PULLMAN &COMLEY

The Perennial Problem of References

Working Together

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Most employers would be very happy to receive a frank appraisal from a prospective employee's former employer. Yet most employers are themselves reluctant to give references concerning former employees, or any information beyond confirming job title and dates of employment, and possibly wage rates. There is a perceived risk in actually giving a candid evaluation of a former employee, especially if the evaluation is less than positive. Employers see themselves being dragged into a dispute if the former employee is not hired by the prospective new employer, or worse, being sued for defamation or for interference with the former employee's business opportunity.

Several years ago the Connecticut Supreme Court tried to address this conundrum. In a case called Miron v. University of New Haven Police Department, 284 Conn. 35 (2007), the Court expressed its concern that the threat of litigation could have a chilling effect on communications between former and future employers. The Court observed that the integrity of employment references is not only essential to prospective employers, but is valuable to the employee, who stands to benefit from the credibility of positive recommendations. The Court feared that employers are choosing a "culture of silence" rather than relying on truth in defense of a defamation claim.

The Court concluded that when the prospective employee gives consent to a request for a reference from a former employer, the former employer has a qualified privilege against defamation, which means that it would not be exposed to a defamation claim even for a critical reference unless the former employee was able to prove that the reference was not an honest assessment but was deliberately false and malicious.

However, there is no legal protection for a former employer that acts with actual malice, and does not merely make a negligent misstatement of fact but actually knows that its report to the new employer is false or recklessly disregards the truth. This was the scenario in the recently decided case of Nelson v. Tradewind Aviation, LLC, released by the Connecticut Supreme Court on February 24, 2015. The defendant conducted a summer air service from New York and New Jersey to Nantucket and Martha's Vineyard. The plaintiff, who had been hired as a new pilot at the beginning of the summer season, was laid off for lack of work when the flights were reduced at the end of the season. He had never been grounded or disciplined; he was simply the junior pilot.

But when the plaintiff found new employment and his prospective employer asked for references in accordance with federal law on disclosure of pilot records, the former employer indicated that the plaintiff had been involuntarily terminated for safety reasons and had been removed from flying status. The report

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also referred to possible drug use, although a random drug test had been negative. What was more, the former employer did not inform the plaintiff of this negative reference, even though required to do so by federal regulations. Not surprisingly, the job offer was rescinded. The plaintiff sued, and the jury had no trouble finding actual malice and awarding substantial damages, which the Supreme Court affirmed.

The facts in Nelson v. Tradewind Aviation, LLC seem appalling, and the decision does not change the Miron case doctrine that an honest reference from a conscientious former employer cannot support a defamation claim. However, the majority of employers may still decide to withhold references rather than risk the ordeal of litigation, even if the outcome is ultimately in their favor.

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