 1976); *Galvin v. New York, N. H. & H. R.R.*, 341 Mass. 293, 168 N.E.2d 262 (1960); *Romano v. United Buckingham Freight Lines*, 4 Wash. App. 929, 484 P.2d 450 (1971).

221. 818 F.2d 380 (5th Cir. 1987).

222. *Id.* at 384.

223. *Id.*

224. *Id.* at 391-93.

225. *Id.* at 394-96.

Statements made by public employers to the media concerning the reasons for terminating their employees may be protected by a qualified privilege. In *Wrenn v. Ohio Department of Mental Health & Mental Retardation*,<sup>226</sup> the plaintiff, a supervisor at a state mental health center, was terminated because of the high ratio of overtime hours and high turnover in comparison to other departments. The mental health center sent a statement to that effect to the local newspapers which published it. The Ohio Court of Appeals held that a qualified privilege protected the statements because of a public interest in releasing the information to the press. Since the hospital was part of the mental health community, the court found that the public had an interest in knowing the reasons for the termination of a key employee.<sup>227</sup>

Private employers do not share the same protection in communications with the press because of the lesser public interest. In *Brown v. First National Bank*,<sup>228</sup> a bank reported the disappearance of small sums of money to a local newspaper, stating that the bank had suspended an unnamed employee. When the employee brought a defamation action, the Supreme Court of Iowa found no privilege. Although the shortage might have been of public interest, the court felt the bank should have reported it to the proper authorities rather than the media.<sup>229</sup>

Statements by an employer to its customers concerning the reasons for an employee's discharge are protected by a qualified privilege if made in good faith and in a manner designed to protect a legitimate interest of the employer. In *Casale v. Dooner Laboratories, Inc.*,<sup>230</sup> a company found that shortly after it discharged the plaintiff someone was spreading rumors that it was going out of business. To combat these rumors, the company sent letters to its customers denying them and attributing them to "vindictive tactics."<sup>231</sup> The Fourth Circuit held that a qualified privilege covered the letter because it protected an important interest of the company and the customers' knowledge helped to protect that interest.<sup>232</sup>

An employer who reports illegal activity to governmental agencies may also fall within a privilege. For example, there is a qualified privilege for information given by an employer to governmental agencies to assist in

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226. 16 Ohio App. 3d 160, 474 N.E.2d 1201 (1984).

227. *Id.* at 165, 474 N.E.2d at 1205-06; *accord* Fairbanks Publishing Co. v. Francisco, 390 P.2d 784 (Alaska 1964).

228. 193 N.W.2d 547 (Iowa 1972).

229. *Id.* at 553; *see also* Miller v. Lear Siegler, Inc., 525 F. Supp. 46 (D. Kan. 1981).

230. 503 F.2d 303 (4th Cir. 1973).

231. *Id.* at 305.

232. *Id.* at 309. *But c.f.* M. F. Peterson Dental Supply Co. v. Wadley, 401 F.2d 167 (10th Cir. 1968) (letter informing customers that plaintiff had been released from defendant's employment implied that he was unfit for his position and guilty of unspecified misconduct).

the prevention of a crime, even if the employer has no reasonable grounds for his suspicions.<sup>233</sup>

Some reports to governmental agencies concerning possible illegal conduct may be absolutely privileged. In *Becker v. Philco Corp.*,<sup>234</sup> a group of employees brought an action for libel against a defense contractor who reported to the Defense Department, as required by law, his suspicion that the employees had compromised state secrets. The Fourth Circuit held that an absolute privilege protected the report because the employer was performing a governmental function.<sup>235</sup> Similarly, courts have held statements made to a state board of liquor control as required by law,<sup>236</sup> reports to a state unemployment agency concerning the reasons for an employee's discharge,<sup>237</sup> and communications to the Equal Employment Opportunity Commission concerning a charge of discrimination<sup>238</sup> absolutely privileged. If the employer is not required to make the report to the government agency, however, the statements may only be qualifiedly privileged.<sup>239</sup>

There are certain situations in which communication to persons outside a company will trigger constitutional scrutiny. In *In re IBP Confidential Business Documents Litigation*,<sup>240</sup> a former employee of the defendant company testified about the company's pricing and marketing practices during the course of a congressional investigation into the meat-packing industry. The company responded to the subcommittee with a detailed letter which accused the former employee of stealing documents in violation of his termination agreement and of perjuring himself.<sup>241</sup> When the subcommittee refused to accept the letter, the company circulated it to the media, to the company's officers, to the meat-packing industry and to others who expressed interest.<sup>242</sup>

233. See *Paramount Supply Co. v. Sherlin Corp.*, 16 Ohio App. 3d 176, 475 N.E.2d 197 (1984).

234. 234 F. Supp. 10 (E.D. Va. 1964), *aff'd*, 372 F.2d 771 (4th Cir.), *cert. denied*, 389 U.S. 979 (1967).

235. *Becker v. Philco Corp.*, 372 F.2d 771, 774 (4th Cir. 1967).

236. See *Shade v. Bowers*, 199 N.E.2d 131 (1962).

237. See *Petyan v. Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986); *Wolf v. First Nat'l Bank*, 20 Ohio Op. 3d 262 (C.P. 1980). However, in *Sanders v. Stewart*, 157 Ind. App. 74, 298 N.E.2d 509 (1973), the court held that statements made to the Indiana Employment Security Division were only protected by a qualified privilege.

238. See *Thomas v. Petruilis*, 125 Ill. App. 3d 415, 465 N.E.2d 1059 (1984).

239. See *Landrum v. Dombey*, 30 Ohio App. 2d 200, 284 N.E.2d 183 (1971) (statement to a state superintendent of banks was not absolutely privileged because the law imposed no duty to communicate).

240. 755 F.2d 1300 (8th Cir. 1985), *on reh'g*, 797 F.2d 632 (8th Cir.) (en banc), *reh'g denied*, 800 F.2d 787 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

241. *Id.* at 1304-08.

242. *Id.* at 1308-09.

The former employee filed an action for libel and for tortious interference with contractual relations.<sup>243</sup> The jury awarded the former employee six million dollars in compensatory and punitive damages.<sup>244</sup> The Eighth Circuit, en banc, found that the company's act of sending the letter to Congress and to third persons constituted a petitioning of the government.<sup>245</sup> This "petitioning" did not entitle the activity to an absolute privilege, but required the employee to prove that the statement was both false and made with actual malice.<sup>246</sup> The court reversed the libel judgment and remanded the case for a determination of falsity and the existence of actual malice.<sup>247</sup>

Employers bear the risk of litigation, if not always liability, when they give out information about current or former employees in response to reference requests. Sometimes a qualified privilege protects a former employer who provides information relevant to a prospective employer's hiring decision. If someone within the former employer's organization who can evaluate the employee gives the reference to someone who has a legitimate interest in the information, a qualified privilege protects it.<sup>248</sup>

The court in *Alford v. Georgia-Pacific Corp.*<sup>249</sup> articulated the policy underlying the application of a qualified privilege to inquiries from potential employers. In *Alford*, the Court of Appeals of Louisiana held privileged the response of a former employer to an inquiry of a prospective employer that the employee was a very good engineer but lacked supervisory ability.

We feel that it would be an undue burden to place on employers and would hopelessly hinder the free exchange of opinion between them if the law did not afford some form of protection. To hold otherwise would either tend to stifle communication of qualification and character evaluations, inherently subjective in nature, or alternatively, would breed deception in its wake. This we cannot condone as we feel community and societal interest dictate otherwise.<sup>250</sup>

243. *Id.* at 1302.

244. *Id.* at 1302 n.3.

245. *In re IBP Confidential Business Documents Litig.*, 797 F.2d 632, 640-42 (8th Cir. 1986) (en banc).

246. *Id.* at 642.

247. *Id.* at 648.

248. *Sindorf v. Jacron Sales Co.*, 27 Md. App. 53, 341 A.2d 856 (1974); *Rainey v. Shaffer*, 8 Ohio App. 3d 262, 456 N.E.2d 1328 (1983); *Duncantell v. Universal Life Ins. Co.*, 446 S.W.2d 934 (Tex. Ct. App. 1969).

Statements that an employee has personality problems, *Carroll v. Owen*, 178 Mich. 551, 146 N.W.2d 168 (1914), has questionable qualifications or morals, *Zuscheck v. Whitmoyer Laboratories, Inc.*, 430 F. Supp. 1163 (E.D. Pa. 1977), or was disloyal, *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975), have been held protected by a qualified privilege.

The privilege has also been applied to statements made by a union to which an employee formerly belonged in response to an inquiry from an affiliated union concerning the employee's application for membership. *Meyer v. Spohnholtz*, 11 Ill. App. 3d 560, 297 N.E.2d 183 (1973).

249. 331 So. 2d 558 (La. Ct. App.), *cert. denied*, 334 So. 2d 247 (1976).

250. *Id.* at 562.

Employee references present a hazard to employers. The virtually certain result of an adverse reference is that a prospective employer will refuse to give the employee a job. This greatly increases the foreseeability of special damage. Further, since the request for a reference is often oral, there is a poor record both of the actual information sought and the detail contained in the response. The response may also be given by an individual other than the company official responsible for such matters, creating additional uncertainty about the circumstances under which the individual communicated the statement and conveyed the specific facts.

The subjective perceptions of the listener, which may add the element of "reading between the lines" even to an innocuous statement may compound the evidentiary difficulties.<sup>251</sup> Consent forms provide limited protection since an employee may claim consent only to truthful, not slanderous statements. Courts may also be more sympathetic to the employee or more likely to find malice if the conditions surrounding the termination were unfriendly and the employer's response indicates continued hostility.

To protect themselves from defamation actions, many large employers have adopted a "name, rank and serial number" approach.<sup>252</sup> In response to a request for information about a former employee, these employers will only divulge the dates during which they employed the individual, the title, job responsibilities, and sometimes highest salary. Even when the former employee agrees to the release of additional information, many employers refuse to release information regarding the reasons for the employee's termination or whether they would rehire the employee.

The unwillingness of employers to provide information about former employees may shield them from defamation suits but it creates the potential for other litigation. For example, if an investigation reveals that an employee stole from an employer and the employer learns that the former employer discharged the employee for theft, the former employer may be faced with a negligence suit for failing to disclose that information. Although no reported cases against employers exist, courts have recognized a duty to disclose information about a person in other areas.<sup>253</sup> Similarly, if an

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251. See *M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968), in which a letter sent to customers was found to be defamatory because praise for the employee's replacement could be construed as criticism of prior employee.

252. See Prentice & Winslett, *Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207 (1987).

253. In *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334 (1976), the California court held that the special relationship between a psychologist and his patient created a duty to warn the intended victim of the danger threatened by the patient. The same court limited this duty in *Thompson v. County of Alameda*, 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728 (1980), by saying that the potential victims must be specifically known and

employer discharges an employee without giving any reasons for the termination, the employee may resort to litigation to discern the reasons or to challenge the perceived reasons for the discharge.<sup>254</sup>

iv. Statements by Persons Outside the Company

Persons outside a company may communicate privileged information to an employer when there is a common interest to protect. In *Creps v. Waltz*,<sup>255</sup> the plaintiff was privately employed as a licensed real estate broker and taught at Bowling Green University's Continuing Education Program. Several real estate brokers sent the university administration and the Ohio Association of Realtors Education Department a letter requesting that the university not permit the plaintiff to continue teaching because of her unethical and unprofessional real estate practices.<sup>256</sup> The Ohio Court of Appeals found that a qualified privilege protected the letter because the realtors had to work with those trained at Bowling Green and the university had an interest in maintaining the quality of its faculty.<sup>257</sup>

A qualified privilege also protects medical reports concerning employee fitness. These statements may include medical reports regarding workers' compensation claims<sup>258</sup> and reports by physicians requested by a state industrial commission to examine employees.<sup>259</sup>

An outsider may also have a qualified privilege to make statements to protect his own interests. In *West v. Peoples Banking & Trust Co.*,<sup>260</sup> a bank officer informed an employer that if he employed the plaintiff as manager of his business, the bank would not lend the business any money. The bank officer specifically accused the employee of selling appliances "out of trust" in prior transactions, prejudicing the bank's rights.<sup>261</sup> The Ohio Court of Appeals found that a qualified privilege covered the statements because of the importance of financing, the foreseeability that a bank would be consulted, and the employer's interest in obtaining financing.<sup>262</sup>

designated individuals. However, in *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980), the Nebraska court refused to make identifiability of the victim a precondition for an attempt to detain a patient. Using this rationale, a former employer could be under a duty to warn a potential employer of dangers presented by a prospective employee.

254. See *Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247 (1986) (breach of contract).

255. 5 Ohio App. 3d 213, 450 N.E.2d 716 (1982).

256. *Id.* at 214, 450 N.E.2d at 718.

257. *Id.* at 214-15, 450 N.E.2d at 718-19.

258. See *Beatty v. Baston*, 13 Ohio L. Abs. 481 (1932).

259. See *Willitzer v. McCloud*, 6 Ohio St. 3d 447, 453 N.E.2d 693 (1983).

260. 14 Ohio App. 2d 69, 236 N.E.2d 679 (1967).

261. *Id.* at 70, 236 N.E.2d at 680.

262. *Id.* at 73, 236 N.E.2d at 682.



## v. Statements by the Employee Himself

An employer is generally not liable for the republication of a defamatory statement made only to an employee<sup>263</sup> because the employee is held responsible for any harm that results from his own statements. Some courts, however, have held that the employer is liable if there is reason to believe that the employee will, at some point, be compelled to repeat the defamatory statement.<sup>264</sup>

In *Lewis v. Equitable Life Assurance Society*,<sup>265</sup> the employer discharged four employees for "gross insubordination" after they had refused to alter their expense reports to reflect company guidelines.<sup>266</sup> While answering questions in employment applications and during interviews, the employees told their prospective employers that their terminations were for gross insubordination.<sup>267</sup> The Supreme Court of Minnesota held that these statements constituted publication since the employer should reasonably have foreseen that prospective employers would eventually compel the employees to state the reasons for their terminations.<sup>268</sup> Although the employees were able to discuss the circumstances of their discharge, the court said that opportunities given by the employer to explain or refute the label did not erase the defamation.<sup>269</sup>

In response to the *Lewis* decision, Minnesota adopted legislation giving involuntarily terminated workers the right to be informed "in writing of the truthful reason for the termination."<sup>270</sup> An employee cannot use such

263. RESTATEMENT (SECOND) OF TORTS § 577 comment m (1977).

264. See *McKinney v. County of Santa Clara*, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980); *Colonial Stores, Inc. v. Barrett*, 73 Ga. App. 839, 38 S.E.2d 306 (1946); *Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982); *Grist v. Upjohn Co.*, 16 Mich. App. 452, 168 N.W.2d 389 (1969).

265. 389 N.W.2d 876 (Minn. 1986).

266. *Id.* at 881.

267. *Id.* at 882. Equitable did not publish or inform any of the prospective employers that the plaintiffs had been discharged for "gross insubordination." *Id.*

268. *Id.* at 886-88.

269. According to the court in *Lewis*:

The concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement when the originator knows, or should know of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages; in other words, in cases where the defamed person was compelled to publish the statement. In such circumstances the damages are fairly viewed as the direct result of the originator's actions.

*Id.* at 888; see also Langvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication*, 26 DUQ. L. REV. 227 (1987); Turner, *Compelled Self-Publication: How Discharge Begets Defamation*, 14 EMPLOYEE REL. L.J. (1989); Note, *Self-Publication of Defamation and Employee Discharge*, 6 REV. OF LITIGATION 313 (1987).

270. MINN. STAT. ANN. § 181.933(1) (West Supp. 1989).

a statement as the basis of a defamation action against the employer.<sup>271</sup> Since truth is a complete defense, an employer who confines his written statement to a truthful recitation of the factual details surrounding the termination will not be liable for defamation.

Even aside from the subsequent legislation, it is questionable whether the court decided *Lewis* correctly. The plaintiffs, when asked in interviews, need not have reported that they were discharged for gross insubordination, but could simply have stated that they were terminated for refusing to alter their expense accounts. If, in fact, the employer chose to refute that characterization, then liability might attach to the later statement, the one which actually inflicted the harm. As a policy matter, the decision will have the effect of discouraging frank evaluations of employees by making such comments actionable if an employee subsequently repeats them.

### III. DEFAMATION AND FEDERAL LAW

The most prominent feature of federal law in the workplace is the preemptive effect of the labor statutes, including the National Labor Relations Act (NLRA)<sup>272</sup> and the Railway Labor Act (RLA).<sup>273</sup> These statutes are significant not only for their direct effect on employment-related defamation actions, but also for their recognition of the potentially destructive force of such actions in the workplace. The constitution's strictures usually are not felt deeply in the workplace, but are no less important, because first amendment requirements have influenced state defamation law. Overall, federal law raises a janus spectre in the workplace, as it simultaneously complicates employment defamation actions and provides a potentially more predictable and fair means for resolving such disputes.

#### A. *Defamation Actions and Federal Labor Law*

The NLRA and RLA substantially affect workplace defamation actions. As a practical matter, the regulation of the collective bargaining process provides an informal means for the resolution of workplace disputes. These statutes may, therefore, serve to reduce the need for defamation actions in the unionized context. Still, a union organizing campaign or grievance procedure will very likely provide the opportunity for making defamatory statements.

Federal law protects statements made in these contexts and during other workplace disputes in the unionized setting. Most of this protection comes through the mechanism of federal preemption. The degree of preemption

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271. *Id.* § 181.933(2).

272. 29 U.S.C. §§ 151-168 (1982).

273. 45 U.S.C. §§ 151-188 (1982).

of a libel or slander claim in the unionized setting will differ depending upon the context in which the allegedly defamatory statements were made, such as during an organizing campaign, at an arbitration hearing, or simply between co-workers. The degree of preemption may also vary depending upon the specific statute involved, and the balancing of state, federal, and individual interests.

### 1. Defamation and Union Activity

The NLRA imposes additional requirements upon persons attempting to recover for statements made in the context of a labor dispute. While an employer, employee, or union may still bring suit for defamatory statements made during labor disputes like organizational campaigns, the NLRA, as construed by the courts, has limited the availability of state defamation remedies.

The Supreme Court has recognized that state defamation claims arising out of organizing campaigns may only proceed in a restricted fashion to avoid preemption. In *Linn v. Plant Guard Workers*,<sup>274</sup> a company manager brought a defamation claim based upon statements made by the union in a leaflet distributed during an organizational campaign. The Court found that the NLRA does not preempt state defamation actions because defamatory statements are only a "peripheral concern" of the Act, and because the states' interests in redressing defamation are "deeply rooted in local feeling and responsibility."<sup>275</sup> The Court recognized that strong language is a common occurrence during labor disputes and that the National Labor Relations Board (NLRB) permits this language primarily because the Board cannot prevent it without discouraging free expression of opinion.<sup>276</sup> To balance the state interest in protecting the reputation of its citizens and the policy of the NLRB in favor of essentially unlimited expression, the Court held that federal law does not preempt the statements made during labor disputes, but that such statements are actionable only when they are made with "actual malice" and there are actual damages.<sup>277</sup>

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274. 383 U.S. 53 (1966).

275. *Id.* at 59 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

276. *Id.* at 60.

277. *Id.* at 64-65. The Court said that this requirement was adopted by analogy from the standard in *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964), but was not of constitutional compulsion. *Linn*, 383 U.S. at 65. The United States, as amicus curiae, had asked the court to adopt a standard which would limit liability to "grave defamations," "those which accuse the defamed person of having engaged in criminal, homosexual, treasonable, or other infamous conduct." *Id.* at 65 n.7. The Court declined on the ground that such "artificial" characterizations would "encroach too heavily on state jurisdiction." *Id.* Justice Black dissented in *Linn*, believing that the threat of defamation actions and punitive

The Supreme Court further developed the "actual malice" standard for labor disputes in *National Association of Letter Carriers v. Austin*.<sup>278</sup> In *Austin*, the union began an effort to organize the remaining unrepresented postal workers. During its campaign, it published a newsletter containing the names of nonunion employees under the heading "List of Scabs" and repeated Jack London's colorful, derogatory definition of a scab.<sup>279</sup> When a group of employees named on the list filed an action for defamation, the trial court permitted recovery based upon the common law definition of malice.<sup>280</sup> The Supreme Court of Virginia affirmed, holding that *Linn* did not protect malicious statements, even in the labor context. The court found no constitutional compulsion to require the *New York Times* definition of actual malice.<sup>281</sup>

The United States Supreme Court reversed.<sup>282</sup> While it agreed with the trial court that *Linn* required a showing of actual malice, it took issue

damages arising out of labor disputes "tosses a monkey wrench into the collective bargaining machinery Congress set up to try to settle labor disputes." *Id.* at 67 (Black, J., dissenting). In *Farmer v. United Bhd. of Carpenters*, 430 U.S. 290, 298-99 (1977), the Court held that its holding in *Linn* was an exception to the general rule of preemption, and that the limitations placed on defamation actions in that case were necessary due to the limited scope of that exception. *See also* *Lowe Excavating Co. v. International Union of Operating Eng'rs*, 180 Ill. App. 3d 39, 535 N.E.2d 1065 (defamatory statement on picket signs actionable under *Linn* standard), *cert. denied*, 110 S.Ct 499 (1989).

278. 418 U.S. 264 (1974).

279. *The Scab*

After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.

A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles. When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has the right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*

*Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.*

*Id.* at 268.

280. *Id.* at 281.

281. *Old Dominion Branch No. 496, N.A.L.C. v. Austin*, 213 Va. 377, 382-84, 192 S.E.2d 737, 741-42 (1972).

282. *Austin*, 418 U.S. at 270.

with the trial court's definition of malice as "hatred, personal spite, ill will, or desire to injure . . . ." <sup>283</sup> The Court found that this definition incorrectly focused on the animosity between the parties and that what malice required was "knowledge of falsity or reckless disregard of the truth . . . ." <sup>284</sup> Thus, a plaintiff in a defamation action based upon statements made during organizational activity must show that the defendant made those statements with knowledge of falsehood or reckless disregard of the truth. <sup>285</sup> The decisions in *Linn* and *Austin*, while technically creating a limited exception for claims which federal law would otherwise have preempted, demonstrate partial preemption of those claims by altering their elements and evidentiary requirements.

While *Linn* and *Austin* set out a standard which is both broad and relatively easy to apply, litigation still results from statements made during labor disputes. Perhaps the most interesting issue currently addressed by the courts is liability for the continuing use of the word "scab." *Linn* itself rejected the potential for defamation claims based upon the word "scab." In discussing NLRB policy concerning the permissiveness of abusive language, the Court noted:

[I]n a number of cases, the Board has concluded that epithets such as "scab," "unfair," and "liar" are commonplace in these struggles and not so indefensible as to remove them from the protection of § 7, even though the statements are erroneous and defame one of the parties to the dispute. <sup>286</sup>

The Court recognized, however, that if such statements were made with actual malice, the NLRB would be considerably less tolerant. <sup>287</sup> It still found, however, that even "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." <sup>288</sup>

The word "scab" coupled with a derogatory definition in a union newsletter formed the basis of the action in *Austin*. <sup>289</sup> The Court found that "scab" could not form the basis of a state defamation action because federal law protects it in the context the defendant made it and, although insulting, was "literally and factually true." <sup>290</sup> The imputations of treason

283. *Id.* at 281.

284. *Id.*

285. See *Nage v. NFFE*, 844 F.2d 216 (5th Cir. 1988); *Hotel Employees v. Anaheim Operating Inc.*, 82 Cal. App. 3d 737, 147 Cal Rptr. 510 (1978); *Meuser v. Rocky Mountain Hosp.*, 685 P.2d 776 (Colo. Ct. App. 1984).

286. *Linn*, 383 U.S. at 60-61.

287. *Id.* at 61. The NLRB remains tolerant of abusive language. See *NLRB v. Container Corp. of Am.*, 649 F.2d 1213 (6th Cir. 1981) (implications that manager was a slave driver and that employees were treated like a "chain gang" were permissible); *Great Lakes Steel, Div. of Nat'l Steel Corp. v. NLRB*, 625 F.2d 131 (6th Cir. 1980) (accusation that an employer had engaged in "murder for profit" was permissible).

288. *Linn*, 383 U.S. at 63.

289. *Austin*, 418 U.S. at 268-69.

290. *Id.* at 282-83.

and other unpleasantries contained in the definition merely indicated the union's strong feelings and one could not construe them as representations of fact.<sup>291</sup> Thus, the union's statements were not actionable.<sup>292</sup>

The seemingly conclusive statements in *Linn* and *Austin* have not prevented defamation actions based upon intemperate language used in organizational campaigns. While generally these actions concern other conduct, as well as the use of the word "scab," the courts have uniformly rejected all such claims.

The word "scab" itself, as used in the labor context, is not actionable, either because it is true, because it is federally protected speech, or both.<sup>293</sup> Even when used with increasingly foul and intemperate language, as well as harassing conduct, epithets using the word "scab" remain protected.<sup>294</sup> Hence, the plaintiff in an action brought for statements made during a labor dispute must rely not upon abusive language or extreme accusations, but upon factual statements that were both false and likely to be believed.

Like a privilege, however, federal protection for statements made in the labor arena does not arise in every instance. For the additional strictures of *Linn* and *Austin* to apply, the statements must have been made in the context of a "labor dispute," as defined in the Act.<sup>295</sup> Courts have, however,

291. *Id.* at 284-86. The Court, however, cautioned that "[t]his is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact." *Id.* at 286.

292. *Id.* at 286-87.

293. *See id.* at 282-83; *Barss v. Torches*, 785 F.2d 20, 21 (1st Cir. 1986) ("scab" is literally correct); *Cline v. McLeod*, 180 Ga. App. 286, 288, 349 S.E.2d 232, 234 (1986) (case law expressly protects the word "scab"); *Steinhilber v. Alphonse*, 115 A.D.2d 844, 846-47, 495 N.Y.S.2d 907, 910-11 (1985) ("scab" is not actionable), *aff'd*, 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986); *Local Lodge 1297 v. Allen*, 22 Ohio St. 3d 228, 230, 490 N.E.2d 865, 867 (1986) ("scab" is federally protected speech).

294. *See Austin*, 418 U.S. at 283-84 (Jack London's definition of a "scab"); *Steinhilber*, 115 A.D.2d at 846-47, 495 N.Y.S.2d at 910-11 ("scab" not actionable; "sucks" merely indicates disapproval); *Local Lodge 1297*, 22 Ohio St. 3d at 229-31, 490 N.E. at 867-69 (shrieking and jeering, "scab" not actionable); *Crawford v. Steelworkers*, 230 Va. 217, \_\_\_, 335 S.E.2d 828, 830-35 (1986) ("scab," "scabby," "nigger," "bastard," "son-of-a-bitch," "cocksucker," "motherfucker" federally protected in the context of a labor dispute).

295. The definition of the term "labor dispute" includes "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(a) (1982); *see Austin*, 418 U.S. at 273; *Linn*, 383 U.S. at 61; *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691 (9th Cir. 1978); *Tosti v. Ayik*, 386 Mass. 721, 437 N.E.2d 1062 (1982).

defined the term broadly, and have rarely found concerted union activity to fall outside of the definition.<sup>296</sup>

## 2. Statements Made During Grievance Procedures

Courts differ over whether statements made incident to grievance resolution are qualifiedly or absolutely privileged. The differences arise primarily from the weight given to the competing state and federal concerns in the labor context.

*General Motors Corp. v. Mendicki*<sup>297</sup> is the case most often cited for the proposition that such statements fit in the absolutely privileged category. In *Mendicki*, the employee brought a defamation action based upon statements made by his employer at a meeting between union and company representatives to resolve a grievance he had filed following his discharge for theft. The jury found in Mendicki's favor, and General Motors appealed.<sup>298</sup>

The Tenth Circuit reversed and entered a final judgment for General Motors, finding the statements protected by an absolute privilege.<sup>299</sup> It reasoned that permitting employees to resort to defamation claims would unduly burden the federal interest in the peaceful settlement of industrial disputes. The federal interest required, then, a complete shield against liability.<sup>300</sup> The court recognized that in *Linn* the Supreme Court had found

296. See *Hasbrouck*, 586 F.2d at 694 n.3; *Mountain Navigation Co. v. Seafarers*, 348 F. Supp. 1298, 1302-03 (D. Wis. 1971); *Tosti*, 386 Mass. at 723, 437 N.E.2d at 1064. However, in *Bailey v. Sams*, 24 Ohio App. 3d 137, 493 N.E.2d 966 (1985), a mock "grievance" accusing an employer of theft of wages was not protected. Contractual liability may still exist, even where there is a labor dispute. In *Davis Co. v. Furniture Workers*, 674 F.2d 557 (6th Cir. 1982), the union posted false statements on the company bulletin board. The court found that the statements could not form the basis of a defamation action because they were made in the context of a labor dispute and were not made with actual malice. *Id.* at 563. However, it found that there could be contractual liability because the union had agreed not to post false statements in exchange for permission to use the bulletin board. *Id.*

Courts remain hostile to recovery in these instances, even without the protection afforded by the NLRA. In *Davis*, the court refused to permit recovery despite the existence of abstract contractual liability because of a lack of proof of damages. In *NLRB v. Container Corp. of Am.*, 649 F.2d 1213 (6th Cir. 1981), the court found that the term "chain gang" in a union newsletter did not violate a provision in the collective bargaining agreement permitting the publication of "official union business." *Id.* at 1215. In *Great Lakes Steel v. NLRB*, 625 F.2d 131 (6th Cir. 1980), the court found that a company rule prohibiting the distribution of libelous statements was too broad to permit enforcement.

297. 367 F.2d 66 (10th Cir. 1966).

298. *Id.* at 67.

299. *Id.* at 70.

300. *Id.* at 70-72.

that federal law only imposed additional requirements on state defamation law in the context of a labor dispute.<sup>301</sup> Nevertheless, the court found that the additional concern of peaceful dispute resolution justified the imposition of an absolute privilege.<sup>302</sup>

Many courts have followed the reasoning and holding in *Mendicki*, and have further developed and shaped the limits of the absolute privilege.<sup>303</sup> Some courts have expanded the scope of the privilege to informal grievance conferences<sup>304</sup> and to disciplinary action notices when the collective bargaining agreement requires them.<sup>305</sup>

Courts have also recognized limitations on the *Mendicki* rule. The most important of these is that a statement made before the initiation of contract-mandated grievance procedures likely will not be absolutely, but only qualifiedly privileged.<sup>306</sup> If the statement is communicated completely outside of the workplace, it may not qualify for a privilege at all.<sup>307</sup>

A second line of cases has rejected the *Mendicki* approach, finding that a balancing of interests requires only a qualified privilege for statements made during grievance resolution. In *Dunning v. Boyes*,<sup>308</sup> for example, the court found a qualified privilege to be more consistent with federal labor policy. Citing *Linn*, the court noted that while grievance resolution was an essential component of federal labor policy, permitting parties to make knowingly false statements of fact during grievance proceedings did not serve that interest.<sup>309</sup> Accordingly, the court found that it could best promote federal labor policy by a qualified privilege, requiring a showing of actual malice for there to be recovery.<sup>310</sup>

301. *Id.* at 71-72.

302. *Id.* at 72.

303. *E.g.*, *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981); *Brooks v. Solomon Co.*, 542 F. Supp. 1229 (N.D. Ala. 1982); *Honaker v. Florida Power & Light Co.*, 95 L.R.R.M. (BNA) 3265 (M.D. Fla. 1977); *Joftes v. Kaufman*, 324 F. Supp. 660 (D.D.C. 1971); *Watts v. Grand Union Co.*, 114 L.R.R.M. (BNA) 3158 (N.D. Ga. 1971); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454, 457 (La. Ct. App. 1973); *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447 (Ct. App.), *cert. denied*, 84 N.M. 896, 507 P.2d 443 (1973); *Bailey v. Sams*, 24 Ohio App. 3d 137, 493 N.E.2d 966 (1985).

304. *Honaker v. Florida Power & Light Co.*, 95 L.R.R.M. (BNA) 3265, 3270 (M.D. Fla. 1977).

305. *Joftes*, 324 F. Supp. at 662-63; *Rougeau*, 274 So. 2d at 457.

306. *See Neece*, 84 N.M. at 707, 507 P.2d at 454 (involving procedures under the Railway Labor Act).

307. *Bailey*, 24 Ohio App. 3d at 138-39, 493 N.E.2d at 968-69.

308. 351 So. 2d 883 (Ala. 1977), *cert. denied*, 436 U.S. 917 (1978).

309. *Id.* at 884.

310. *Id.* For other cases finding only a qualified privilege applicable, see *Morvay v. Maghielse Tool & Die Co.*, 708 F.2d 229 (6th Cir.), *cert. denied*, 464 U.S. 1011 (1983); *Hardee v. North Carolina Allstate Servs., Inc.*, 537 F.2d 1255 (4th Cir. 1976); *Munsell v. Ideal Food Stores*, 208 Kan. 909, 494 P.2d 1063 (1972); *Bird v. Meadow Gold Prod. Corp.*, 60 Misc. 2d 212, 302 N.Y.S.2d 701 (Sup. Ct. 1969).



Statements made during an arbitration hearing pursuant to a grievance procedure in a collective bargaining agreement should be absolutely privileged under state law because of the hearing's quasi-judicial nature.<sup>311</sup> Such an approach is entirely consistent both with state policy and federal labor policy, since analytically neither would otherwise impose liability in such a case.

### 3. The Labor Management Relations (Taft-Hartley) Act

A second potential source of federal preemption of state defamation claims is Section 301 of the Labor Management Relations Act (LMRA).<sup>312</sup> Unlike the NLRA, which generally imposes a higher standard on parties to a labor dispute, the LMRA may preempt a state defamation claim altogether. The preemption issue arises particularly when the collective bargaining agreement provides for arbitration as the exclusive remedy for employee grievances.

Two recent Supreme Court cases define the parameters of Section 301 preemption and provide set guidelines to determine whether a state defamation claim may go forward. In *Allis-Chalmers Corp. v. Lueck*,<sup>313</sup> the Supreme Court held that Section 301 preempts state claims that are "inextricably intertwined" with the terms of a collective bargaining agreement.<sup>314</sup> In *Lueck*, the Court held the employee's action arising out of the handling of his claim for disability benefits preempted. The Court reasoned that evaluation of the dispute would necessarily require a review of the collective bargaining agreement, the document establishing his right to benefits.<sup>315</sup>

In *Lingle v. Norge Division of Magic Chef, Inc.*,<sup>316</sup> the Court recognized that the converse was also true; federal law may not preempt claims which are independent of the collective bargaining agreement. In *Lingle*, the Seventh Circuit had held that, as it applied to a union employee, federal law preempted an Illinois state statute prohibiting retaliation by an employer against an employee for filing a workers' compensation claim.<sup>317</sup> The Seventh Circuit based its decision upon a term in the collective bargaining agreement

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311. See *Corey v. New York Stock Exch.*, 493 F. Supp. 51 (W.D. Mich. 1980), *aff'd*, 691 F.2d 1205 (6th Cir. 1982); *Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393 (D.S.C. 1968), *aff'd per curiam*, 398 F.2d 543 (4th Cir. 1969); *Hill v. Aro Corp.*, 263 F. Supp. 324 (N.D. Ohio 1967); *Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058 (D.C. 1983); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985).

312. 29 U.S.C. § 185 (1982).

313. 471 U.S. 202 (1985).

314. *Id.* at 213.

315. *Id.* at 216.

316. 486 U.S. 399 (1988).

317. 823 F.2d 1031 (7th Cir. 1987).

providing that an employer could discharge only for "just cause."<sup>318</sup> Since a discharge for filing a workers' compensation claim would not be for "cause," and since the collective bargaining agreement would provide a remedy to the aggrieved employee, the Seventh Circuit found that federal law preempted the claim.<sup>319</sup>

The Supreme Court reversed.<sup>320</sup> The Court found that although the agreement might have provided a remedy, the claim was not preempted. The state law right not to be discharged for filing a worker's compensation claim was completely outside of the collective bargaining agreement and the employee's claim, therefore, required no consideration of the terms of that agreement.<sup>321</sup> Whether Section 301 would preempt a defamation claim will depend upon whether the claim requires consideration of the terms of the labor agreement.

For example, in *Green v. Hughes Aircraft Co.*,<sup>322</sup> a case decided between *Lueck* and *Lingle*, the company suspended an employee from work for suspicion of theft. The employee filed a grievance and the company reinstated her with back pay. The employee then withdrew her grievance and sued the company for defamation based upon statements it had made before her discharge while it had investigated the matter.<sup>323</sup>

The court entered summary judgment for the employer, holding that federal labor law preempted the action because the collective bargaining agreement provided that arbitration was the exclusive remedy for employment grievances.<sup>324</sup> Citing *Lueck*, the court held that an employee's tort claim is preempted if it is "inextricably intertwined with consideration of the terms of the labor contract."<sup>325</sup> Because of the close relationship between the defamation claim and the contract terms providing for dispute resolution and discharge for cause, the court found there was preemption.<sup>326</sup>

318. *Id.* at 1044-47.

319. *Id.* at 1047-49.

320. 486 U.S. 399 (1988).

321. *Id.* at 1881-83. After *Lingle*, the Court vacated and remanded a number of section 301 preemption cases for reconsideration. *See, e.g.,* Dougherty v. Parsec, Inc., 108 S. Ct. 2812 (1988) (interference with contract), *vacating* 824 F.2d 1477 (6th Cir. 1987); De Soto v. Yellow Freight Sys., Inc., 108 S. Ct. 2813 (1988) (wrongful discharge), *vacating* 820 F.2d 1434 (9th Cir. 1987); Mays v. Reynolds Metals Co., 108 S. Ct. 2814 (1988) (defamation), *vacating* 516 So. 2d 517 (Ala. 1987).

322. 630 F. Supp. 423 (S.D. Cal. 1985).

323. *Id.* at 425.

324. *Id.* at 426; *see also* Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) ("[E]mployees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure in a collective bargaining agreement.").

325. *Green*, 630 F. Supp. at 426.

326. For decisions following *Lueck*, *see* Hull v. Central Transp., Inc., 628 F. Supp. 784 (N.D. Ind. 1986); Reynolds Metals Co. v. Mays, 516 So. 2d 517 (Ala. 1987), *vacated*, 108 S. Ct. 2814 (1988); Aubuschon v. International Mill

*Green* was correctly decided. The collective bargaining agreement authorized the company to discipline or discharge an employee for cause, and also provided a grievance procedure for the employee to use in the event of an incorrect accusation. The company's conduct in investigating the employee's conduct, including the taking of statements, fell squarely within the realm of acts necessary to carry out the agreement's terms.

The holdings in *Lueck* and *Lingle* may serve to modify the law of defamation for unionized workers. Statements concerning evaluation, investigation, or discharge all relate to management's rights and duties under labor agreements, as well as the rights of employees affected by discipline or termination. Broad preemption would be a favorable result since defamation actions are as disruptive of labor tranquility as the types of disputes the NLRA and Section 301 were enacted to resolve.

#### 4. The Railway Labor Act

While the structure of the Railway Labor Act (RLA)<sup>327</sup> differs greatly from that of the NLRA and Section 301, it also has affected state defamation law for workplaces within its scope. The law of defamation for employees covered by the RLA is not yet settled, but there is a growing trend within the federal courts giving the RLA preemptive effect over employees' state claims. Courts differ, however, on whether Section 301 and the NLRA and the RLA have equal preemptive effect. The case law under the RLA reflects the same conflicting policy considerations that have concerned courts deciding cases under Section 301 and the NLRA. The RLA's more intrusive framework has also shaped this case law.

There are at least two distinct lines of authority under the RLA concerning the impact of federal law on state defamation claims. Under the first, courts are to confer an absolute privilege on statements made during grievance resolution or those made in connection with employee discipline. The second line finds such statements to be barred completely by preemption, and therefore does not reach the privilege issue.

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Service, 167 Ill. App. 3d 965, 522 N.E.2d 898, *rev'd*, 123 Ill. 2d 555, 530 N.E.2d 976 (1988), *cert. denied*, 109 S. Ct. 3157 (1989); *Tucker v. Cincinnati Bell Tel. Co.*, 30 Ohio App. 3d 111, 506 N.E.2d 944 (1986). However, in *Tellez v. Pacific Gas & Elec. Co.*, 2 IER Cases (BNA) 310 (9th Cir. 1987), the court held the employee's defamation claim was not preempted by section 301 since the claim did not assert rights derived from the collective bargaining contract and did not require interpretation of the contract. The court also held that the collective bargaining agreement did not envision extreme and outrageous behavior and the grievance mechanism was not equipped to handle it. *Id.* at 312.

327. 45 U.S.C. §§ 151-188 (1982). The Railway Labor Act covers employees of railways and airlines. 45 U.S.C. §§ 151 (First), 181 (1982).

### 5. Absolute Privilege

*Macy v. TransWorld Airlines, Inc.*<sup>328</sup> is the most commonly cited opinion for the first line of authority. In *Macy*, TransWorld Airlines discharged the plaintiff in the presence of a union steward for sabotage. Pursuant to the labor agreement, the employer gave the union notice of the discharge and held a hearing in which it upheld the discharge. The court first found that the statements to the union were qualifiedly privileged under state law because Maryland protected employer-employee communications regarding employment.<sup>329</sup> It then held that the RLA provided an absolute privilege because of the national policy favoring statutory and contractual dispute resolution mechanisms.<sup>330</sup>

Other courts have found that an absolute privilege exists for statements made in the labor grievance itself.<sup>331</sup> The absolute privilege may also apply to statements made during hearings before the National Railroad Adjustment Board (NRAB)<sup>332</sup> or before public law boards because of their quasi-judicial nature.<sup>333</sup>

### 6. Preemption

An absolute privilege may be unnecessary under the second analysis, which holds that the RLA preempts defamation claims entirely. Claims are preempted either if they require consideration of the terms of the collective bargaining agreement, or if the allegations of the complaint are inextricably

328. 381 F. Supp. 142 (D. Md. 1974).

329. *Id.* at 146.

330. *Id.* at 148.

331. The same approach was taken in *Bell v. Gellert*, 469 So. 2d 141 (Fla. Dist. Ct. App. 1985), and *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985). Prior to the Supreme Court's opinion in *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972), which expanded the RLA's preemptive effect, a number of courts found that statements made incident to grievance resolution were only protected by a qualified privilege. See *Henthorn v. Western Md. Ry.*, 226 Md. 499, 174 A.2d 175 (1961); *Jorgensen v. Pennsylvania R.R.*, 25 N.J. 541, 138 A.2d 24 (1958). The only post-*Andrews* case finding only a qualified privilege is *Arsenault v. Allegheny Airlines, Inc.*, 485 F. Supp. 1373 (D. Mass.), *aff'd*, 636 F.2d 1199 (1st Cir. 1980), *cert. denied*, 454 U.S. 821 (1981). However, no mention is made of federal law and it is conceivable there was no union or that the issue was never raised.

332. *Stepanishan v. Merchants Despatch Transp. Corp.*, 722 F.2d 922 (1st Cir. 1983).

333. *Alsbury v. Missouri Pac. R.R.*, 670 S.W.2d 87 (Mo. Ct. App. 1984); *Barchers v. Missouri Pac. R.R.*, 669 S.W.2d 235 (Mo. Ct. App. 1984); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985). *Alsbury* and *Barchers* also found that libel claims based upon a letter sent between railroad officials regarding their termination were preempted by the RLA.

intertwined with the RLA's mandatory grievance machinery.<sup>334</sup> A review of Supreme Court authority on the preemptive effect of the RLA is helpful to an understanding of the underpinnings of these decisions and their ultimate impact on the workplace.

While the NLRA merely encourages an established grievance resolution mechanism, it is an absolute requirement under the RLA. Case law under the RLA creates a distinction between so-called "minor disputes" and "major disputes." Minor disputes<sup>335</sup> are those which arise out of the interpretation or application of collective bargaining agreements. The parties to the dispute must resolve them through the mechanisms provided by the Act rather than by the judiciary.<sup>336</sup> Essentially, minor disputes must be handled through contractual grievance procedures, with unresolved differences submitted to the NRAB or to contractually created public law boards.<sup>337</sup> Major disputes, on the other hand, are those involving efforts to secure, form, or change a collective bargaining agreement.<sup>338</sup> The parties need not take major disputes up through these mechanisms, and courts may enjoin actions that violate the Act's status quo provisions.<sup>339</sup>

334. See *Frale v. Hayes*, 112 L.R.R.M. (BNA) 2298 (S.D. Ill. 1982).

335. See *Consolidated Rail Corp. v. Railway Labor Executives Ass'n*, 109 S. Ct. 2477 (1989); *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723, *reh'g granted*, 326 U.S. 801 (1945), *opinion adhered to on reh'g*, 327 U.S. 661 (1946); *Magnuson v. Burlington N., Inc.*, 576 F.2d 1367, 1369-70 (9th Cir. 1978), *cert. denied*, 439 U.S. 930 (1978). See generally H. LUSTGARTEN, *PRINCIPLES OF RAILROAD AND AIRLINE LABOR LAW* 141-48 (1984) for a discussion of the distinction between major and minor disputes.

336. 45 U.S.C. § 153 (First) (i) (1982). In *Elgin*, 325 U.S. 711, the Court stated that "minor disputes . . . affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so." *Id.* at 724.

337. 45 U.S.C. § 153 (First) (i) (1982); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 325 (1972). Courts lack jurisdiction to resolve such disputes. In *Union Pac. R.R. v. Sheehan*, 439 U.S. 89 (1978), the Court said that "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts." *Id.* at 94.

338. In *Elgin*, 325 U.S. 711, the Court said that major disputes:

[P]resent the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.

*Id.* at 723-24.

339. See *International Longshoremen's Ass'n v. Toledo Lakefront Dock & Pellet Co.*, 776 F.2d 1341 (6th Cir. 1985); *Air Cargo Inc. v. Local Union 851, Int'l Bhd. of Teamsters*, 733 F.2d 241 (2d Cir. 1984); *Illinois Cent. R.R. v. Brotherhood of Locomotive Firemen & Enginemen*, 332 F.2d 850 (7th Cir.), *cert. denied*, 379 U.S. 932 (1964).

In *Moore v. Illinois Central Railroad Co.*,<sup>340</sup> the Supreme Court considered a railroad employee's claim for wrongful discharge. The railroad argued that the worker's claim was premature since he had not exhausted the administrative remedies provided in the RLA. Its argument rested upon the statutory language which stated that minor disputes "shall" be handled in accordance with the normal grievance procedure, with final resort to the NRAB. The railroad also presented the terms of the collective bargaining agreement, which required resort to dispute resolution mechanisms.<sup>341</sup> The Court rejected the railroad's argument, finding that Congress intended the Act's dispute resolution mechanism to be voluntary. Accordingly, it held that an employee covered by the RLA could bring suit for wrongful discharge in court.<sup>342</sup>

Thirty years later, in *Andrews v. Louisville & Nashville Railroad Co.*,<sup>343</sup> the parties presented the Court with precisely the same issue as in *Moore*. Andrews maintained that his employer had discharged him in violation of the collective bargaining agreement. Andrews brought a state action for breach of contract rather than taking advantage of the Act's grievance mechanisms. The trial court dismissed the complaint for failure to exhaust the RLA's statutory remedies, and the Fifth Circuit affirmed.<sup>344</sup>

The Supreme Court began its analysis with a review of the language and history of the RLA, as well as its own pronouncements following *Moore*.<sup>345</sup> It concluded that it had erroneously decided *Moore*: "[T]he notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or carrier chooses, was never good history and is no longer good law."<sup>346</sup> Disputes arising from the interpretation or application of a collective bargaining agreement under the RLA, therefore, must be resolved according to the mandatory grievance mechanisms.

Turning to the employee's wrongful discharge claim, the court in *Andrews* found that the employee's right not to be discharged arose from the terms of the collective bargaining agreement.<sup>347</sup> The dispute concerned the parties' differing interpretations of the contract as applied to the railroad's obligation to reinstate the employee following an automobile accident.<sup>348</sup> Since the dispute arose out of differences regarding the application or interpretation of the collective bargaining agreement, the em-

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340. 312 U.S. 630 (1941).

341. *Id.* at 634-35.

342. *Id.* at 635-36.

343. 406 U.S. 320 (1972).

344. *Id.* at 320-21.

345. *Id.* at 321-22.

346. *Id.* at 322.

347. *Id.* at 323-24.

348. *Id.* at 324.

ployee's exclusive remedy was the RLA's grievance procedure, which barred his state law cause of action.<sup>349</sup>

A defamation action based upon statements made in the context of the RLA thus raises the issue of federal preemption. Under the test articulated in *Andrews*, if the employee's defamation claim is in reality a dispute about the application or interpretation of a collective bargaining agreement, a court may find that the RLA preempts it. As the alleged defamation becomes distanced from the workplace, however, the question of the extent of preemption also becomes more difficult.

The simplest defamation cases under the second line of authority are those in which plaintiffs have disguised minor disputes as state common law torts to avoid preemption. In *Magnuson v. Burlington Northern, Inc.*,<sup>350</sup> a train dispatcher brought an action for intentional infliction of emotional distress based upon his discharge for causing a serious train collision. To avoid preemption, the employee argued that his action was not one for wrongful discharge, but one in tort, and thus was not a minor dispute.<sup>351</sup> The court rejected that argument because the employee's claim rested entirely upon his discharge and its effects.<sup>352</sup> The court also found that the state law cause of action was not so "deeply rooted in local feelings [sic] and responsibility" as to avoid preemption.<sup>353</sup> Accordingly, it affirmed the trial court's dismissal of his complaint.<sup>354</sup>

349. *Id.* at 324-26. The Court recognized the potential constitutional implications of the holding since the employee was, in effect, being denied a right to trial by jury but refused to decide the issue since it had not been properly raised on appeal. *Id.* at 324-25. In dissenting, Justice Douglas expressed his belief that the Court's deprivation of the plaintiff's right to a jury trial could not be reconciled with the requirements of the seventh and fourteenth amendments. *Id.* at 328-31 (Douglas, J., dissenting).

In *Essary v. Chicago & N.W. Transp. Co.*, 618 F.2d 13 (7th Cir. 1980), the court considered a challenge to the constitutionality of the RLA's preemption and found it to be "totally without merit in light of the Act's equal protection of employers and employees and its reasonable safeguards for the rights of the parties." *Id.* at 17. In spite of this pronouncement, some litigants have continued to contest the RLA's constitutionality. See *DeTomaso v. Pan Am. World Airways, Inc.*, 172 Cal. App. 3d 1170, 218 Cal. Rptr. 746, 753 n.4 (1985), *rev'd*, 43 Cal. 3d 517, 733 P.2d 614, 235 Cal. Rptr. 292, *cert. denied*, 484 U.S. 829 (1987).

350. 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).

351. *Id.* at 1368.

352. *Id.* at 1369-70.

353. *Id.* at 1369 (quoting *San Diego Bldg. Trades Council v. Gormon*, 359 U.S. 236, 244 (1959)); see also *Majors v. United States Air, Inc.*, 525 F. Supp. 853, 855 (D. Md. 1981).

354. *Magnuson*, 576 F.2d at 1370. Claims for retaliatory discharge are also preempted under the *Magnuson* standard since a state tort for retaliatory discharge is nearly identical to a grievance over the same act. *Minehart v. Louisville & Nashville R.R.*, 731 F.2d 342 (6th Cir. 1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

In the companion cases of *Barchers v. Missouri Pacific Railroad Co.*<sup>355</sup> and *Alsbury v. Missouri Pacific Railroad Co.*,<sup>356</sup> the court found that the RLA preempted the employees' defamation claims based upon a letter sent between railroad officials stating the reasons for their discharges.<sup>357</sup> Courts also have found preemption to exist when the employer's accusations of employee misconduct do not actually lead to discharge.<sup>358</sup>

Although some state courts remain suspicious of preemption, the cases reflect an increasing acceptance of the RLA's grievance mechanisms to resolve workplace disputes. In *DeTomaso v. Pan American World Airways, Inc.*,<sup>359</sup> the airline sold three bins of salvage to an employee, but later learned that the bins had contained some unabandoned material. An airline security official accompanied an FBI agent to the employee's home, made statements concerning the impropriety of the employee's possession of the material, and confiscated the cargo.<sup>360</sup> The airline subsequently discharged the employee for "fraud, dishonesty and abuse of company policy."<sup>361</sup> He

355. 669 S.W.2d 235 (Mo. Ct. App. 1984).

356. 670 S.W.2d 87 (Mo. Ct. App. 1984).

357. This letter used particularly strong language:

In addition to information contained in the investigation and write-up from Trainmaster W. E. Richmond, these two gentlemen had been a problem for quite some time in that it was necessary to counsel this crew quite frequently for their failure to perform work as requested by General Mills. They had a tendency to do the work to suit themselves, regardless of how General Mills requested their plan to be set up. They continually argued with the foreman at General Mills and at least three times a week I would receive a telephone call from General Mills' Traffic Manager in regard to these two gentlemen.

Although neither General Mills or us were able to catch or prove it, we felt these gentlemen were stealing flour from the mill. Since their dismissal, General Mills tells me they have had no problems.

I have run across some lousy and rotten people in my time and these two rank close to the top as being the worst I have seen. I would be very hopeful that we would not be required to return them to service as they represent a very poor image of the Missouri Pacific.

*Barchers*, 669 S.W.2d at 236-37; *Alsbury*, 670 S.W.2d at 87-88.

358. See *Majors v. United States Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981). This view was rejected in *Raybourn v. Burlington N. R.R.*, 602 F. Supp. 385 (W.D. Mo. 1985). However, the court in *Raybourn* confused the severity of the conduct with its proximity to the workplace. *Majors* involved a one-time interrogation of the employee in a supervisor's office. *Majors*, 525 F. Supp. at 854-55. In *Raybourn*, the employee was accused of drunkenness and was voluntarily taken to a hospital for a blood test. At the hospital he refused to submit to the test without his family doctor present, resulting in a 30-minute heated argument. *Raybourn*, 602 F. Supp. at 386. The court analogized to a situation in which an employer broke into an employee's home to recover stolen property and decided that the RLA did not preempt claims based upon such conduct. *Id.* at 388.

359. 43 Cal. 3d 517, 733 P.2d 614, 235 Cal. Rptr. 292, cert. denied, 484 U.S. 829 (1987).

360. *Id.* at 520-21, 733 P.2d at 615-16, 235 Cal. Rptr. at 293-94.

361. *Id.* at 523, 733 P.2d at 617, 235 Cal. Rptr. at 295.



filed a grievance and the airline ultimately reinstated him with back pay.<sup>362</sup> Prior to his reinstatement, the employee brought an action for defamation and infliction of mental distress.<sup>363</sup>

The California Court of Appeals found that the RLA did not preempt these claims. They were not merely a relabeling of claims for his discharge, but were "legally independent of any contractual claims or grievances he may have that may be arbitrable."<sup>364</sup> The court stated that the RLA only preempted claims arising under the collective bargaining agreement and did not apply to the employer's conduct.<sup>365</sup> Finally, it held that the state's interest in protecting its citizens from outrageous conduct far outweighed the slight risk of interference with the federal interest in labor dispute resolution.<sup>366</sup>

The California Supreme Court reversed.<sup>367</sup> It found that the statements upon which the employee based his claim were made during investigations and hearings required by the collective bargaining agreement.<sup>368</sup> It found that the RLA's preemptive effect extended beyond actions for breach of contract, particularly in claims premised upon statements during proceedings or investigations mandated by the collective bargaining agreement.<sup>369</sup> Finding that the statements fell "squarely within the ambit of *Magnuson*," the court found that the RLA preempted the defamation and emotional distress claims.<sup>370</sup>

While many courts balance the interests to decide whether federal law preempts a state law claim, that method provides uncertainty and leads to inconsistent results, depending upon the court's jealousy of federal rights. A better test looks to the function and purpose of the RLA. In *Beers v. Southern Pacific Transportation Co.*,<sup>371</sup> the court held that the determination

362. *Id.*

363. *Id.*

364. *DeTomaso v. Pan Am. World Airways, Inc.*, 218 Cal. Rptr. 746, 750 (1985).

365. *Id.* at 751-52. However, see *Louisville & N. R.R. v. Marshall*, 586 S.W.2d 274, 282 (Ky. Ct. App. 1979), in which the defamation action was preempted because the termination letter was not "outrageous."

366. *DeTomaso*, 218 Cal. Rptr. at 752-53.

367. *DeTomaso v. Pan Am. World Airways, Inc.*, 43 Cal. 3d 517, 733 P.2d 614, 235 Cal. Rptr. 292, *cert. denied*, 484 U.S. 829 (1987).

368. *Id.* at 530, 733 P.2d at 622, 235 Cal. Rptr. at 300.

369. *Id.* at 530-31, 733 P.2d at 622, 235 Cal. Rptr. at 300.

370. *Id.* at 530, 733 P.2d at 621, 235 Cal. Rptr. at 299. The court stated the policy behind this decision:

If an employee can institute a civil action, in essence litigating the questions at issue in an arbitration, the value of arbitration as a dispute resolution tool will be undermined. Further, if the courts can be used as forums to resolve arbitrable disputes, employees can make an end run thereby avoiding the carefully crafted congressional procedures set forth in the RLA.

*Id.* at 528, 733 P.2d at 620-21, 235 Cal. Rptr. at 298-99.

371. 703 F.2d 425, 429 (9th Cir. 1983).

of preemption was dependent upon whether the parties could have presented the underlying controversy itself to the NRAB. In *Beers*, the court found the RLA preempted the employee's action for infliction of mental distress based upon an alleged course of harassment because the claim in fact arose out of working conditions and the claimant could have brought the complaint before the NRAB.<sup>372</sup>

Other courts look to whether an employee's claim is in essence an employment grievance<sup>373</sup> or whether it is "inextricably intertwined" with the Act's grievance mechanisms.<sup>374</sup> The former test may not be workable because it would too often involve a subjective evaluation of the arbitrability of the employee's claim before establishing preemption.<sup>375</sup> The latter is simply a variation on the test articulated in *Beers*, that parties should resolve a controversy through the RLA when state claims are inextricably intertwined with those remediable by the NRAB. The test in *Beers* not only provides a proper, functional focus on the availability of a forum, it also reaches a result compatible with that reached in cases using the less-refined balancing test.

The *Beers* test is also considerably more appropriate for the transportation industry. Under the balancing test used by most courts, the same claim might fare differently depending on the state or jurisdiction.<sup>376</sup> A state-oriented court may be more protective of the state's interests and less

372. *Id.* at 429; *see also* *Tello v. Soo Line R.R.*, 772 F.2d 458 (8th Cir. 1985). However, it appears that no analysis would lead to preemption under the RLA for employees who are not covered by any agreement. *See Gorrill v. Icelandair*, 761 F.2d 847 (2d Cir. 1985); *Mungo v. UTA French Airlines*, 166 Cal. App. 3d 327, 212 Cal. Rptr. 369 (1985).

373. *See Carson v. Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979); *Burkin v. Burlington N. R.R. Co.*, 690 S.W.2d 508 (Mo. Ct. App. 1985); *Gonzales v. Northwest Airlines, Inc.*, 201 N.J. Super. 422, 493 A.2d 547 (1985).

374. *Fraley v. Hayes*, 112 L.R.R.M. (BNA) 2298 (S.D. Ill. 1982). The confusion of the courts and litigants with regard to the preemption of defamation claims is illustrated by *Miller v. Norfolk & W. Ry.*, 834 F.2d 556 (6th Cir. 1987).

375. This is particularly important because if a claim is deemed a minor dispute, the claim will be preempted and the court will lack subject matter jurisdiction. *See International Longshoremen's Ass'n v. Toledo Lakefront Dock & Pellet Co.*, 776 F.2d 1341 (6th Cir. 1985); *Brotherhood Ry. Carmen v. Norfolk & W. Ry.*, 745 F.2d 370 (6th Cir. 1984); *Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425 (9th Cir. 1983); *Fraley v. Hayes*, 112 L.R.R.M. (BNA) 2298 (S.D. Ill. 1982); *Carson v. Southern Ry.*, 494 F. Supp. 1104 (D.S.C. 1979).

376. *Compare DeTomaso*, 218 Cal. Rptr. at 752-53 (employee's defamation and emotional distress actions not preempted by RLA); *Pikop v. Burlington N. R.R.*, 390 N.W.2d 743 (Minn. 1986) (employee's intentional infliction of emotional distress claim not preempted by RLA), *cert. denied*, 480 U.S. 951 (1987), *with DeTomaso*, 43 Cal. 3d at 532, 733 P.2d at 623, 235 Cal. Rptr. at 301 (employee's defamation and emotional distress claims preempted by RLA); *Miller v. United Airlines, Inc.*, 174 Cal. App. 3d 878, 220 Cal. Rptr. 684 (1985) (flight attendant's claims against airline preempted by RLA); *Barchers v. Missouri Pac. R.R.*, 669 S.W.2d 235 (Mo. Ct. App. 1984) (employee's libel action preempted by RLA).

sensitive to federal law policy. Because Congress enacted the RLA precisely to protect and preserve interstate transportation, the employers under its scope are most likely to be present in several states. To subject such employers and their employees to the uneven and unpredictable results reached under the balancing test is both unreasonable and inconsistent with the congressional desire for national uniformity.

#### IV. REFORM OF WORKPLACE DEFAMATION LAW

Examination of the common law, constitutional law, and federal labor law principles governing defamation claims arising out of the workplace reveals numerous areas of inconsistency and unpredictability which encourage litigation. These suits are time consuming and expensive, fail to protect adequately the reputation of employees, hinder the communication of information concerning employees, and discourage the free and uninhibited discussion of issues pertinent to employees, employers, and unions. This section will offer a series of recommendations for judicial modification and clarification of certain aspects of workplace defamation law, for a uniform statute to govern workplace defamation cases, and for administrative and arbitral resolutions of workplace defamation claims.

##### *A. Judicial Modification of the Law of Defamation*

Some aspects of defamation law do not lend themselves to precise definition and application by courts. Which statements are defamatory and the distinction between fact and opinion are areas that will continue to be problematic and will turn on the facts of the particular case. An examination of the common law principles underlying defamation law, however, reveals some areas the courts could render more precise and uniform.

##### 1. Abolish the Distinction Between Libel and Slander

One of the major sources of confusion in defamation law is the separate rules that govern libel and slander. According to a comment to the Restatement, "no respectable authority has ever attempted to justify the distinction on principle . . . . This anomalous and unique distinction is in fact a survival of historical exigencies in the development of the common-law jurisdiction over defamation."<sup>377</sup> Although in many situations the printed word does carry more weight than spoken statements, in cases of defamation arising in the workplace, the distinction no longer retains any meaningful significance. Oral statements can be just as damaging as written material.

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377. RESTATEMENT (SECOND) OF TORTS § 568 comment b (1977).  
<https://scholarship.law.missouri.edu/mlr/vol54/iss4/1>

This is particularly true for employee references which employers often give over the telephone. Similarly, classifying defamatory statements as "per se" and "per quod" for proof of damages purposes is anachronistic and confusing.

Instead of the distinction between libel and slander and the subcategories of per se and per quod, a single definition of defamation should be developed. Some Australian states have done this by statute.<sup>378</sup> One example is the 1958 *Defamation Act* of New South Wales<sup>379</sup> which defined defamation as:

Any imputation concerning any person, . . . by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him . . . .<sup>380</sup>

Similarly, the 1975 final report of the Faulks Committee in England recommended the abolition of the distinction between libel and slander.<sup>381</sup> The Committee, however, went further than "mere assimilation of slander to libel and propose[d] a statutory definition of defamation to replace" that used at common law: "'Defamation shall consist of the publication to a third party of matter which in all circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.'" <sup>382</sup>

The New South Wales and English definitions would include defamatory statements arising out of the workplace. They would shift the focus to whether the allegedly defamatory statement meets this test, the credibility given to the statement, and the damage it causes. They would also eliminate unnecessary and often irreconcilable steps in the analysis of a defamation case. Instead of grappling with the distinctions between libel and slander and their very different definitions of "per se" and "per quod," the parties and courts could concentrate on the underlying issue of the extent to which the statement harmed the plaintiff.

## 2. Broaden the Definition of Opinion and Abolish the Innocent Construction Rule

Courts have had great difficulty in evaluating subjective statements contained in workplace communications. Apart from labor disputes, courts

378. Australian states which have codified a definition of defamation are Queensland (Queensl. Stat., ch. 35, § 366 (1962)), Tasmania (TAS. STAT. § 5 (1957)); Western Australia (W. AUSTR. REPR. ACTS ch. 35, § 346 (1956)); New South Wales (*Defamation Act*, N.S.W. Stat. Act. No. 39, § 5 (1958)).

379. *Defamation Act*, N.S.W. Stat. Act No. 39, § 5 (1958).

380. *Id.* § 5.

381. Cmnd. 5909, March 1975. For a discussion of the report, see Note, *Report of the Committee on Defamation*, 39 MOD. L. REV. 187 (1976).

382. Note, *supra* note 379, at 187 (quoting Faulks Committee England, Cmnd. 5909, March 1975).

have adopted a restrictive definition of opinion, causing liability to attach to nebulous statements. Other courts have, by adoption of the innocent construction rule,<sup>383</sup> prevented recovery even for statements that were more likely than not to harm the employee's reputation. Neither approach is sound.

Courts should recognize that employers must constantly formulate opinions about their workers based upon both subjective and objective data. To permit liability for statements such as an individual's value as an employee, whether he is a "good" or "bad" employee, or whether an employer would rehire him, is unrealistic and fails to consider the very personal nature of the employment relationship, particularly for smaller employers. Courts should broaden the opinion defense to include such matters, as well as other subjective traits such as "attitude" and "commitment." A court should not consider an employer's statements to be factual unless the employer actually discloses facts or, considering the surrounding circumstances, the statement directly implies the existence of undisclosed defamatory facts.

Only a small minority of states continue to follow the innocent construction rule. Courts should abolish that rule in workplace defamation cases. In *Chapski v. Copley Press*,<sup>384</sup> the Illinois Supreme Court defended continued adherence to the rule on the ground that it provides "breathing space" for the first amendment guarantees of freedom of speech and the press.<sup>385</sup> The United States Supreme Court, however, has never held that the first amendment requires such a rule and has itself applied the reasonable construction test.<sup>386</sup> Because most workplace defamation suits involve purely private situations, courts should leave statements reasonably capable of a defamatory meaning to the jury to decide whether in fact they were so understood. A broadened definition of opinion and adoption of an actual malice standard to defeat a qualified privilege would adequately protect the interest of the employer in the communication of personnel information.

### 3. Abolish Presumed and Limit Punitive Damages

Consideration of damages is an essential component of the reform of defamation law. On the one hand, reputational harm should be remediable. On the other, disproportionate awards and the haphazard pattern of recovery ill serve all parties. To preserve the balance between the interests of those communicating information against those whose reputations the communications may harm, courts should abolish presumed damages and limit punitive damages.

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383. See *supra* notes 103-04 and accompanying text.

384. 92 Ill. 2d 344, 442 N.E.2d 195 (1982).

385. *Id.* at 351-52, 442 N.E.2d at 198.

386. See *Washington Post Co. v. Chaloner*, 250 U.S. 290, 293 (1919).

Even if a plaintiff suffers no actual harm, *Dun & Bradstreet* permits the recovery of presumed damages without showing actual malice when the statement does not concern a public figure or a matter of public interest.<sup>387</sup> Courts originally permitted presumed damages because of the difficulties plaintiffs faced in proving injury to their reputations.<sup>388</sup> The continued recognition of such damages, however, makes defamation unique among torts. In other areas of tort law, the jury must determine damages based on evidence of the plaintiff's actual loss resulting from the defendant's actions.<sup>389</sup> Presumed damages create the potential for large recoveries when no harm has resulted. If an individual makes a statement to a prospective employer which is defamatory per se, the employee may recover presumed damages even if the employer did not believe the statement, testifies that it did not adversely affect his opinion of the employee, and hires the employee. Courts should dispel the fiction and leave the calculation of damages to the trier of fact, based upon evidence of actual harm to the employee's reputation and resulting injury. It is not unreasonable to require an employee to introduce evidence of injury to his reputation and resulting economic harm.

Punitive damages are also problematic in workplace defamation cases. Because of the confusion or blurring of the distinctions between actual malice and common law malice, often, once an employee defeats privilege, punitive damages are a virtual certainty. The law should recognize different levels of scienter for defeating a privilege and for the awarding of punitive damages. As argued below, courts should apply the *New York Times* definition of malice for overcoming a privilege.<sup>390</sup> Whether or not a privilege applies, punitive damages should be available only if there are actual damages and if the employee satisfies the requirements for common law malice. To recover punitive damages in the face of a privilege, a court should require a plaintiff to establish both kinds of malice.

Calls for judicial and legislative reforms of punitive damages have resulted from products liability cases<sup>391</sup> and defamation suits involving the media.<sup>392</sup> Recently, however, punitive damages have taken on a constitutional

387. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

388. In *Dun & Bradstreet*, the Supreme Court stated: "The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" *Id.* at 760 (quoting PROSSER & KEETON, *supra* note 84, § 112 at 765).

389. For a discussion of damages in other areas of torts, see D. DOBBS, *HANDBOOK ON THE REMEDIES: DAMAGES—EQUITY—RESTITUTION* chs. 5 and 8 (1973).

390. See *infra* note 405 and accompanying text.

391. See Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353, 412-13 (1988).

392. See R. SMOLLA, *supra* note 2, at 241-42.

dimension. In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,<sup>393</sup> the Supreme Court held that the excessive fines clause of the eighth amendment did not apply in civil actions for punitive damages. The Court left open the question of whether due process will bar or limit punitive damage awards.<sup>394</sup> In an earlier case, the Court noted that eighth amendment challenges to punitive awards raise questions of "some moment and difficulty" but the Court did not reach the punitive damage issue.<sup>395</sup>

Challenges to punitive damages have focused on their quasi-criminal nature and the fact that they do not represent actual loss, but instead constitute a windfall to the plaintiff.<sup>396</sup> A more serious challenge may be the virtually complete discretion in awarding punitive damages which most states permit juries.<sup>397</sup>

Even if the Court does find that the Constitution impacts the awarding of punitive damages, the Court may stop short of an absolute bar and, instead, establish guidelines requiring that punitive damages bear some proportional relationship to the amount of actual damages. Whether or not the Court ultimately finds that punitive damages violate the constitution, state courts should adopt guidelines to insure that punitive damages are not grossly disproportionate to the award of actual damages.

#### 4. Adopt a Uniform Theory of Publication

States differ on whether there is publication when an employer communicates defamatory material in performance evaluations, reports, and

393. 109 S. Ct. 2909 (1989).

394. *Id.* at 2921.

395. *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1651 (1988). According to the Court, the challenges to the punitive damage award "were not raised and passed upon in state court, and we decline to reach them here." *Id.* at 1649; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

396. See Comment, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 75 CALIF. L. REV. 1433 (1987); Note, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 MICH. L. REV. 1699 (1987); cf. *Solem v. Helm*, 463 U.S. 277 (1983) (criminal penalties disproportionate to defendant's conduct were unconstitutional). The Supreme Court has stated on a number of occasions that "[p]unitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The same view was also expressed in *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986), and *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981).

397. In her concurring opinion in *Banker's Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988), Justice O'Connor expressed concern that unfettered jury discretion in determining the amount of punitive damages might be inconsistent with due process. *Id.* at 1655.

letters to persons within the same corporation.<sup>398</sup> Much of this debate revolves around the "single entity" theory; whether all persons working for a corporation are part of a single entity so communication within the entity is not communication to a third party.<sup>399</sup> Although it has been stated that "damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside,"<sup>400</sup> the practical realities are not so simple. A statement about mediocre or below average performance would very likely be sufficient to cause a prospective employer to deny a job application, yet probably would not result in immediate termination of an employee whom the employer has already hired. Communication of that statement within the company would *not* be as harmful as outside the company.

Likewise, employers give many internal communications much lighter scrutiny than material published to outsiders. A secretary typing a letter or a personnel employee filing an evaluation form would not give the same consideration to the material as an employer deciding whether to hire a job applicant.

Moreover, for a corporation to function, it must communicate information internally. If a corporation is to take action, whether to counsel, discipline, or terminate an employee, the decision-makers must have all the facts. The threat of defamation liability might very well dampen any such communication.

Nevertheless, the maker of defamatory statements should not get immunity simply because the persons to whom he publishes a statement work for the same company. In many cases, others within the corporation simply have no legitimate need for information about a coworker.

These conflicting concerns may be accommodated in two ways. First, courts should recognize communications made by one employee within the scope of his employment to another employee in the corporation as not published. If, somehow, the communicator publishes the statement to outsiders or to those inside the company with no business need, then a finding of publication might be warranted. A second approach in these cases would be a qualified privilege presumption and a requirement that an employee establish actual malice if he is to recover. Either route recognizes that unfettered workplace communication is vital to operating any business and is in the public interest.

Courts should also reject compelled self-publication. The Minnesota legislature passed a statute to limit the *Lewis* holding.<sup>401</sup> That decision

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398. See *supra* notes 105-14 and accompanying text.

399. See *supra* notes 109-12 and accompanying text.

400. *Luttrell v. United Tel. Sys.*, 9 Kan. App. 2d 620, 622, 683 P.2d 1292, 1294 (1984).

401. See *supra* notes 270-71 and accompanying text.



signals employers not to disclose the reasons surrounding an employee's discharge, preventing the employee from learning by performance or other disciplinary mistakes, and lessening the likelihood of having an erroneous decision changed. The holdings in *Lewis* also provide much potential for abuse and little for mitigation. In *Lewis*, for example, the plaintiffs could simply have related the circumstances surrounding their discharges without whispering even a defamatory syllable.

#### 5. Adopt a Uniform Standard for Recovery

After the Supreme Court's decision in *Gertz*, defamation was no longer a strict liability tort. Some states adopted a negligence test after *Gertz*,<sup>402</sup> yet, *Dun & Bradstreet* may permit states to return to strict liability. To avoid the confusion and inequity that this could produce, courts should adopt a uniform standard of negligence in workplace defamation cases. Since first amendment interests are rarely at stake in workplace cases, the *New York Times* test of actual malice does not apply to most employers. Similarly, there is no reason to afford employees special protection by making defamation a strict liability tort. Instead, the courts could best serve the goals of defamation law by requiring that the employee show the employer was at least negligent in determining the truth or falsity of her statements. Adoption of this standard would require the plaintiff to show both that the publication was false and that the defendant either knew it was false or, believing it was true, lacked reasonable grounds for that belief.<sup>403</sup>

#### 6. Broaden the Concepts of Consent and Invited Publication

Another area of judicial disagreement is whether employees who permit the publication of statements about them also consent to the publication of defamatory material of which they are unaware in the statements.<sup>404</sup> Although employees may give prospective employers permission to check on their work record or request references from former employers, they may do so unaware of the unflattering comments which former employers may make about them. Simple consent to the giving of a reference alone should not be enough to foreclose recovery.

Most employees will be aware of their former employer's assessment of their ability. Only in the rarest cases will an employee be completely

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402. See *supra* note 121 and accompanying text.

403. *Gertz*, 418 U.S. 323; see also *Landsdowne v. Beacon Journal Publishing Co.*, 32 Ohio St. 3d 176, 512 N.E.2d 979 (1987) (negligence standard requires determination of whether defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication).

404. See *supra* notes 166-80 and accompanying text.

surprised by the comments made about him. If an employee is aware that the employer is likely to make the comments, he should have a greater burden of proof.

To balance these conflicting concerns, the law should broaden the concept of consent, particularly in the area of references. For example, the law could permit and enforce consent forms releasing the former employer for *all* statements made. A more moderate approach may be to introduce negligence principles into the consent defense. Additionally, the courts can give the employer a defense of invited publication if the employee knew or should have known that the employer's statement was likely to be defamatory.

#### 7. Adopt a Uniform Standard of Malice for Defeating a Privilege

The most fertile source of workplace defamation litigation is the information provided by employers in response to requests for references. Despite the difficulties in applying the qualified privilege in this area, policy does not dictate an absolute privilege for employment references. An employer should not be immune from liability if, in response to a reference, it makes an unfavorable statement which is wholly a fabrication. Permitting the circulation of information which the publisher knows is false does not serve any policy. The sheer number of cases on appeal, however, demonstrates that employers cannot give out unfavorable references without risk of potentially expensive litigation. It is little comfort to an employer that it has won a case at trial when it has incurred thousands of dollars of legal fees for performing an act solely to benefit another employer.

The solution to this problem lies, at least partly, in the definition of malice. The *New York Times* actual malice standard would require that the employer make the statement knowing it was false or while entertaining serious doubts about its truthfulness.<sup>405</sup> This standard looks at the tangible information available to the employer when it made the statement, coupled with its subjective evaluation of the statement's meaning.

The common law standard of malice, on the other hand, looks at the employer's motivation or feeling toward the employee. This is inappropriate in the employment context. Often circumstances surrounding the termination generate bad feelings or ill-will. In those cases many inaccuracies will be actionable, regardless of how careful the employer has been or how much it believes they are true, simply because of the bad feelings between the parties. The common law malice standard focuses on an incorrect and potentially irrelevant aspect of the making of the statement.

Thus, the *New York Times* standard of actual malice strikes the proper balance between the need for the free flow of information about the

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405. *St. Amant*, 390 U.S. at 731-33.

employees and the interest in protecting them from defamatory statements. The recognition of a qualified privilege for all employment references, coupled with the *New York Times* definition of malice, provides suitable protection for employers. This test is also capable of more precise application and provides the opportunity for defamed employees to recover when the communication does not serve any public interest.

## 8. Federal Preemption

Courts should broadly apply federal preemption of state law claims, under Section 301, the NLRA, and the RLA. Defamation claims are especially likely to disrupt the labor tranquility which those statutes envision. Multi-million dollar litigation may threaten a company's existence as effectively as the most damaging strike activity.<sup>406</sup> Defamation claims based upon statements attendant to the grievance and arbitration process endanger the dispute resolution mechanisms themselves. The mere fact of a defamation claim used to circumvent the grievance procedures serves to undermine the validity of those procedures.

Particularly for claims under the RLA, where dispute resolution mechanisms are mandatory, courts should look not only to the language of labor agreements, but also to the context in which the employers made the statements. If a defamation claim is part of a larger dispute which the parties may submit to arbitration, then the courts should hold the claim preempted. Courts should allow the parties to follow grievance procedures secure in the knowledge that the ultimate outcome, whatever that might be, will be final.

### A. Uniform Statute for Workplace Defamation

The recommendations in the last section would result in greater consistency in defamation law among the states and provide predictability for both employers and employees. They could have a significant effect on reducing the number of defamation suits arising out of the employment relationship. It would take some time to implement the changes since courts in each state would have to make the necessary modifications on a case-by-case basis. A faster way to achieve the desired consistency, predictability, and efficiency is by a model statute.

In her book *A Chilling Effect*, Judge Lois Forer devotes a chapter to "A Proposed Libel Statute." Forer argues for a federal statute which would

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406. See *Linn*, 383 U.S. at 68 (Black, J., dissenting) ("[I]t is difficult to conceive of an element more certain to create irritations guaranteed to prevent fruitful collective bargaining discussions than the threat or presence of a large monetary judgment gained in a libel suit generating anger and a desire for vengeance on the part of one or the other of the bargaining parties.").

govern *all* cases of libel.<sup>407</sup> In her view, such a statute would “establish rules of procedure, standards of liability, and requirements for assessing damages.”<sup>408</sup> It would serve to prevent forum shopping by plaintiffs seeking the state with the most favorable laws.<sup>409</sup>

Forer does not draft a statute but does discuss what such a statute should cover. It would define libel,<sup>410</sup> fact and opinion,<sup>411</sup> and truth.<sup>412</sup> Further, it would base liability upon negligence.<sup>413</sup> The statute would limit damages to those harms, including emotional distress, which the plaintiff actually proved. Presumed and punitive damages would be impermissible.<sup>414</sup> Forer gives workplace defamation cases only limited attention since she

407. L. FORER, *supra* note 1, at 338-60. There have also been several recent proposals for wrongful discharge legislation to deal with the dramatic increase in common law actions brought to remedy employee dismissals. Many commentators believe that jury trials are not the proper vehicle to resolve employment disputes and have proposed mediation, arbitration and limited judicial procedures as a solution. Some proposed laws would require an individual who proceeds under the statute to forego defamation remedies. The discussion draft of the Employment Termination Act proposed by the National Conference of Commissioners on Uniform State Laws provides in section 6(d) that: “There is no right to damages for termination of employment . . . under this [Act] for . . . defamation . . . .” *July 15, 1988 Draft Employment Termination Act Prepared For Discussion by Drafting Committee of National Conference of Commissioners on Uniform State Laws*, Daily Labor Report (BNA) No. 161, at D-1 (Aug. 19, 1988). Further, the wrongful discharge legislation proposed by the New York County Lawyers’ Association Committee on Labor Relations also forecloses recovery for defamation. The Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1987), preempts tort or express or implied contract remedies for discharge. MONT. CODE ANN. § 39-2-913 (1987). The provisions quoted above may result from the view that many employment-based defamation claims are a means to circumvent the employment-at-will doctrine and gain a remedy for wrongful dismissals. Hence, if a direct remedy is provided by statute, these collateral and potentially conflicting actions must be foreclosed. Providing direct statutory remedies for improper discharges may significantly decrease workplace defamation litigation aimed at remedying adverse personnel actions.

408. L. FORER, *supra* note 1, at 25.

409. *Id.* at 26.

410. *Id.* at 338-40. Forer defines defamation as “a statement that taken as a whole makes a verifiably false charge that the subject committed a specific criminal or other degrading act.” *Id.* at 339.

411. *Id.* at 340. Forer proposes that “fact be defined as a discrete, objectively verifiable statement of a specific matter. All other statements would be defined as opinions.” *Id.*

412. *Id.* According to Forer, “[t]he test of truth like that of defamation should be based on the document as a whole and should be only substantial accuracy, not meticulous, nit-picking verification of every detail.” *Id.*

413. *Id.* at 340-41. “Fault should be defined as negligence, the failure to do what a reasonable person would have done under all the circumstances or doing what a reasonable person would not have done under the circumstances.” *Id.* at 340.

414. *Id.* at 354-55.

believes that "existing law . . . now provides, in most instances, adequate protections."<sup>415</sup> Under her definition of defamation, however, "statements as to the competence, integrity, and qualifications of employees . . . would . . . be deemed to be opinions and not actionable."<sup>416</sup> In addition, Forer proposes a provision in the statute "giving a right of confidentiality to references and opinions as to competence, integrity and qualifications."<sup>417</sup>

In 1988, the Libel Reform Project of the Annenberg Washington program issued a "Proposal for the Reform of Libel Law."<sup>418</sup> Central to the report is a Model Libel Reform Act.<sup>419</sup> Although the impetus for the Act came from actions against the press, provisions "apply without regard to the media or non-media status of the publisher."<sup>420</sup> This Model Act, thus, could include suits between employers and employees. The Act not only defines many of the crucial components of defamation law, it emphasizes remedies other than money damages and substitutes a three-step program to simplify libel litigation.

The Libel Reform Act begins with a series of basic reforms, including abolishing the distinctions between "libel, slander, libel per se, libel per quod, slander per se and slander per quod."<sup>421</sup> It creates a "cause of action, for defamation . . . for all claims based on publication of false defamatory statements."<sup>422</sup> The Act also adopts the reasonable construction test to determine if a statement is defamatory<sup>423</sup> and it lists the factors a court must consider in determining whether a statement constitutes opinion.<sup>424</sup>

The basic premise of the proposed Model Act, however, is that the simplest and most effective remedy for defamation is a prompt and reasonable retraction or reply. Thus, under the Act, a plaintiff must first

415. *Id.* at 352.

416. *Id.* at 341.

417. *Id.* at 353. Marc Franklin has also proposed major changes in defamation law in the form of a statute. Franklin, *A Critique of Libel Law*, 18 U.S.F. L. REV. 1 (1983). Unlike Forer, Franklin limits his focus to defamation actions against the media. The most controversial aspect of Franklin's statutes is his proposal for a new action for "restoration of reputation." *Id.* at 40-49. Legislation for such an action was introduced in Illinois but encountered widespread opposition. See "Do We Really Need 'Restoration of Reputation' Bill?", *Chicago Daily L. Bull.*, May 3, 1988, at 2, col. 2.

418. ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM (1988).

419. *Id.* at 15-18.

420. *Id.* § 1(c), at 15.

421. *Id.* § 9(a), at 17.

422. *Id.* § 1(a), at 15.

423. *Id.* § 2(b), at 15.

424. *Id.* § 2(d), at 15.

request a retraction<sup>425</sup> or the opportunity to reply.<sup>426</sup> If the defendant refuses to retract or provide an opportunity to reply within 30 days, either side may bring an action for a declaratory judgment.<sup>427</sup>

If a party brings a declaratory action, trial must be held within 120 days.<sup>428</sup> Neither fault nor the defendant's state of mind is an element of such an action<sup>429</sup> and the Act abolishes all qualified privileges "in a proceeding of this type."<sup>430</sup> Instead, the only issue is the truth or falsity of the defamatory statement.<sup>431</sup> The burden is on the plaintiff to prove "with clear and convincing evidence" that the statement is false.<sup>432</sup> A judge may not award damages in such a declaratory judgment action<sup>433</sup> and the loser must pay the winner's attorney's fees.<sup>434</sup>

The declaratory judgment option has incentives both for employers and employees. Although employees could not sue for damages, they would have a less costly and easier case to prove than in a traditional defamation action. Employers would also benefit by not being put at risk financially. Both employees and employers would benefit from the expedited nature of such a trial.<sup>435</sup>

A trial for damages is still available under the Model Act, but only if both parties agree. In an action for damages, the plaintiff must prove that the statement was false<sup>436</sup> and that the defendant "failed to act as a reasonable person under the circumstances."<sup>437</sup> The Act retains the common law qualified privileges but they could be lost by a showing of the *New York Times* definition of actual malice.<sup>438</sup> Although the plaintiff need not prove special damages, recovery is limited to "reasonable compensation based on proof of actual injury."<sup>439</sup> Once the plaintiff establishes injury to reputation, the plaintiff may also recover damages for personal humiliation, anguish or emotional distress.<sup>440</sup> The Act abolishes presumed and punitive damages.<sup>441</sup>

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425. *Id.* § 3(a)(1), at 15.

426. *Id.* § 3(a)(2), at 15.

427. *Id.* § 4, at 16.

428. *Id.* § 4(f), at 16.

429. *Id.* § 4(c), at 16.

430. *Id.* § 8(b), at 17.

431. *Id.* § 4(a), at 16.

432. *Id.* § 4(d), at 16.

433. *Id.* § 4(b), at 16.

434. *Id.* § 10, at 16.

435. *Id.* § 4(f), at 16.

436. *Id.* § 6(a), at 17.

437. *Id.* § 7, at 17.

438. *Id.* §§ 8(c), (d), at 17.

439. *Id.* § 9(b), at 17.

440. *Id.*

441. *Id.* § 9(d), at 17.

*B. Alternatives to Traditional Litigation*

Some commentators have recently suggested that arbitration, mediation, or other means of alternative dispute resolution are the appropriate forums for handling defamation cases.<sup>442</sup> The authors believe that this indeed is the most promising means to permit the efficient resolution of most workplace defamation disputes. No proposal has been made, however, to remedy the peculiar problems of workplace defamation.

One significant attempt to apply alternative dispute resolution methods to media defamation cases is the Libel Dispute Resolution Program of the Iowa Libel Research Project. The program is the result of a three-year empirical analysis of defamation litigation and the parties' reaction to it.<sup>443</sup> The study found litigation against the media to be expensive, time-consuming, and often unsatisfactory to the parties.<sup>444</sup> These claims fail to address the primary goal of plaintiffs: the restoration of their reputations by setting the record straight.<sup>445</sup> Instead, the issue in media defamation litigation is the application of the constitutional privilege and fault rather than the truthfulness of the statement made.<sup>446</sup> The result is a lower incidence of settlement and the trial of more libel cases.<sup>447</sup>

The Libel Dispute Resolution Program focuses on the reputational harm and the truth or falsity of the statements at issue.<sup>448</sup> Fault-related questions such as malice, negligence, and reasonableness are irrelevant. The Program prohibits discovery and evidence on these issues. The plaintiff has the burden of defining the specific statements which he alleges to be false, establishing that the statements caused damage to his reputation, and proving the issue of falsity.

The proceedings under the Program are scheduled strictly. The Program limits discovery so a dispute can be resolved in sixty to seventy-five days. A neutral selected from a panel provided by the American Arbitration

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442. One advocate of this is General Westmoreland who has urged that libel cases be removed from the courts. See L. FORER, *supra* note 1, at 23.

443. See R. BEZANSON, G. CRANBERG & J. SOLOSKI, *supra* note 2.

444. *Id.* at 95-151.

445. *Id.* at 79-82.

446. *Id.* at 111-44.

447. *Id.* at 144-46.

448. Information about the Iowa Libel Research Project is taken from a booklet, RESOLVING LIBEL DISPUTES, published by the project (a copy of which is on file with the authors); Wissler, Bezanson, Cranberg & Soloski, *Why Current Libel Law Doesn't Work*, 27 JUDGES J. 29 (Spring 1988); Wissler, Bezanson, Cranberg & Soloski, *Resolving Libel Cases Out of Court*, 71 JUDICATURE 197 (1988); *Iowa Libel ADR Program Continues into Second Year*, BNA MEDIA LAW REP. (BNA) (June 1, 1988). Information was also obtained from discussions with Professor Randall Bezanson (Dean, Washington and Lee School of Law), one of the professors working on the project. The authors are grateful to Dean Bezanson for discussing the project with them.

Association hears disputes that the parties cannot settle. The neutral's finding states the existence of reputational harm and the truth or falsity of the statement. The remedy is subject to negotiation but the respondent is likely to publish the finding of the issue of falsity. Monetary damages are not available under the Program and both parties must agree to waive all future litigation.

Although the Libel Dispute Resolution Program is for media defamation cases, several of its premises and procedures apply to workplace defamation actions. An employee may suffer economic harm as a result of a defamatory statement. This may be the loss of a promotion, a job, or the ability to secure new employment.

Many employees harmed by false statements would want to retain the current system, since it provides them with compensation for their monetary losses plus vindication of their reputations. For others, however, the goal is to correct false statements, to restore their reputations so they can secure the promotion or new job they desire, and to prevent future economic harm.

Regardless of the factual background, a significant number of employees would find a rapid, efficient and inexpensive means to resolve the truth of the statement worth foregoing all but demonstrable economic damages. Similarly, employers and unions may be willing to sacrifice the protection of privileges to eliminate the cost and adverse publicity of litigation. This is especially true when an arbitrator or other decision maker will award only damages for actual economic injury if the employers or unions are unsuccessful.

A procedure providing for an accelerated, non-judicial resolution of workplace defamation claims could take either an administrative or purely arbitral form. Legislation could establish an administrative agency, either state or federal, to provide an alternative forum for an employee aggrieved because of a reference or other workplace statement made on behalf of his employer or his union. While opting into the procedure is voluntary, once an employee chooses the procedure and the union or employer consents, neither side can institute litigation regarding the claim.

Administrative agencies already are a familiar feature in the workplace. The NLRA, state unemployment compensation, workers' compensation, and equal employment opportunity acts often use administrative means to resolve disputes. The structure and experience of these administrative agencies could serve as models for a more effective means to handle employment-based defamation claims.

### 1. Proposed Administrative Procedure

The authors propose the following model procedure as an alternative means to resolve workplace defamation claims. Employees may initiate defamation proceedings against their employers or unions by filing a simple



claim form describing the facts surrounding the dispute and detailing the allegedly defamatory statement. The agency follows the filing of the claim form by an abbreviated investigation of the claim. If supported by substantial evidence, the agency issues an administrative complaint, leading to a contested hearing on the record before an administrative law judge (ALJ). The administrative agency employs an attorney to represent the employee during the hearing or he can employ his own counsel if he so elects. An array of remedies is available to a successful employee, including the correction of the employee's personnel or union records, the preparation of a rebuttal statement to correct false statements already made, and the award of monetary relief limited to back pay with interest, if the employee establishes demonstrable economic injury. As in administrative proceedings, there is no remedy for pain and suffering, no punitive damages are available, and the ALJ will not award presumed damages.

In form, the proposed administrative remedy is much like that of its model, the state equal employment opportunity agencies.<sup>449</sup> The employee gains an inexpensive, expeditious forum in which to resolve his claim and in turn must forego the possibility of presumed and punitive damages. Appeals from the agencies' determinations could go directly to a state or federal court of appeals with the standard for appellate review limited to whether the record, when considered as a whole, supports the decision. This relatively narrow standard of review protects the administrative process from unwarranted intrusion by the courts and, yet, provides for limited appellate review of the agency's legal determinations.

One drawback to the proposed administrative method of dispute resolution is the expense of the bureaucracy required to support it. Legislators may be unwilling to spend funds to provide a faster way to resolve defamation claims when the state courts presently are resolving them. The burden of litigating defamation claims in state courts, particularly considering the length, complexity, and number of cases, may, however, outweigh the cost of establishing an administrative procedure. Another option to lessen the start-up expense of the administrative procedure would be to give the responsibility for handling the workplace defamation claims to an existing agency created to handle workplace disputes.

## 2. Proposed Arbitral Remedy

A second and less expensive means to reform workplace defamation law is the adoption of a variation of the administrative alternative discussed

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449. See, e.g., 29 U.S.C. § 160 (1982); 42 U.S.C. § 5851 (1982); OHIO REV. CODE ANN. § 4112.05 (Page 1988). The American Arbitration Association presently has Model Employment Arbitration Procedures providing employees and employers with private alternatives to resolve disputes. These procedures state that "[c]ases may be initiated by joint submission in writing, or in accordance with provisions in a personnel manual or employment agreement . . . ." (Model Employment Arbitration Procedures at 6).

above. This alternative would have the following key features. Enabling legislation establishes the standards for the claim and provides for an elective remedy. Neutrals selected from an American Arbitration Association panel attempt to mediate the dispute but act as triers of fact when the parties cannot reach a settlement. The neutral hearing the claim renders an award on the issues of defamation, reputational harm, and the company or union's responsibility for the statement. This alternative also provides for relief including the correction of personnel or union records and back pay based upon established economic loss. Arbitral awards must be rendered within ninety days of the hearing unless the parties agree to a longer period. The parties bear the cost of arbitration, including the arbitrator's fee and expenses, equally.

Since arbitration is a remedy that the unionized workplace has known for many years, its adoption to handle workplace defamation action claims should not be problematic. Panels of seasoned arbitrators skilled in handling workplace disputes and making credibility determinations already exist. Unions and employers understand the system, appreciate its expeditious character, and are familiar with the type of decisions rendered by labor arbitrators. In addition, the enabling legislation should require that appellate courts give arbitrators' decisions substantial deference so there would be only very narrow grounds for judicial review.<sup>450</sup>

When the employee already possesses an avenue available to attack the offending statement or the adverse personnel action taken against him, he is required to elect a remedy. Either he can pursue his arbitral claim for the workplace defamation or he can pursue his existing state law wrongful discharge, tort, or contractual remedies. This system does not allow employees to pursue both judicial and arbitral remedies, and once the employee elects a remedy, it is final. Moreover, employers and unions initially consenting to the arbitration procedure also are bound. They cannot later pursue common law or contractual law proceedings against the employee.

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450. See Federal Arbitration Act, 9 U.S.C. § 10 (1982), which provides four general grounds for vacating arbitration awards. The grounds are:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Railway Labor Act also provides exceedingly narrow grounds for over-turning decisions of the National Railroad Adjustment Board. See 45 U.S.C. § 153 (First) (g) (1982).

It is the authors' view that such a flexible arbitration remedy is the least expensive and most practical way to reform the present law of workplace defamation. This reform, however, would not be all-encompassing. Unless Congress enacted it, federal labor statutes could impact it still either through the vehicle of preemption or through some claim of overriding privilege based upon federal labor statutes. Even if there were occasional problems resulting from the federal scheme, the arbitral remedy would be beneficial, particularly if adopted by the states as part of a scheme of uniform laws on the arbitration of defamation claims.

## V. CONCLUSION

The criticism leveled at the law of defamation is especially well-taken in the employment context. This is particularly true since that entire body of law developed without consideration of workplace concerns. Businesses and labor organizations must, as part of their very existence, send massive amounts of personnel information which often is critical of individuals in the workplace. The present patchwork quilt of laws governing workplace communications fails to benefit employers, employees, and unions. Conflicting and ill-defined standards found in the common law of defamation produce a lack of uniformity and certainty. Further, the impact of federal and constitutional laws frequently change the common law rules and, while creating superior results in individual cases, leads to further disharmony in the law when viewed as a whole.

Reform is needed. This Article has proposed judicial and legislative reform to abolish the distinction between libel and slander, to abolish presumed and limit punitive damages, and to adopt a uniform standard for recovery. To hasten the necessary changes, however, alternative administrative or arbitral remedies are needed. These remedies would require that all participants in the workplace give up certain benefits conferred by the common law, but in return would provide greater efficiency, uniformity, and certainty in the law. Finally, an arbitral remedy for workplace defamation appears to be the fairest and least expensive means to institute a comprehensive reform of the law of workplace defamation. In the authors' view, the balance of workplace interests, the shortcomings of the current law of defamation, and the familiarity of arbitration in the workplace all mitigate in favor of this alternative means of resolving disputes about the truth or falsity of work-related statements.