

EMPLOYMENT REFERENCES

- *Speak No Evil* -
- *Hear No Evil* -

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"I didn't bring any references - I don't like dwelling on the past."

References

- Use of references is a common and necessary aspect of business operations.
- Encourages frank disclosure among employers.
- But there's a danger of harming the individual or other organization.

References

- Many adopt a “name, rank and serial number” policy, verifying only dates worked and positions held.
- Fear of lawsuits is a major factor in the refusal to give references.

Potential Legal Liability

4 Common Areas of Liability:

1. Defamation
2. Negligent References
3. Wrongful Dismissal
4. Privacy

Defamation

- Harming a person's reputation by making false statements to a 3rd party.
- Statements which tend to lower the person's character in the community.

Defamation

- Malice is implied from the fact that the statement was made.
- slander = spoken; libel = written

Defamation

- To succeed in a defamation case, the plaintiff must prove:
 - the statements were actually made;
 - they were “published” i.e. were made to someone other than the plaintiff (verbally or in writing);
 - he/she suffered “damages” as a result (quantifiable \$\$)

Defamation

Defences to Defamation:

A. Truth / Justification

B. Fair Comment

C. Qualified Privilege

Defences to Defamation

A. Truth / Justification

- A fundamental defence to an action for defamation is to prove that the statements made were true.
- There need only be “substantial justification of the whole”, in that the gist of it must be shown to be true.
- “Honest belief” of truth is not enough

Defences to Defamation

B. Fair Comment

- Even if the statement is not factual, it may be allowed if it is merely an expression of opinion on a matter of public interest.
- Relevant in employment only if the remark pertains to a public figure / matters in the public domain
- Comment must pertain to public activities, not personal character

Defences to Defamation

C. Qualified Privilege

- Exists on occasion when there is common interest between the person making the statement and the person to whom it is made; mutual concern between parties.
- Generally applies to employers when offering reference opinions concerning former employees.

Defences to Defamation

C. Qualified Privilege (cont.)

- For the defence to succeed, the statement must have been made *bona fide* and without malice toward the plaintiff.
- *Knorr v. Ibrahim* (N.S.) – ex-employer told Dept. Labour officer about the former employee taking \$\$ from register
- *DeMoor v. Harvey*

Defences to Defamation

C. Qualified Privilege (cont.)

- Malice = personal spite, ill-will or an indirect/ulterior motive such as personal gain or a desire to injure.
- May include dishonest statements, but also those made with reckless disregard for the truth.
- Malice is evident from the defamatory words themselves or the surrounding circumstances.

Negligent References

- *Spring v. Guardian Assurance*
 - British House of Lords (1994)
 - employers owe former employees a duty of care when providing references.
 - “little or no integrity, kept best leads for himself, gave bad advice on sales, left Guardian owing money.”
- *Queen v. Cognos Inc.*
 - Supreme Court of Canada (1993)
 - employers have a duty of care not to make negligent misrepresentations before employment begins.

Negligent References

- Very likely that *Spring* is now law in Canada.

Examples:

- Employee alleges negative reference arose from employer's failure to take reasonable care.

Negligent References

- Current employer alleges former employer was negligent in reference about former employee.
 - failing to disclose material facts
- But, was new employer duly diligent when checking references of applicant?

Negligent References

- *Law not well developed in Canada, but...*
- *In U.S., several cases where NEW employer liable for failing to check references, and new employee causes physical harm to public.*
- *Also, in Randi W. v. Muroc School District (Calif.) writer of a letter of recommendation owes duty to prospective employers (and third parties) not to misrepresent facts*

Negligent References

- California Court said there was no duty on school districts to provide negative information.
- Two options: (1) full disclosure; or (2) a letter verifying basic employment data or a “no comment” letter omitting positive representations
- So far, no Canadian court has adopted the principles in *Muroc*.

Wrongful Dismissal

- There is no express obligation on an employer to provide a reference letter.
- BUT, many cases find it is unreasonable to refuse to provide one.
- Statements made (or omitted) about employees may have an impact on damage awards in wrongful dismissal suits.

Wrongful Dismissal

- “Name, rank and serial number” references are becoming troublesome.
- Former employers may be liable for negligent references if they refuse to provide a reference and the employee demonstrates the same bad behavior in the new job as in the old.

Wrongful Dismissal

- Some courts have increased the notice period, while others have awarded aggravated damages for mental distress.
 - *Bogden v. Purolator Courier Ltd.*
 - *Lim v. Delrina (Canada) Corp.*
 - *Boldon v. Computer Innovations Distribution Inc.*

Privacy Issues

- Privacy law applicable reference checks is found within privacy legislation and common law.
- *PIPEDA* governs how private-sector organizations may collect, use or disclose personal information in the course of commercial activities.

Privacy Issues

- *PIPEDA* only applies to employee personal information of organizations that are engaged in federal businesses.
- *Privacy Act* (NL) creates the *tort* of violation of privacy. Plaintiff may sue on violation of privacy alone.
- *Access to Information and Protection of Privacy Act* (NL) applies to provincial public bodies

Providing References

- Establish and follow a policy on references
- Designate a contact person
- Tell the truth / avoid statements unsupported by facts
- Avoid abusive or insulting remarks
- Avoid “off the record” comments

Providing References

- Provide references only in response to written requests
- Limit references to persons who have legitimate need to know
- Limit telephone references
- If verbal references unavoidable, document the questions and your responses

Providing References

- Don't disclose to a 3rd party any information unless the candidate consents to the disclosure
- Obtain a general consent from employees leaving the organization for post employment references

Obtaining References

- Prudent to obtain written consent from job applicant to contact references and to release former employers from providing information.
- Seek references from individuals with personal knowledge of the applicant's work performance (i.e. former immediate supervisor)

Obtaining References

- Use a pre-set list of questions or a reference form.
- Don't ask questions prohibited by human rights or other legislation.
 - Is she able-bodied?
 - Is he gay?

FINAL THOUGHT

- Document, document, document.
- If in doubt, call your friendly neighbourhood lawyer.