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THE NEW MISSOURI EMPLOYER IMMUNITY STATUTE: ARE MISSOURI EMPLOYERS STILL DAMNED IF THEY DO AND DAMNED IF THEY DON'T?

"I have noticed," Calvin Coolidge used to say, "that nothing that I never said ever did me any harm." In the field of employment law, Calvin Coolidge has a lot of disciples, especially when it comes to job references.¹

I. INTRODUCTION—THE NEED FOR A NEW LAW

It has long been the practice of employment lawyers in Missouri to caution their clients to give only "name, rank, and serial number" when asked to respond to reference requests.² This advice stems from the Hobson's choice created for employers who fear that including too much information in a reference will subject them to a suit for defamation or retaliatory discharge, while including too little information will expose them to suits for misrepresentation.³

Even as they shy away from divulging information about current or former employees, Missouri employers are presumably following the national trend to aggressively seek references when hiring new employees.⁴ At the same time,

1. Jack Kenny, *Beware Giving References for Ex-Employees*, 9 N.H. BUS. REV. 1, Feb. 14, 1997.

2. See *New Missouri Reference Request Law—For What It's Worth*, 9 MO. EMP. L. LETTER 1 (Armstrong Teasdale LLP, St. Louis, Mo.), June 1999, at 1. This practice is certainly not unique to Missouri employment attorneys. See, e.g., Kenny, *supra* note 1 (quoting a local employment attorney, "My advice is that the employer should confirm the dates of employment, the nature of the position and that's it").

3. See Jonathon Vegosen, *Employment Law: Figuring Out Whether to Tell All or Zip Your Lip on References*, 19 CHI. LAW. 15, Sept. 1996 ("Employers providing information to prospective employers frequently have found themselves the target of defamation suits. As a result, many employers have adopted a 'name, rank and serial number' approach."). See also Robert S. Adler & Ellen R. Pierce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Proposal for Reform*, 53 WASH. & LEE L. REV. 1381, 1415-19 (1996) (discussing misrepresentation in the employment context); Susan Oliver, *Opening the Channels of Communication Among Employers: Can Employers Discard Their "No Comment" and Neutral Job Reference Policies?*, 33 VAL. U. L. REV. 687, 689 (1999) (same); *infra* notes 55-179 and accompanying text (discussing reference-based claims).

4. See SOCIETY OF HUMAN RESOURCE MANAGEMENT, *JOB CANDIDATES AREN'T AFRAID TO FIB* (Press Release) (1998) (visited Feb. 20, 2000) <<http://www.shrm.org/press/releases/980130.html>> (explaining that of the 854 human resource professionals who responded to a reference checking survey conducted in July 1998, 89 percent check references for

and in response to the increasing problem of workplace violence, courts are beginning to hold employers responsible for the safety of their employees and third parties.⁵ During the 1990s, approximately one million workers became victims of assault in the workplace each year.⁶ In the same decade, there were an average of twenty workplace homicides every week.⁷ Consequently, an employer's ability to obtain complete and accurate references is becoming more important than ever.⁸

Applicants may be more likely to falsify information about their work history or criminal past if they know that employers are reluctant to release information about job performance.⁹ Once employees realize that their detailed work history does not follow them from job to job, they may have less

professional positions, 85 percent for administrative positions and 81 percent for technical positions). See also Peter Dalpe, *Job References Can Be Elusive*, NEW HAVEN REG., Aug. 29, 1995, at D1 (reference checking has increased ten-fold since a 1979 scandal involving a Washington Post reporter who faked her credentials); Kenny, *supra* note 1 (“[S]ome personnel officials who follow non-disclosure policies say they, too, would like more information about job applicants at their firms. ‘It’s frustrating,’ admitted [one human resource manager]. ‘I guess I’m expecting people to give me information I won’t give anybody else.’”).

5. See William C. Martucci & Denise Drake Clemow, *Workplace Violence: Incidents and Liability on the Rise*, EMP. REL. TODAY, Dec. 22, 1994, at 463. Note also that the Tenth Circuit Court of Appeals recently held that a plaintiff who was awarded compensatory damages as a result of sexual harassment by her supervisor might also be entitled to punitive damages because her employer was “unmistakably aware” of the harasser’s previous behavior. *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1187 (10th Cir. 1999). The employer was aware of the harasser’s propensities because he had already been accused of pinning another female employee against a wall and making sexual advances. See *id.* at 1186-87. The company first fired the harasser, but then rehired him at a sister company, gave him a larger office and an \$8,000 raise. See *id.* The *Knowlton* court cited the Supreme Court’s recent articulation of the standard for punitive damages liability in sexual harassment cases, *Kolstad v. American Dental Ass’n*, 119 S. Ct. 2118, 2120-23 (1999), as a basis for overturning the district court’s decision to grant the employer’s motion for directed verdict on the issue of punitive damages. *Knowlton*, 189 F.3d at 1186. See also 164 Daily Lab. Rep. (BNA), Aug. 25, 1999, at A-2 (discussing *Knowlton*).

6. See DEPARTMENT OF HEALTH & HUMAN SERVS., NIOSH REPORT ADDRESSES PROBLEM OF WORKPLACE VIOLENCE, SUGGESTS STRATEGIES FOR PREVENTING RISKS (1996) (Press Release) (last modified July 18, 1996) <<http://www.cdc.niosh/violpr.html>>.

7. See *id.*

8. See Oliver, *supra* note 3, at 735. See also Vegosen, *supra* note 3 (“[T]his ‘neutral reference’ strategy can backfire. For example, inquiring companies have sued employers for providing a ‘negligent reference’ when employers have failed to disclose that former employees committed violent acts in the course of their employment.”). See also *infra* notes 150-79 and accompanying text (discussing negligent misrepresentation/referral).

9. See SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *supra* note 4 (indicating that almost half of the human resource departments surveyed said they knew a candidate who falsified information about a criminal past); Rob Hotakainen, *Pannier Case Calls Scrutiny of Teachers Into Question*, STAR-TRIB. (Minneapolis-St. Paul), July 27, 1999, at 1A (explaining how a teacher falsified his college transcript to gain a teaching job and is now standing trial for having sex with a 15-year-old student).

incentive to refrain from unacceptable behavior in the workplace.¹⁰ Additionally, the lack of available information regarding an employee's performance may lead some to assume a cavalier attitude toward their work.¹¹ Yet, the reluctance of employers to give a detailed reference persists.¹²

Employers are aware of the need for information about an applicant, not only to avoid potential liability resulting from hiring a violent employee, but also to hire someone who is qualified to do the job.¹³ When information about an applicant is unavailable prospective employers may turn to less reliable sources, such as physical and psychological profiles, drug tests, or a prospective employee's credit history.¹⁴ These avenues for seeking information may have little value as a predictor of an employee's performance and may raise employee privacy concerns.¹⁵

Thus, employers are not the only ones harmed by "no comment" or neutral job reference policies.¹⁶ An employer's refusal to give information when asked for a reference can inhibit the job search for applicants with outstanding

10. See *id.* at 1429. See also Julie Forster, *25 States Adopt 'Good Faith' Job Reference Laws to Shield Businesses from Liability*, WEST'S LEGAL NEWS, July 2, 1996, available in 1996 WL 363324 (quoting South Carolina's state director for the National Federation of Independent Businesses, "The silence . . . quite honestly [helps] the bad employee because that person [knows] he [can] go from job to job and [his] employers [won't] say[] anything bad about [him]."); Hotakainen, *supra* note 9 (relating the story of a teacher about to stand trial for having sex with a 15-year-old student after the teacher moved from job to job undeterred by prior misconduct in other school districts).

11. See Adler & Pierce, *supra* note 3, at 1429.

12. See *New Missouri Reference Request Law*, *supra* note 2, at 2. See also Julie M. Buchanan, *Threat of Defamation Lawsuits Limits Employee Information*, MILWAUKEE J. & SENTINEL, July 22, 1999, at 15 ("All you can get these days is name, rank and serial number. In other words, you get dates of hire, but no information pertaining to job performances, misconduct or attendance. You can't even find out whether the individual quit or was fired."); Judi Russell, *Law Backs Employer Candor in Job Reference*, NEW ORLEANS CITY BUS., July 22, 1996, at 6 ("Job references, once the jewel in a résumé's crown, have become about as useless to employers as manual typewriters. Fearful of lawsuits . . . supervisors often limit their replies to a few terse facts when asked about a current or former staff member.").

13. See Oliver, *supra* note 3, at 692. See also Vegosen, *supra* note 3 ("This practice [of providing neutral job references] inhibits the ability of prospective employers to obtain important information about a potential employee's competence.").

14. See Adler & Pierce, *supra* note 3, at 1428-29. See also Buchanan, *supra* note 12 ("The lack of reliable information on a prospective employee . . . results in an undue emphasis being placed on job interviews, which often are less objective types of candidate assessment.").

15. See Adler & Pierce, *supra* note 3, at 1429. See generally Rochelle B. Esker, *To Catch A Thief: The Private Employer's Guide to Getting and Keeping an Honest Employee*, 63 UMKC. L. REV. 251 (1994) (addressing employee privacy in the job reference context).

16. See Mike Maharray, *Legislature 1997: Bill Allows More Leeway in Job References*, NEWS TRIB. (Tacoma, Wa.), Mar. 1, 1997, at B4 (quoting the owner of a local employment agency, regarding employers' nondisclosure policies, "This hurts employers and it hurts the good employee who has earned a good reference.").

credentials.¹⁷ These exceptional employees are effectively prevented from showing prospective employers their superior records when seeking to advance their careers.¹⁸ Employers are less likely to hire an applicant for whom they are unable to obtain information than they are to hire an applicant with a good reference.¹⁹

Perhaps more troubling, the dearth of reference information has led some employers to bypass restrictions established by a company's human resource department and seek information directly from an employee's supervisor or co-workers.²⁰ This approach may do little to insulate an employer from liability, while, in some cases, it may subject employees to a biased review from the one person in the workplace with whom they have a personality conflict.²¹

Moreover, in an effort to undermine restrictive reference practices, some employers are engaging in a "wink and nod" approach.²² Under this approach, employers attempt to convey their feelings about an employee by saying something like "John was terrific, we hated to lose him, however, our official policy is to say this and this."²³ Other employers may try to get their message across by providing a neutral reference such as "yes, the person worked here" in a resigned tone.²⁴ These approaches are subject to misinterpretation by a prospective employer; for example, a message that an employee requires closer scrutiny may go undetected, while a highly muted message that an employee is worthy of praise may be read as disapproval.²⁵

17. *See id.* *See also* Adler & Pierce, *supra* note 3, at 1429 n.245 (quoting Paul W. Barada, *Check References With Care*, NATION'S BUS., May 1993, at 54) ("Nothing puts up a red flag in the mind of the prospective employer quicker than a reference who is unwilling to talk about a former employee. If a former employer refuses to comment, the caller may assume it's because something is wrong with the applicant.").

18. *See* Adler & Pierce, *supra* note 3, at 1428-29. *See also* Forster, *supra* note 11 (quoting South Carolina's state director for the National Federation of Independent Businesses, "The silence also hurts good employers [sic] because they aren't getting the quality recommendation that they worked hard to get."); Kenny, *supra* note 1 (quoting a local human resource manager, "We don't even give out good references, just to be consistent. At this point we're all playing the game of 'don't say anything, even if you want to.'").

19. *See* Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 50 (1995) (citing a 1992 survey conducted by Paul Half International, Inc., an executive search firm, indicating that forty-four percent of responding executives view a former employer's no comment regarding a former employee's work record as a detriment to the applicant's chances of being hired).

20. *See* Adler & Pierce, *supra* note 3, at 1429-30.

21. *See* Vicky Uhland, *Escaping a Bad-Mouth Boss: How Do You Get a Decent Reference from an Enemy?*, DENVER ROCKY MTN. NEWS, June 20, 1999, at 1J.

22. Adler & Pierce, *supra* note 3, at 1430.

23. *Id.* at 1430 n.252 (quoting Brooklyn-based employment attorney Jose Rivera).

24. *Id.* *See also* Uhland, *supra* note 21 (quoting a Littleton, Colorado employment lawyer, "[M]uch can be implied by tone or inference.").

25. *See* Adler & Pierce, *supra* note 3, at 1430.

In an effort to encourage employers to abandon their “no comment” and neutral job reference policies, during its 1999 legislative session, the Missouri General Assembly passed a law that attempts to balance the competing interests of workers who need protection against arbitrary references, and employers who need to make informed hiring decisions.²⁶ The measure was signed into law by Governor Mel Carnahan on July 13, 1999, as part of a bill designed to make changes in the state’s unemployment compensation system.²⁷ The new statute will be codified at section 290.152 of the Missouri Revised Statutes.²⁸

26. *See New Missouri Reference Request Law, supra* note 2, at 1.

27. *See id.*

28. At the time this Comment went to press, the new statute was not yet available in the bound volume of the Missouri Revised Statutes or its supplement. Accordingly, throughout this Comment, the new statute will be cited to Vernon’s Annotated Missouri Statutes. *See* MO. ANN. STAT. § 290.152 (West Supp. 2000):

1. As used in this section, the following terms shall mean:

(1) “Employer,” any individual, organization, partnership, political subdivision, corporation or other legal entity which has or had in the entity’s employ one or more individuals performing services for the entity within this state;

(2) “Prospective employer,” any employer, as defined in this subsection, to which an individual has made application for employment, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment.

2. An employer may:

(1) Respond in writing to a written request concerning a current or former employee from an entity or person which the employer reasonably believes to be a prospective employer of such employee; and

(2) Disclose the nature and character of service rendered by such employee to such employer and the duration thereof; and

(3) Truly state for what cause, if any, such employee was discharged or voluntarily quit such service.

The provisions of this section shall apply regardless of whether the employee becomes employed by the prospective employer prior to receipt of the former employer’s written response. The information provided pursuant to this section shall be consistent with the content of any service letter provided pursuant to section 290.140 for the same employee.

3. The employer shall send a copy of any letter provided pursuant to subsection 2 of this section to the current employee or former employee at the employee’s last known address. The current or former employee may request from the employer a copy of the letter provided pursuant to subsection 2 of this section for up to one year following the date of such letter.

4. For purposes of this section, an employer shall be immune from civil liability for any response made pursuant to this section or for any consequences of such response, unless such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false.

5. Any employer who violates the provisions of subsection 2 of this section shall be liable for compensatory damages but not punitive damages.

6. Any letter issued pursuant to this section shall not be admitted as evidence in an unemployment compensation claim.

Id.

The statute gives an employer who voluntarily responds to a request for a reference from a prospective employer “immun[ity] from civil liability,” unless the response was “false and made with knowledge that it was false or with reckless disregard for whether such response was true or false.”²⁹ Employers who choose to respond pursuant to the statute’s dictates are also protected from an award of punitive damages if they “[d]isclose the nature and character of service rendered by such employee and the duration thereof; and . . . [t]ruly state for what cause, if any, such employee was discharged or voluntarily quit such service.”³⁰ The statute requires that a copy of any response be mailed to the current or former employee at the employee’s last known address.³¹ The statute also allows an affected employee to request a copy of any response made pursuant to the statute.³²

According to law’s primary sponsor, Missouri State Representative Vicky Riback Wilson, the new reference immunity statute represents a compromise between the interests of employers and employees and serves a variety of important purposes.³³ First, the statute limits employers’ civil liability for information provided in a reference.³⁴ This protection encourages the free-flow of information between employers, allowing them to make informed hiring decisions.³⁵ Better-informed hiring decisions in turn may permit employers to weed out dangerous employees and to protect the general public as well as those in the workplace.³⁶ The statute also protects employees by attempting to assure that they are provided with the same information as their prospective employers and that the information is job-related.³⁷

29. *Id.* § 290.152.2, -.4.

30. *Id.* § 290.152.2.

31. *Id.* § 290.152.3.

32. *See id.* § 290.152.3.

33. *See* H.R. 441, 90th Leg., 1st Reg. Sess. (Mo. 1999), available in 1999 MO H.B. 441 (Westlaw, MO-BILLS database) [hereinafter H.B. 441 of 1/18/99]. Missouri State Representative Vicky Riback Wilson, Democrat, 25th Dist., was the primary sponsor of the bill, which was also sponsored by Representative Carol Jean Mays, Democrat, 50th Dist. *See id.* The bill was co-sponsored by Representatives Marsha Campbell, Democrat, 39th Dist.; Tim Van Zandt, Democrat, 38th Dist.; Scott Lakin, Democrat, 33rd Dist.; and Emmy L. McClelland, Republican, 91st Dist. *See id.* It was this bill that underwent major changes during the 1999 legislative session and was eventually incorporated, in total, into Senate Bill 32. S. 32, 90th Leg., 1st Reg. Sess. (Mo. 1999) (enacted) (to be codified at MO. REV. STAT. § 290.152). *See also* interviews with Missouri State Representative Vicky Riback Wilson (Oct. 25, 1999 & Feb. 23, 2000) [hereinafter Riback Wilson interviews] (notes on file with author).

34. *See* Riback Wilson interviews, *supra* note 33.

35. *See id.*

36. *See id.* According to one of the bill’s sponsors, Representative Riback Wilson, the Missouri home health care industry was one of the most active participants in lobbying for passage of the bill. *See id.*

37. *See id.*

Still, statutory immunity may help vindictive employers escape liability resulting from defamatory references by placing a hurdle in the path of employees seeking to challenge such references.³⁸ On the other hand, failing to protect employers who provide references in good faith makes it easier for incompetent or dangerous employees to move from job to job.³⁹ The new Missouri reference immunity statute, or “shield law,”⁴⁰ attempts to encourage the voluntary exchange of reference information, but does not decrease the chances that reasonable and defensible reference practices will be challenged in court.⁴¹

Accordingly, even before the new statute became effective, attorneys for Missouri employers were advising their clients not to “substantially depart” from the “‘name, rank, and serial number’ mentality.”⁴² This Comment explores the reasons why Missouri employers are likely to retain their current practices and suggests ways in which the new statute might be clarified to create additional incentives for employers to abandon their “no comment” and neutral job reference policies.⁴³

38. See Adler & Pierce, *supra* note 3, at 1432. Under the new statute, if an employer is found to have abused the qualified statutory immunity, an employee is purportedly limited to an award of compensatory damages. See MO. ANN. STAT. § 290.152.5. This limits an employee’s common law defamation remedies, which include eligibility for an award of punitive damages when the common law qualified privilege for references is overcome. See *infra* notes 108-19 and accompanying text (discussing the common law qualified privilege that attaches to employment reference in Missouri).

39. See Adler & Pierce, *supra* note 3, at 1432.

40. Some commentators refer to reference immunity statutes as “shield laws” because they are intended to “shield” an employer from liability for providing reference information. See, e.g., Adler & Pierce, *supra* note 3, at 1388.

41. See *New Missouri Reference Request Law*, *supra* note 2, at 2 (stating that the new law “does not limit the currently available claims that can be made against an employer” in Missouri). See also Uhland, *supra* note 21 (quoting Sandra Goldman, an attorney with Holland & Hart LLP, explaining that immunity from civil liability is not the equivalent of immunity from suit).

42. See *New Missouri Reference Request Law*, *supra* note 2, at 2.

43. Professor Bradley Saxton, who has written extensively on the subject of employment references, believes the five most significant factors influencing employers to adopt restrictive reference policies are:

- (1) the fact that the most tangible benefits of open reference practices are realized by the recipients, rather than the providers of reference information;
- (2) the fact that the expected costs of open reference policies have typically been borne almost exclusively by the providers of reference information;
- (3) the significant inconsistencies in the rules potentially determining employers’ liability for employment references;
- (4) the absence of a legal duty on the part of employers to respond to reference inquiries; and
- (5) the ‘American Rule’ requirement that even employers whose reference practices are reasonable and responsible will pay significant attorney’s fees if forced to defend those practices.

Saxton, *supra* note 19, at 113.

One reason employers may be reluctant to rely on the new statute to protect them from reference-based liability is because statutory immunity from civil liability is not the same thing as immunity from suit.⁴⁴ To illustrate the extent of liability Missouri employers face, Part II of this Comment examines some of the causes of action employees may utilize in challenging a reference.⁴⁵ Additionally, Missouri courts will likely look to the law that has developed pursuant to these causes of action when construing the new statute.

Another reason Missouri employers may be hesitant to rely on the new statute to protect them from reference-based claims is because a perception exists that the law affords no more protection than employers already had under the common law.⁴⁶ Part III of this Comment examines the language, scope, and possible implications of the new law to determine exactly what the statute does and does not do.⁴⁷ Part III also provides proposals for reforming the statute to encourage employers to rely on the law to protect them from liability when attempting, in good faith, to comply with the statute's dictates.⁴⁸

Part IV suggests that the new Missouri statute does not go far enough in encouraging employers to provide detailed information when responding to reference requests.⁴⁹ This section includes a proposed statute that would place a duty on employers to provide certain information in response to a proper request for a reference.⁵⁰ Even further, the proposed statute would place a strictly limited, but affirmative "duty to warn" on a current or former employer who provides a reference.⁵¹ This limited "duty to warn" would require a former or current employer to inform a prospective employer if an employee

44. See *New Missouri Reference Request Law*, *supra* note 1, at 2; *supra* note 41.

45. See *infra* notes 55-179 and accompanying text (discussing causes of action commonly brought to challenge an employment reference in Missouri, negligent hiring, and the emerging cause of action or negligent misrepresentation or referral). Note that an allegedly defamatory reference may also form the basis of a claim for intentional interference with prospective economic advantage. See, e.g., *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 316 (Mo. 1993) (en banc). Under Missouri law this tort requires proof of:

(1) contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages.

Id. at 316 (citing *Community Title v. Roosevelt Fed. Sav. & Loan*, 796 S.W.2d 369, 372 (Mo. 1990) (en banc)). See also *Adler & Pierce*, *supra* note 3, at 1412-14 (discussing the tort of intentional interference with prospective economic advantage in the employment reference context); *Saxton*, *supra* note 19, at 64-65 (same).

46. See *New Missouri Reference Request Law*, *supra* note 2, at 2 ("Although the [new statute] adopts a qualified privilege for employers, the courts had already done that, so it does not actually create any new protections.").

47. See *infra* notes 180-246 and accompanying text.

48. See *id.*

49. See *infra* notes 247-313 and accompanying text.

50. *Id.*

51. *Id.*

has engaged in certain harmful or violent conduct in the workplace.⁵² As an additional limitation, the duty to include admonitory information in a reference would only arise if the employee was being considered for a position in which he or she would pose a substantial risk of harm to third parties.⁵³ Finally, the proposal suggests that courts, in their discretion, be allowed to award attorneys' fees and costs to a prevailing party in any litigation brought pursuant to the statute.⁵⁴

II. AN OVERVIEW OF SELECTED REFERENCE-BASED CLAIMS

A. *Claims Brought by the Current or Former Employee*

1. The Missouri Service Letter Statute

Under the Missouri Service Letter Statute, certain corporate employees are granted the right to request, and the employer is required to issue, a service letter describing the nature, character and length of service rendered by the employee, including the reason the employee was discharged or voluntarily left employment.⁵⁵ In sharp contrast, Missouri's new reference immunity statute extends immunity to references given only in response to a written request from a "prospective employer," and the employer's response is completely voluntary.⁵⁶

52. *Id.*

53. *Id.*

54. *See supra* notes 247-313 and accompanying text.

55. The Missouri Service Letter Statute currently provides:

1. Whenever any employee of any corporation doing business in this state and which employs seven or more employees, who shall have been in the service of said corporation for a period of at least ninety days, shall be discharged or voluntarily quit the service of such corporation and who thereafter within a reasonable period of time, but not later than one year following the date the employee was discharged or voluntarily quit, requests in writing by certified mail to the superintendent, manager or registered agent of said corporation, with specific reference to the statute, it shall be the duty of the superintendent or manager of said corporation to issue to such employee, within forty-five days after the receipt of such request, a letter, duly signed by such superintendent or manager, setting forth the nature and character of service rendered by such employee to such corporation and the duration thereof, and truly stating for what cause, if any, such employee was discharged or voluntarily quit such service.

2. Any corporation which violates the provisions of subsection 1 of this section shall be liable for compensatory but not punitive damages but in the event that the evidence establishes that the employer did not issue the requested letter, said employer may be liable for nominal and punitive damages; but no award of punitive damages under this section shall be based upon the content of any such letter.

MO. REV. STAT. § 290.140 (1994).

56. *Compare* MO. ANN. STAT. § 290.152.2, with MO. REV. STAT. § 290.140.1.

The Missouri Service Letter Statute has been strictly construed to protect only employees working in Missouri for a corporation doing business in Missouri.⁵⁷ Public employers or public entities, including municipalities and municipal corporations, are not “corporation[s] doing business in the state” within the meaning of the statute.⁵⁸ In contrast, the new Missouri employer immunity statute is applicable to nearly all employers in the state, both private and public.⁵⁹

The history of the Service Letter Statute demonstrates another sharp contrast with the new law: the Service Letter Statute was designed to protect the employee’s ability to move from job to job unhindered by the inability to obtain a reference from his or her past employers.⁶⁰ The new statute, however,

57. See *Cordon v. Trans World Airlines, Inc.*, 442 F. Supp. 1064, 1068 (D. Kan. 1977) (holding Service Letter Statute protects only those persons actually employed in Missouri); *Ramm v. Dempster Sys., Inc.*, 601 F. Supp. 114, 116 (W.D. Mo. 1985) (finding that an employee originally hired in Missouri and who worked for sometime in Missouri was not an “employee” for purposes of Service Letter Statute).

58. *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 651 (Mo. Ct. App. 1989); *Sprenger v. City of Springfield*, 629 S.W.2d 493, 493-94 (Mo. Ct. App. 1981); *Hunt v. St. Louis Hous. Auth.*, 573 S.W.2d 728, 730-31 (Mo. Ct. App. 1978).

59. The Service Letter Statute is applicable to “an employee of any corporation doing business in this state and which employs seven or more employees” MO. REV. STAT. § 290.140.1.

60. In the early case of *Cheek v. Prudential Ins. Co.*, the Missouri Supreme Court put the statute into historical perspective. 192 S.W. 387 (Mo. 1916). The court noted that at the time of the statute’s passage, a custom existed among railroads and other corporations not to hire an employee who could not produce a satisfactory written referral from his past employer. *See id.* at 389. The court stated:

This custom became so sidespread [sic] and effected such vast numbers of laboring people it became a public evil, and worked great injustice and oppression upon large numbers of persons who earned their bread by the sweat of their faces. The statute quoted was enacted for the purpose of regulating that custom, not to destroy it (for it contained some good and useful elements, enabling the corporations of the state to ascertain the degree of the intelligence as well as the honesty, capacity, and efficiency of those whom they wished to employ, for whose conduct they are responsible to the public and their fellow employees), and thereby remedy the evil which flowed therefrom.

Id. In *Cheek*, the Missouri Supreme Court held that the Service Letter Statute was not an infringement of a corporation’s due process rights or equal protection rights under the Fourteenth Amendment. *See id.* The Supreme Court upheld the Missouri Supreme Court’s decision and stated:

What [is] more reasonable than for the Legislature of Missouri to deem that the public interest required it to treat corporations as having, in a peculiar degree, the reputation and well-being of their former employees in their keeping, and to convert what otherwise might be but a legal privilege, or under prevailing customs a “moral duty,” into a legal duty

Prudential Ins. Co. of Am. v. Cheek, 259 U.S. 530, 546 (1922).

is designed to encourage the voluntary free-flow of information among employers.⁶¹

Although their basic purposes may differ, the two laws share some features. Just as the Service Letter Statute currently purports to prohibit an award of punitive damages based on the content of a service letter, the new statute attempts to protect employers from punitive damage awards based on a reference.⁶² Finally, the language of the new statute proscribing the contents of any response made pursuant to the statute's requirements tracks the language defining the contents of a service letter.⁶³ Thus, it is likely Missouri courts will look to case law that has developed under the Service Letter Statute to assist them in construing the new statute.

a. The History of the Service Letter Statute

Missouri's Service Letter Statute was first enacted in 1905.⁶⁴ The statute provided that a failure to issue a service letter was punishable by a fine not to exceed five hundred dollars or by imprisonment in the county jail for a period not exceeding one year, or both.⁶⁵ When originally enacted the Service Letter Statute did not provide for civil liability; however, the Missouri Supreme Court held that the statute created a private cause of action for a failure to issue a service letter that supported awards of both actual and punitive damages.⁶⁶

61. See *supra* notes 33-37 and accompanying text (discussing the primary sponsor's remarks regarding the purposes of the new statute).

62. Compare MO. REV. STAT. § 290.140.2, with MO. ANN. STAT. § 290.152.5.

63. Compare MO. REV. STAT. § 290.140.2, with MO. ANN. STAT. § 290.152.5.

64. The Act from which the statute was derived was entitled, "An act for the protection of laboring men by requiring employing corporations to give letter showing service of employe [sic] quitting service of such corporation, and providing for penalty for violation of this act." 1905 Mo. Laws 178.

65. MO. REV. STAT. § 3020 (1909).

66. See *Cheek*, 192 S.W. 387. See also Ralph K. Soebbing, *The Missouri Service Letter Statute*, 31 MO. L. REV. 505, 510-12 (1966). Note that at least one Missouri court decision suggests that a letter issued pursuant to Missouri's Service Letter Statute likewise could be used to support a claim of retaliation pursuant to Title VII, the Americans with Disabilities Act and the Missouri Human Rights Act. *Blandin v. Marriott Int'l, Inc.*, No. 4:96CV1130-DJS, 1997 WL 581562, at *3 (E.D. Mo. Aug. 25, 1997). In *Blandin*, the United States District Court for the Eastern District of Missouri found that a plaintiff could rely on an employer's failure to supply a properly requested service letter to establish a *prima facie* case of retaliation. See *id.* at *8-*9. The *Blandin* court found, however, that "Marriott's failure to provide plaintiff with a service letter and the 'vague harm' which she alleges as a result [did] not rise to the level of an adverse employment action." *Id.* Nevertheless, it is clear the *Blandin* court left open the possibility that failure to issue a service letter could form the basis for an action for retaliation under a number of state and federal anti-discrimination statutes, thus creating a whole new class of litigation under Missouri's Service Letter Statute.

In 1982, the Missouri Legislature revisited the language of the Service Letter Statute.⁶⁷ Presumably, a major purpose of the 1982 amendment was to “limit punitive damage awards to cases where no letter is timely furnished, and to preclude punitive awards based upon the content of the letter.”⁶⁸ The amendment did not preclude an award of punitive damages in cases where the employer fails to issue a service letter at all.⁶⁹

It appears, however, that the legislative attempt to limit punitive damages to cases in which no service letter is issued has been largely unavailing. Contrary to the legislative amendment, Missouri courts continue to hold that an insufficient response or a response that falsely states the reasons for termination is tantamount to a failure to issue a service letter and may entitle a plaintiff to punitive damages.⁷⁰

67. See *Ryburn v. General Heating & Cooling, Co.*, 887 S.W.2d 604, 607 (Mo. Ct. App. 1994). See also William C. Martucci & Mark P. Johnson, *Recent Developments in Missouri: Labor and Employment Law*, 53 UMKC L. REV. 509, 515 (1985). In its present embodiment, the Service Letter Statute no longer makes it a criminal offense to fail to supply a service letter. See MO. REV. STAT. § 290.140.

68. See *Ryburn*, 887 S.W.2d at 607. The language limiting the award of punitive damages under the amended Service Letter Statute was carried forward into the new reference immunity statute. However, under the Service Letter Statute, an employer’s response is required if a proper request is received, whereas under the new statute an employer’s compliance is voluntary. See also *infra* notes 238-44 (discussing how the voluntary nature of the new statute creates a major ambiguity because it is difficult to conceive of an award of punitive damages for failure to comply with a statute that is voluntary).

69. See Martucci & Johnson, *supra* note 67, at 515. In *Talbert v. Safeway Stores, Inc.*, the United States District Court for the Eastern District of Missouri noted with concern that the “Missouri General Assembly did not explain what would constitute a failure ‘to issue the requested letter.’” 651 F. Supp. 1563, 1565 (E.D. Mo. 1987). The court noted that there are at least four possible meanings to the phrase “failure to issue the requested letter” including:

- 1) the employer failed to issue a letter to the day of trial; 2) the employer issued a letter that purported to be a service letter but, in fact, was not; 3) the employer failed to issue a letter within the 45 day time period; and 4) the employer unreasonably delayed in issuing a letter.

Id. The court held, using principles of statutory construction, that if an employer issues a letter more than 45 days after it is requested, the employer has failed to issue a service letter and the employee is entitled to seek punitive damages. See *id.* at 1565-66.

70. In *Van Sickle v. Katz Drug Co.*, an employer testified regarding his failure to state the true reason for an employee’s discharge, “I didn’t want to harm this young man. I didn’t want to say anything in any way that would be harmful to him in obtaining other employment.” 151 S.W. 2d 489, 494 (Mo. Ct. App. 1941). While commending the employer’s desire to protect the former employee, the court found that the employer “had conscious knowledge” of his legal duty under, and failure to comply with, the statute and that these facts supported an award of punitive damages. *Id.* See also *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1067 (8th Cir. 1988) (“[A]n untimely service letter constitutes a complete failure to issue a service letter that will support both compensatory and punitive damages.”); *Stark v. American Bakeries Co.*, 647 S.W.2d 119, 123 (Mo. 1983) (en banc) (“Because the reason ‘your work was unsatisfactory’ would not enable plaintiff to meet and rebut severely impairing ‘facts’ stated by his former

b. Litigation under the Service Letter Statute

The court determines the sufficiency of the employer's response to a proper request for a service letter as a matter of law.⁷¹ For example, the Missouri Court of Appeals held that a service letter that included the cause of the employee's discharge, but not the duration of the employee's employment or the character of the employee's service did not meet the requirements of a proper service letter.⁷² Also, Missouri courts have held that service letters stating that the employee was discharged for "unsatisfactory work" are too vague to satisfy the requirements of the Service Letter Statute.⁷³ Thus, generalities regarding an employee's termination will ordinarily not meet the statutory requirements that a valid, clear, and true reason for an employee's discharge be given.⁷⁴

One of the most litigated requirements of the Service Letter Statute mandates that employers state the "true reasons" for an employee's discharge.⁷⁵ As the Missouri Supreme Court explained in *Labrier v. Anheuser Ford, Inc.*:

corporate employer, we conclude it is too vague to constitute a 'cause' for discharge under § 290.140, RSMO 1969."); *J & J Home Builders, Inc. v. Hasty*, 989 S.W.2d 614, 617 (Mo. Ct. App. 1999) (holding company's failure to sign service letter, even though on company letterhead, constituted refusal to issue requested letter exposing company to punitive damage award); *Hills v. McComas Rentals, Inc.*, 779 S.W.2d 297, 300 (Mo. Ct. App. 1989) (failing to provide duration of employment or character of service held equivalent to non-issuance of service letter); *Ball v. American Greetings Corp.*, 752 S.W.2d 814, 821 (Mo. Ct. App. 1988) (failing to state cause for discharge constitutes refusal to issue the service letter and supports award of punitive damages). *But see Kincaid v. Pitney Bowes, Inc.*, 750 S.W.2d 550, 554 (Mo. Ct. App. 1988) (holding employee not entitled to punitive damages where employer's response is incomplete; not complete failure to issue); *Hendrix v. Wainwright Indus.*, 755 S.W.2d 411, 413 (Mo. Ct. App. 1988) (holding employee barred from seeking punitive damages because service letter provided and employee challenged substance of letter).

71. *See Newton v. State Farm Mut. Auto. Ins. Co.*, 700 F.2d 419, 420 (8th Cir. 1983).

72. *See Hills*, 779 S.W.2d at 300.

73. *Gloria v. University of Health Science*, 713 S.W.2d 32, 33 (Mo. Ct. App. 1986). In *Stark*, the Missouri Supreme Court reasoned that a service letter citing "unsatisfactory work" as the reason for an employee's termination, even if the work was unsatisfactory in some respect, would not allow an employee to challenge any allegedly false statements that his work was not satisfactory in other, possibly vital, respects. 647 S.W.2d at 123.

74. *Cumby v. Farmland Indus., Inc.*, 524 S.W.2d 132, 135 (Mo. Ct. App. 1975). *See also Gerharter v. Mitchelhill Seed Co.*, 157 S.W.2d 577, 580-81 (Mo. Ct. App. 1941) (holding letter which included dates of employment and was signed by the president of the corporation, indicating that the employee's services were satisfactory but no longer required insufficient to comply with statute). *But see Kincaid*, 750 S.W.2d at 554 (employer's response to a service letter request that indicated the employee had resigned, rather than been terminated, was found to be not so incomplete as to be equivalent to a failure to send a letter at all).

75. *See MO. REV. STAT. § 290.140.1.*

There is a distinction between the reasons themselves being true and the reasons given for discharge as being the actual ones for which the plaintiff was dismissed. The statute only requires the latter Therefore, even though the reasons stated may themselves be incorrect, they still may be the real reasons the employer discharged its employee. In such a case, an employer satisfies its obligations under the statute when it states the truth as to discharge reasons, even though they may be incorrect.⁷⁶

The Missouri Supreme Court outlined the burden of proof in a lawsuit challenging the “true reasons” for discharge in *Stark v. American Bakeries Co.*⁷⁷ The *Stark* court cited with approval the decision of the Court of Appeals for the Western District of Missouri in *Newman v. Greater Kansas City Baptist and Community Hospital Association*,⁷⁸ which noted that a plaintiff’s burden under the statute is a subjective one:

[T]he service letter gave as the cause of discharge: “Theft of personal property on hospital premises.” At trial, plaintiff produced evidence that she was not guilty of theft. Reversing judgment for plaintiff, the court opined, “. . . [sic] the evidence that [plaintiff] did not steal proves merely that the statement that she did steal was false, not that the reason stated for discharge was false. In fact, the evidence allows no inference other than that she was terminated because . . . the hospital believed she stole. There was no proof that the reason given was a foil for a true but undisclosed cause. The want of such evidence amounted to a lapse to prove a submissible cause of action under § 290.140.”⁷⁹

To avoid a directed verdict, a plaintiff trying to establish that an employer failed to state the true reason for discharge “need not prove the true reason for his discharge but must cite substantial evidence that the stated reason is not the true reason for his discharge.”⁸⁰

c. Damages Under the Service Letter Statute

Missouri courts have repeatedly found that the failure of an employer to issue a service letter when requested entitles the employee to nominal damages even absent proof of actual injury.⁸¹ In order for an employee to recover actual damages under the statute, the employee must prove:

76. 621 S.W.2d 51, 57 n.2 (Mo. 1981) (en banc).

77. 647 S.W.2d 119 (Mo. 1983) (en banc).

78. 604 S.W.2d 619 (Mo. Ct. App. 1980)

79. *Stark*, 647 S.W.2d at 124 n.7 (citations omitted).

80. *Id.* at 124 n.5 (citations omitted).

81. See *Thompson v. Skelgas, Inc.*, 896 S.W.2d 645, 647 (Mo. Ct. App. 1995). See also *Herberholt v. dePaul Community Health Ctr.*, 625 S.W.2d 617, 622 (Mo. 1981) (en banc) (citing *Heuer v. John R. Thompson Co.*, 251 S.W.2d 980, 985 (Mo. Ct. App. 1952)) (“The failure to give a proper service letter constituted an invasion of plaintiff’s legal rights and without proof of any damages whatever entitled plaintiff to a verdict for nominal damages.”).

(1) that on or about an approximate date the plaintiff was either refused employment or hindered in obtaining such employment; (2) that the refusal or hindrance was caused by the absence or inadequacy of the service letter; (3) that the position the plaintiff had difficulty in obtaining was actually open; and (4) the salary rate of that position.⁸²

The standard under which a Missouri plaintiff may be entitled to an award of punitive damages was defined by the Missouri Supreme Court in *Burnett v. Griffith* as “conduct that is outrageous, because of the defendant’s evil motive or reckless indifference to the rights of others.”⁸³ Courts have upheld the *Burnett* standard as the appropriate standard for submission of punitive damages under the Service Letter Statute.⁸⁴

In *Ryburn v. General Heating & Cooling, Co.*, the Missouri Court of Appeals discussed the level of “outrageousness” necessary to support an award of punitive damages in a service letter case.⁸⁵ The *Ryburn* court rejected the argument of the defendant employer that the term “outrageous,” as used in *Burnett*, was equivalent to the degree of outrageousness needed to support a claim of intentional infliction of emotional distress.⁸⁶ The *Ryburn* court stated:

It may seem anomalous that the standard for imposition of punitive damages might be a lower degree of outrageousness than the standard to award compensatory damages in a tort action of outrage. However, the reluctance of the courts to open the floodgates of claims for the tort of outrage have caused the courts to maintain a very high threshold for such claims⁸⁷

The standard for a punitive damage award in a service letter action requires proof that would support a finding of outrageousness “based upon a wanton mental state—a knowing and conscious disregard of the right or the welfare of another.”⁸⁸ Accordingly, a defendant’s reckless indifference to the rights of

82. *Herberholt*, 625 S.W.2d at 622-23 (citing *Rotermund v. Basic Materials Co.*, 558 S.W.2d 688, 691-92 (Mo. Ct. App. 1977)). See also *Grasle v. Jenny Craig Weight Loss Centres, Inc.*, 167 F.R.D. 406, 413-14 (E.D. Mo. 1996) (Fact that employee asked for service letter by prospective employer, standing alone, insufficient to prove actual damages. There must be a showing that the employer actually held the service letter against the plaintiff); *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 57 (Mo. 1981) (en banc).

83. *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989) (en banc).

84. See *Ryburn*, 887 S.W.2d at 608 n.2 (Mo. Ct. App. 1994) (citation omitted) (“The parties in this case have assumed, and we assume, that a claim of violation of the service letter law is equivalent to an intentional tort for purposes of the appropriate standard for submission of punitive damages.”); *Hills v. McComas Rentals, Inc.*, 779 S.W.2d 297, 302 (Mo. Ct. App. 1989) (citing *Burnett v. Griffith*, 769 S.W.2d 780,787 (Mo. 1989)) (“While the *Burnett* decision involves punitive damages in cases of intentional torts, we find it analogous to the statutory imposition of punitive damages.”).

85. 887 S.W.2d at 608-09.

86. *Id.* at 608.

87. *Id.*

88. *Id.* at 609.

others will support a finding of outrageousness and hence, an award of punitive damages to a service letter plaintiff in Missouri.⁸⁹

Courts may likely apply the standards governing an award of damages under the Service Letter Statute when construing the new employer immunity law. The language describing the contents of any response made under the new law mirrors the language of the required contents of a service letter.⁹⁰ The new statute also borrows language from the standards used by Missouri courts in deciding common law defamation claims.⁹¹ Thus, the courts may rely on common law defamation jurisprudence to determine when the privilege bestowed by the new statute has been overcome, entitling an employee to damages for a defamatory reference.

B. *Defamation in the Employment Context*

While retaining the common law characteristics of libel and slander, Missouri courts consider both causes of action under the single tort label of defamation.⁹² Additionally, Missouri courts no longer distinguish between *per se*⁹³ and *per quod*⁹⁴ defamation.⁹⁵ Under Missouri law, an employee wishing

89. *See id.* *See also* J & J Homebuilders, Inc., v. Hasty, 989 S.W.2d 614, 616 (Mo. Ct. App. 1999). In *J & J*, the court stated:

[T]he jury could reasonably conclude that failing to sign the letter, sending the letter to her former address two weeks after it was prepared and providing an erroneous date of termination was outrageous because of J & J's reckless indifference [to] the rights of Ms. Hasty under the statute. The evidence shows that [Defendant's Vice-President] spoke with her attorney regarding the service letter and was cognizant of the requirements of the service letter statute and that she did not review or sign the letter before it was sent. In entering its verdict, the jury did not believe the deficiencies in the letter were inadvertent or mistakes as J & J contends. Accordingly, the trial court did not err in submitting the issue of punitive damages to the jury.

Id. at 617.

90. *Compare* MO. ANN. STAT. § 290.152.2, with MO. REV. STAT. § 290.140.1.

91. *Compare* “[f]or purposes of this section, an employer shall be immune from civil liability for any response made pursuant to this section . . . unless such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false,” MO. ANN. STAT. § 290.152.4, with the common law standard for overcoming the qualified privilege that attaches to employee references in Missouri which requires that plaintiff prove “the falsity of a statement and knowledge of such falsity (or reckless disregard of plaintiff’s rights without knowledge of whether it was true or false) . . .” *Cash v. Empire Gas Corp.*, 547 S.W.2d 830, 834 (Mo. Ct. App. 1976) (quoting *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197, 204 (Mo. 1972)).

92. *Kennedy v. Jasper*, 928 S.W.2d 395, 399 (Mo. Ct. App. 1996) (citing *Henry v. Halliburton*, 690 S.W.2d 775, 779 (Mo. 1985) (en banc)).

93. At early common law, four categories of false statements were considered slander *per se* including: “that the plaintiff was guilty of a crime, afflicted with a loathsome disease, or unchaste, as well as false statements that concerned the plaintiff’s ability to engage in his or her occupation or business.” *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 308 (Mo. 1993) (en banc). If a plaintiff was alleging slander *per se*, the plaintiff did not have to plead damages because

to challenge an allegedly defamatory reference must prove: (1) the employer made a statement of fact, (2) the statement was of and concerning the plaintiff, (3) the statement was false, (4) a third person heard or read the statement (also known as the “publication” element),⁹⁶ (5) the plaintiff’s reputation was injured, and (6) the defendant was at fault.⁹⁷ In order for a statement of fact to

damages were presumed. *See id.* Libel per se “referred to a statement whose defamatory nature was apparent upon the face of the publication . . .” *Id.*

94. At early common law, slander per quod encompassed words which were not actionable as slander per se and a plaintiff was required to both plead and prove “special damages.” *Nazeri*, 860 S.W.2d at 308. Special damages were those that were capable of being calculated in dollars, such as the loss of marriage, employment, income, profits or even gratuitous hospitality. *Carter v. Willert Home Prods., Inc.*, 714 S.W.2d 506, 509 (Mo. 1986) (en banc) (citation omitted). Extrinsic facts were necessary in order to label a defamatory statement as libel per quod and proof of special damages was also required. *Id.* at 509 & n.1.

95. In *Nazeri*, the Missouri Supreme Court stated:

Although it is clear that respondent’s remarks were defamatory, attempts to characterize them as per se or per quod appear more artificial than real. Unfortunately, the result of the classifications may have a very real impact more far-reaching than justified. In one case the jury is free to presume damages. In the other the jury is precluded from awarding actual damages unless special damages are proven. . . . We hold that in defamation cases the old rules of per se and per quod do not apply and plaintiff need only to plead and prove the unified defamation elements set out in MAI 23.01(1) and 23.01(2). In short, plaintiffs need not concern themselves with whether the defamation is per se or per quod, nor with whether special damages exist, but must prove actual damages in all cases.

860 S.W.2d at 312-13.

96. *See Saxton, supra* note 19, at 69-70.

97. *See Mark P. Johnson & Joseph W. Miller, An Overview of Libel Law in Missouri*, 52 J. MO. B. 210, 211 (1996) (citing *Moore v. Credit Info. Corp. of Am.*, 673 F.2d 208 (8th Cir. 1982)); *Nazeri*, 860 S.W.2d at 312-13. To recover at early common law, a defamation plaintiff needed only to prove the publication of a false and defamatory statement; the intent or “fault” of the defendant was not an issue. John Bruce Lewis, et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 816 (1989). The landmark case of *New York Times v. Sullivan*, 376 U.S. 254 (1964) marked a turning point in the law of defamation. In *Sullivan*, the Supreme Court attempted to reconcile the principles of freedom of speech with defamation law developed by the states by requiring that “actual malice” be proven before a public official can recover damages for defamation:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless the plaintiff proves the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279-80. A decade later, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974), the Court distinguished between public and private defamation plaintiffs, and found that the “actual malice” standard should apply to public figures and officials, while the standard for private litigants was left to the states to define “so long as they do not impose liability without fault.” The standard of fault for private figures announced in *Gertz* has been called into question by the Supreme Court’s decision in *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). *Dunn* has been read to limit the fault requirement in *Gertz* to plaintiffs that are private figures when the defamatory statement does not involve a matter of public concern. *See Lewis*,

be defamatory, it must tend 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.”⁹⁸

The initial determination as to whether a statement is defamatory is a question of law decided by the court.⁹⁹ When determining whether a statement is defamatory, Missouri courts consider the statement in context, not in isolation.¹⁰⁰ Once the court determines that a statement is defamatory, the court examines whether one or more privileges or defenses protect the defendant from liability.¹⁰¹

a. Common Law Defenses to a Defamation Claim

Privileged communications are divided into two general categories: communications that are absolutely privileged¹⁰² and those that are qualifiedly or conditionally privileged.¹⁰³ If a communication is absolutely privileged, even intentional false statements are immune from suit, while a qualifiedly or conditionally privileged communication is immune only if the privilege is not abused and the defamatory statements are published in good faith and without malice.¹⁰⁴

supra, at 817. At least one commentator has noted that *Dunn* does not significantly impact defamation claims in the workplace because most employees are private individuals and references are not normally of public interest. *See id.* Thus, fault remains a requirement in most reference-based claims. *See Saxton, supra* note 19, at 70-71.

98. RESTATEMENT (SECOND) OF TORTS § 559 (1977). Comment d to the RESTATEMENT (SECOND) OF TORTS § 559 explains that a communication can be defamatory even absent actual harm, so long as the statement has a general tendency to cause such harm. *See id.* § 559 cmt. d. Thus, there is a difference in determining whether a communication is defamatory and whether damages can be recovered. *See id.*

99. *See Pape v. Reither*, 918 S.W.2d 376, 379 (Mo. Ct. App. 1996).

100. *See Buller v. Pulitzer Publ'g Co.*, 684 S.W.2d 473, 477 (Mo. Ct. App. 1984). *See also Balderree v. Beeman*, 837 S.W.2d 309, 324 (Mo. Ct. App. 1992) (finding that examined in context the only reasonable inference from defendant's statement that plaintiff "propositioned" members of the contractor with whom the employer did business was that plaintiff had "sexually propositioned" such members. According to the court, "[a]ny other holding would ignore today's vernacular.").

101. *See Pape*, 918 S.W.2d at 380.

102. When a statement is absolutely privileged, the defense of privilege is generally not required to be set forth in the answer and may be raised by way of a motion to dismiss or a motion for summary judgment. *See* 50 Am. Jur. 2d *Libel & Slander* § 457 (1995).

103. A qualified or conditional privilege must be pleaded and proved; unless it is affirmatively disclosed by the complaint, or the defense, as an issue in the case. *See* 50 Am. Jur. 2d *Libel & Slander* § 457 (1995). Failure to raise the qualified privilege as a defense generally constitutes a waiver of the defense. *See id.* *See also Laun v. Union Elec. Co.*, 166 S.W.2d 1065, 1068 (Mo. 1942) (citation omitted) ("The difference in the two classes of privilege is 'that malice destroys the one and does not change the other.'").

104. *Laun*, 166 S.W.2d at 1068.

Absolute immunity is generally confined to a few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives.¹⁰⁵ Absolute privilege is based upon the public policy of freedom of speech and is generally limited to judicial, legislative or executive proceedings.¹⁰⁶ The privilege is sometimes extended "to occasions where the communication is provided for and required by law."¹⁰⁷

Communications concerning the character of an employee or former employee are generally qualifiedly privileged.¹⁰⁸ For the privilege to attach, the communication must be made in "good faith" concerning a subject in which both parties have a common duty or interest.¹⁰⁹ Even a false defamatory statement in a reference enjoys a qualified privilege under Missouri law if it is made in good faith and the employer reasonably believes it to be true.¹¹⁰

105. *See id.* *See also* Wright v. Over-The-Road & City Transfer Drivers, Helpers, Dockmen and Warehousemen, 945 S.W.2d 481, 492 (Mo. Ct. App. 1997).

106. Pulliam v. Bond, 406 S.W.2d 635, 640 (Mo. 1966).

107. *See State ex rel. McNary v. Hais*, 670 S.W.2d 494, 496 (Mo. 1984) (en banc). These "other occasions" have been held to include proceedings that are "quasi-judicial" in nature. *Id.*

108. *See Cash v. Empire Gas Corp.*, 547 S.W.2d 830, 833 (Mo. Ct. App. 1976) (quoting 50 Am. Jur. 2d *Libel & Slander* §§ 195, 273 (1995)). The Missouri Supreme Court has also held that information given to a loan company investigating an employee is subject to a qualified privilege. In *Carter v. Willert Home Prods.*, the Supreme Court held:

Although Civil Finance Company was not a prospective employer of plaintiff, it was about to enter into a business relationship with plaintiff, and its interest in the information was no less substantial than [sic] of the prospective employer in Cash. We believe that the statements made in this case are likewise, as a matter of law, qualifiedly privileged.

714 S.W.2d 506, 513 (Mo. 1986) (en banc).

109. *Cash*, 547 S.W. 2d at 833.

110. In *Washington v. Thomas*, 778 S.W.2d 792, 795 (Mo. Ct. App. 1989), the resident manager of an apartment complex sued the corporation that owned the apartment complex for defamation after the complex allegedly published documents "accusing plaintiff of threatening to do bodily harm with a loaded weapon to his superiors." 778 S.W.2d 792, 795 (Mo. Ct. App. 1989). The court stated:

Lack of personal knowledge is no bar to the relating of all relevant information regarding a former employee to one who has a definite interest [in] providing it is done in good faith, i.e. without serious doubt as to the truth of the information. Proof of falsity is not proof of malice, nor is malice shown by the defamatory nature of the charges nor by the failure to investigate.

Id. at 799 (citations omitted). In *Carmichael v. Wiesemann*, 738 S.W.2d 877 (Mo. Ct. App. 1987), the employer told customers that the employee had been fired for stealing and the employee sued for slander. *See id.* at 887. The employee had failed a lie detector test, but denied stealing. *See id.* at 879-80. The court held that the plaintiff failed to prove by clear and convincing evidence that the defendant realized the statement in which he said that the plaintiff "had stolen or that he was fired for stealing was false" or that the defendant "subjectively entertained serious doubt as to the truth of such statements." *Id.* at 881.

To overcome the qualified privilege that attaches to letters of reference in Missouri, the employee has the burden of proving express malice.¹¹¹ A jury then determines whether the showing of malice is sufficient to overcome the qualified privilege.¹¹² Missouri's approved jury instructions on libel and slander, however, do not contain the term "malice,"¹¹³ instead jurors are directed to determine whether the statement was made with "knowledge that it was false, or with reckless disregard for whether it was true or false at a time when they had serious doubt as to whether they were true"¹¹⁴ When the evidence shows that the defamatory statement was published "for a motive inconsistent with the principles that gave rise to the qualified privilege," malice may be present.¹¹⁵

The common law qualified privilege can be overcome not only by a finding of "malice,"¹¹⁶ but also by what is termed "excessive dissemination."¹¹⁷ The "excessive dissemination" exception might exist, for example, if publication is made "to persons other than those to whom the communication is important and thus privileged."¹¹⁸ Other ways in which the

111. *Washington*, 778 S.W.2d at 834.

112. *Snodgrass v. Headco Indus., Inc.*, 630 S.W.2d 147, 153-54 (Mo. Ct. App. 1982) (citing *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966)).

113. In *Snodgrass*, a defendant in a slander case challenged Missouri's Approved Instructions (MAI), claiming they failed to properly prescribe the plaintiff's burden when the communication is qualifiedly privileged. 630 S.W. 2d at 154. The MAI on libel and slander track the language of the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1965) in defining "actual malice." *Snodgrass*, 630 S.W.2d at 154. The drafters of the MAI were apparently cognizant of the considerable confusion in case law regarding the proper terminology for the type of malice necessary to overcome a qualified privilege, alternately referred to by the courts as "actual malice," "express malice," "legal malice," "malice in fact," and "malice in law." *Id.* The MAI contains but one term "malice" which has only one definition, i.e., "the doing of a wrongful act intentionally without just cause or excuse." *Id.* at 154-55 (quoting MAI 16.01). Because the *New York Times* standard is used in the libel and slander instruction, there is no need for a jury in Missouri to find either "legal malice" or "actual malice" to award punitive damages. *Snodgrass*, 640 S.W.2d at 155. The notes on use to the MAI for libel and slander provide that MAI 4.16 should be used as a damage instruction. *See id.* at 155. This instruction allows an award of punitive damages if the jury finds such damages "will serve to punish the defendant and deter him and others from like conduct." *Id.* at 155 (quoting MAI 4.16) (internal quotations omitted).

114. *Snodgrass*, 630 S.W.2d at 154 (citing MAI 23.10(2)). Note the similarity between this language and the language of section 4 of the new statute: "an employer shall be immune from civil liability for any response . . . unless such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false." MO. ANN. STAT. § 290.152.4.

115. *Snodgrass*, 630 S.W.2d at 154.

116. *Id.*

117. *Rice v. Hodapp*, 919 S.W.2d 240, 244 (Mo. 1996) (en banc).

118. *See Saxton*, *supra* note 19, at 73. *See also Rice*, 919 S.W.2d at 244 (citing *Hellesen v. Knaus Truck Lines*, 370 S.W.2d 341, 345 (Mo. 1963)); RESTATEMENT (SECOND) OF TORTS § 604 (1977).

qualified privilege may be defeated include a showing that the employer published information about the employee to a person who did not have an important stake or interest in the information; that the published statements were not limited to a necessary purpose; or that such statements were made on an improper occasion.¹¹⁹

In addition to the common law qualified privilege, an employer has additional defenses against a defamation claim. Truth may always be asserted as an absolute defense to a defamation action.¹²⁰ The Missouri Constitution provides that “in all suits and prosecutions for libel or slander the truth thereof may be given in evidence”¹²¹ This tenet remains intact even if the reference is made with express malice.¹²²

Consent is also an absolute defense to defamation.¹²³ The consent defense typically applies when, at the employer’s request, an employee has executed a waiver of claims based upon any reference or the employee has given written consent to an employer to release pertinent information to prospective employers.¹²⁴ The consent defense may also be applicable when an employee

119. See RESTATEMENT (SECOND) OF TORTS §§ 603-605A (1977).

120. See RESTATEMENT (SECOND) OF TORTS § 581A (1977) (“One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.”). See also *Pulliam v. Bond*, 406 S.W.2d 635, 642 (Mo. 1966) (citing *Warren v. Pulitzer Publ’g Co.*, 336 Mo. 184, 78 S.W.2d 404, 412(1) (1934)) (“Where all the facts stated are completely true, no defense of privilege is necessary since the truth is always a defense to libel.”).

121. MO. CONST. art. 1, § 8. In *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996) (en banc), plaintiff’s supervisor held an employee meeting after plaintiff was suspended for three days for sexual harassment. See *id.* at 242. On appeal, Rice asserted that he was not guilty of sexual harassment and that any statements to the contrary made by his supervisor at the employee meeting were false, and thus actionable. See *id.* at 243. The Supreme Court disagreed:

First, Rice asserts that his supervisor stated that ‘there had been an investigation of charges of sexual harassment of female State Farm employees by [Rice] and that as a result of said investigation [Rice] was being transferred.’ All parties agree that there was indeed an investigation and Rice was transferred. Truth is an absolute defense to the first statement alleged.

Second, Rice points to one employee’s affidavit stating that the supervisor told the employees at the meeting that ‘a sexual harassment investigation had been concluded and two individuals were found guilty of such conduct.’ Rice asserts that he was not guilty and thus, was defamed by the statement. Clearly, the statement was true in the sense that State Farm management, after an investigation, believed Rice had committed sexual harassment.

Id. at 243-44.

122. See *Cook v. Pulitzer Publ’g Co.*, 145 S.W.2d 480, 490 (Mo. 1912).

123. See RESTATEMENT (SECOND) OF TORTS § 583 (1977). See also *Turner v. Gateway Transp. Co.*, 569 S.W.2d 358, 360 (Mo. Ct. App. 1978) (citing *Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341 (Mo. 1966)).

124. See *Adler & Pierce*, *supra* note 3, at 1404.

contractually agrees to follow certain policies related to his discharge or separation from employment.¹²⁵

The First Amendment to the United States Constitution provides an absolute privilege for statements of opinion regardless of whether the statement is made maliciously or insincerely.¹²⁶ Additionally, public entities

125. See Saxton, *supra* note 19, at 61-63. In *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358 (Mo. Ct. App. 1978), a union member's discharge letter was automatically sent to the Motor Carrier Council of St. Louis (Council), the organization that handled grievances for Gateway. See *id.* at 359. The union member argued that he had been libeled when his employer published the letter to the Council. See *id.* at 360. The court found that Turner was bound by the union contract which provided that discharge letters be forwarded to the Council. See *id.* The court held: "plaintiff consented to the procedures followed in this case, and the contents of the discharge letter properly sent pursuant to those procedures were absolutely privileged." *Id.*

126. See U.S. CONST. amend. I. Only statements of fact, as opposed to statements of opinion, are actionable as defamatory. See *Pape v. Reither*, 918 S.W.2d 380, 381 (Mo. Ct. App. 1996) ("The fact that it might be eventually established in court that the persons accused in these statements indeed engaged in fraudulent or illegal conduct does not make the statements verifiable; it simply means that the prediction issued in the statements proved accurate."). Statements that contain a mixture of fact and opinion are also actionable. See *Johnson & Miller*, *supra* note 97, at 211. Missouri courts look at the "totality of the circumstances" when determining whether a statement is fact, mixed opinion, or pure opinion. See *Henry v. Haliburton*, 690 S.W.2d 775, 788 (Mo. 1985) (en banc). For example, an employee of a construction firm sued the project owner for defamation for statements made in a settlement letter and a letter mailed to the state Board of Architects, Professional Engineers, and Land Surveyors. *Pape*, 918 S.W.2d at 378-79. The statement in the settlement letter was prefaced with the words "[i]t is my position." *Id.* at 380. The court held that it would be impossible to construe the phrase "it is my position" as "positing a verifiable proposition, and verifiability is the crux of the fact/opinion distinction in defamation law." *Id.* The court also found that the defamatory statement in the settlement letter was judicially privileged and not actionable. See *id.* at 381. This distinction between fact and opinion may assist in protecting a Missouri employers' assessment of an employee's work performance. See Bernard E. Jacques, *Defamation in an Employment Context: Selected Issues*, WRONGFUL TERMINATION CLAIMS 1999: WHAT PLAINTIFFS AND DEFENDANTS HAVE TO KNOW 721, 728 (PLI Litig. & Admin. Practice Course Handbook Series No. 600, 1999); Murray Schwartz et al., *Claims for Damage to an Employee's Reputation and Future Employment Opportunities*, in WRONGFUL TERMINATION CLAIMS 1999: WHAT PLAINTIFFS AND DEFENDANTS HAVE TO KNOW 745, 763-64 (PLI Litig. & Admin. Practice Course Handbook Series No. 600, 1999) ("[U]nless the employee is able to assert that the statement was based on facts and was not just the opinion of the supervisor, the employee's claim for defamation will fail."). But see *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 314 ("The remarks pleaded in the petition consist of outright expressions of fact and ostensible expression of opinion which very strongly imply underlying facts."); *Benner v. Johnson Controls, Inc.*, 813 S.W.2d 16 (Mo. Ct. App. 1991):

The statement with which defendants are charged – that Deana Benner released confidential information – could be in its context a statement of fact; it implies that Deana Benner disclosed information about George Benner's condition which she had gained from the medical files in Med Clinic. The alleged statement meets the test . . . ; it clearly "implies an assertion of objective fact."

Id. at 20 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

may be able to defend against a claim of defamation on sovereign immunity grounds.¹²⁷ Sovereign immunity generally protects public entities from suit in tort, in the absence of an express statutory waiver.¹²⁸

Although a number of defenses are available to employers who provide an accurate assessment of an employee's performance, many employers are still reluctant to part with their "no comment" or neutral job reference policies.¹²⁹ Yet under the doctrine of self-compelled publication, an employer may be held liable for defaming an employee even if he says nothing at all.

b. A New Twist on an Old Claim

Until relatively recently, the publication element of the common law tort of defamation required the defendant to have "publicized" the defamatory statement to at least one person in addition to the plaintiff.¹³⁰ The publication requirement is thus based on a principle of common sense; it is simply not possible to harm the plaintiff's reputation if only the plaintiff heard, read or saw what the defendant communicated about the plaintiff.¹³¹

Despite this "common sense" policy, an emerging doctrine currently adopted by a minority of jurisdictions, including Missouri, allows a relaxation of the traditional publication requirement in the employment context.¹³² The doctrine of "compelled self-publication," permits a plaintiff employee to satisfy the publication element in a defamation action if the employee proves that he or she was wrongfully dismissed and was subsequently compelled to inform prospective employers of the reason for the dismissal.¹³³ In Missouri to make out a claim of compelled self-publication defamation, a plaintiff must show:

- (1) that the employer stated a false reason for termination;
- (2) that the employer knew the statement was false or had serious doubt about its truth when it was made;
- (3) that the employer intended or had reason to suppose that the statement would be disclosed to a third party;
- (4) that the statement tended to expose the employee to contempt within his profession;
- (5) that the

127. See MO. CONST. art. IX, § 9a.

128. See *Krasney v. Curators of the Univ. of Mo.*, 765 S.W.2d 646, 650 (Mo. Ct. App. 1989).

129. See *supra* notes 2-25 and accompanying text (discussing employers' reluctance to respond to reference requests).

130. See Arlen W. Langvardt, *Defamation In The Employment Discharge Context: The Emerging Doctrine Of Compelled Self-Publication*, 26 DUQ. L. REV. 227, 242 (1998).

131. See *id.*

132. See *id.* at 230, 243-44 & n.79.

133. See Charles S. Murray, Jr., *Compelled Self-Publication in the Employment Context: A Consistent Exception to Defamation Requirement of Publication*, 45 WASH. & LEE L. REV. 295, 297 (1988).

statement was communicated to prospective employers; and (6) that the employee suffered actual damages to his reputation.¹³⁴

To prove actual damages in the context of a compelled self-publication defamation action, a Missouri employee must demonstrate a nexus between the employer's false statement and the loss of a job opportunity.¹³⁵ The sole fact that a false statement was communicated to a prospective employer is insufficient to establish the necessary causal connection.¹³⁶ An employee must prove that he or she was denied employment because a prospective employer in fact relied on the false statement.¹³⁷

The doctrine of self-compelled defamation is not the only new weapon in a plaintiff's arsenal to assist in challenging an allegedly defamatory employment reference. A recent Supreme Court decision has created another new avenue under Title VII by which an employee may seek to hold an employer liable for such a reference.

3. Title VII Retaliation Claims

In 1997, the United States Supreme Court held that a former employer might be held liable under Title VII¹³⁸ for retaliatory discharge¹³⁹ based on a

134. *Arthaud v. Mutual of Omaha Ins. Co.*, 170 F.3d 860, 862 (8th Cir. 1999). In *Neighbors v. Kirksville College of Osteopathic Med.*, 694 S.W.2d 822 (Mo. Ct. App. 1985), the Missouri Court of Appeals reversed the dismissal of a libel claim based upon a service letter citing 50 Am. Jur. 2d, *Libel & Slander* § 148 (1970):

Many cases make an exception to or qualification of the general rule that there must be a communication to others than the person defamed, where the utterer of the defamatory matter intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person.

Neighbors, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985).

135. *See Arthaud*, 170 F.3d at 862.

136. *See id.*

137. *See Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 742 (8th Cir. 1985).

138. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e -2(a)(1)-(2) (1994), provides in pertinent part:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id.

139. Title VII also prohibits an employer, with fifteen or more employees, from retaliating against an employee for filing a charge pursuant to the statute. Title VII provides, in pertinent part:

negative reference.¹⁴⁰ In *Robinson v. Shell Oil Co.*, the plaintiff alleged that she was terminated from her position in retaliation for filing a claim with the Equal Employment Opportunity Commission.¹⁴¹ The Supreme Court concluded that Congress intended Title VII's anti-retaliation provision to extend to current and former employees and to encourage victims of discrimination to file claims under Title VII even if the retaliation occurred subsequent to the time of employment.¹⁴²

Missouri courts have yet to find that a negative reference is sufficient to establish a plaintiff's *prima facie* case of retaliatory discharge under Title VII. However, the decision of at least one Missouri district court to dismiss a claim based on a negative reference has been reversed as a result of the Supreme Court's holding in *Robinson*.¹⁴³ Additionally, the Eighth Circuit Court of Appeals has held that the holding in *Robinson* is pertinent not only to retaliation claims brought under Title VII, but also to claims of retaliation brought pursuant to the Missouri Human Rights Act and the Americans with Disabilities Act.¹⁴⁴

The Supreme Court's holding in *Robinson*, litigation under the Service Letter Statute, and threats of suits for defamation encourage employers to

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

140. See *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

141. See *id.* Note also that the Equal Employment Opportunity Commission is the federal agency responsible for enforcing Title VII. See generally 42 U.S.C. § 2000e-5.

142. See *Robinson*, 519 U.S. at 346. The Supreme Court reasoned that if Congress had intended the anti-retaliation provisions of Title VII only to apply to current employees, Congress would have expressly limited the reach of the anti-retaliation provision to "current" employees. *Id.* at 341-42.

143. See *Smith v. St. Louis Univ.*, 109 F.3d 1261 (8th Cir. 1997):

Although the District court held, and the University argues, that Title VII does not provide a cause of action for retaliation that took place after employment has concluded, the Supreme Court has now held that Title VII's protections from retaliation extend to former employees . . . and Smith may therefore recover for retaliation taken after her residency ended.

. . . .

If Schweiss provided negative references to Smith's potential employers, as she contends, and she demonstrates that he did so because she had complained about his harassment, then a jury could reasonably conclude that the University was liable under Title VII for retaliation.

Id. at 1266 (citation omitted).

144. See *Blandin v. Marriott Int'l, Inc.*, No. 4:96CV1130-DJS, 1997 WL 581562, at *8 (E.D. Mo. Aug. 25, 1997).

include little or no information in an employee reference.¹⁴⁵ These disincentives to establishing more open reference policies are reinforced by the possibility that a decision to provide a reference may expose an employer to liability to third parties. Reference-based claims that may be brought by third parties include allegations of negligent hiring and misrepresentation.

B. Reference Based Claims Brought by Third Parties

1. Negligent Hiring

In *Gaines v. Monsanto Co.*, the Missouri Court of Appeals for the Eastern District held that an employer might be held directly liable for negligent hiring of an employee where “the employer knew or should have known of the employee’s dangerous proclivities and the employer’s negligence was the proximate cause of the plaintiff’s injury.”¹⁴⁶ The *Gaines* court found that “[l]iability would depend, among other things, on the nature of the criminal record and the surrounding circumstances.”¹⁴⁷ Accordingly, a typical negligent hiring claim turns on whether an employer adequately investigated a prospective employee’s background to determine the applicant’s fitness for the position.¹⁴⁸ The magnitude of necessary investigation differs depending on the type of job the applicant seeks.¹⁴⁹

Thus, Missouri courts have imposed a duty on employers with sufficient cause to inquire into a prospective employee’s background. Nevertheless, it appears Missouri courts have yet to impose a corresponding duty on employers to warn prospective employers of the applicant’s dangerous propensities. Such a duty is the touchstone of the emerging cause of action of negligent misrepresentation or referral.

145. See Oliver, *supra* note 3, at 694-96 (discussing factors that encourage employers to adopt “no comment” or neutral job reference policies).

146. 655 S.W.2d 568, 570 (Mo. Ct. App. 1983).

147. *Id.* at 571 n.2 (citation omitted).

148. See J. Bradley Buckhalter, Comment, *Speak No Evil: Negligent Employment Referral and the Employer’s Duty to Warn (or, How Employers Can Have Their Cake and Eat It Too)*, 22 SEATTLE U.L. REV. 265, 273 (1998) (citations omitted).

149. See Janet Swerdlow, Note, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S.C. L. REV. 1645, 1650 (1991). In *Hollingsworth v. Quick*, 770 S.W.2d 291 (Mo. Ct. App. 1989), the Missouri Court of Appeals for the Western District specifically declined the plaintiff’s invitation to impose a duty on employers whose employees have contact with the public to conduct a police and court records check on an applicant. See *id.* at 294. The court stated that under such a duty “an employer who fails to make such an inquiry, even though not alerted to do so by circumstances or information associated with a particular job applicant, may be held liable if the employee later becomes involved in a confrontation” *Id.*

2. Negligent Misrepresentation or Referral

Recent court decisions, including those in California, New Mexico and Colorado, may be indicative of the judiciary's willingness to rely on a theory of negligent misrepresentation to hold employers liable when they choose to provide a reference and misrepresent or omit relevant admonitory information about an employee.¹⁵⁰ In *Randi W. v. Muroc Joint Unified School District*, a school district described its former vice-principal in glowing terms and unconditionally recommended him for an administrative position in another school district.¹⁵¹ The recommendation was made even though the school district knew that the vice-principal had been forced to resign under pressure due to his sexual misconduct involving female students.¹⁵² After securing a job with a new school district based, at least in part, on the recommendation of his prior employer, the administrator molested a thirteen year-old student in the new district.¹⁵³ The student sued the vice-principal's former employers and included an allegation of negligent misrepresentation in her complaint.¹⁵⁴

The California Supreme Court ruled that the omission of information concerning the sexual misconduct allegations, coupled with the unconditional recommendation, amounted to an affirmative misrepresentation.¹⁵⁵ The court held that the former employer school district owed a duty to the injured student to refrain from misrepresenting its former employee's qualifications.¹⁵⁶ The court relied on sections 310¹⁵⁷ and 311¹⁵⁸ of the RESTATEMENT (SECOND) OF

150. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); *Davis v. Board of County Comm'rs*, 987 P.2d 1172 (N.M. Ct. App. 1999); *Fluid Tech., Inc. v. CVJ Axles, Inc.*, 964 P.2d 614 (Colo. Ct. App. 1998). See also *Gutzan v. Altair Airlines, inc.*, 766 F.2d 135, 140 (3rd Cir. 1985) (recognizing a cause of action for negligent misrepresentation, citing to RESTATEMENT(SECOND) OF TORTS §§ 311A, 324A (1965); *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 291 (Tex. 1996) (recognizing cause of action for negligent misrepresentation relying on RESTATEMENT (SECOND) OF TORTS § 302B (1965). But see *Cohen v. Wales* 133 A.2d 94 (N.Y. App. Div. 1987) (refusing to recognize a duty when recommending former employees "where another party is responsible for the actual hiring").

151. 929 P.2d at 584-85.

152. See *id.* at 593.

153. See *id.* at 585.

154. See *id.* at 585-86.

155. See *id.* at 592-93.

156. See *Muroc*, 929 P.2d at 591.

157. Section 310 of the RESTATEMENT (SECOND) OF TORTS states in pertinent part:

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor:

(a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involved an unreasonable risk of physical harm to the other, and

(b) knows

(i) that the statement is false, or

TORTS, in holding that the former employer was liable to the injured student.¹⁵⁹ The court did attempt to limit its holding by restricting the duty not to misrepresent only to instances where the making of representations “would present a substantial, foreseeable risk of physical injury to the prospective employer or third person.”¹⁶⁰ The court ruled that no duty to disclose is present in the absence of resulting physical injury or a special relationship between the parties.¹⁶¹

The *Muroc* court also addressed the applicability of California’s shield law. The California Supreme Court was reluctant to find that the shield law would protect employers from suits by injured third parties.¹⁶² According to the court, legislative material provided by amicus curiae indicated that the state law was “primarily intended to provide employers with a defense to actions by former employees” and not to “insulate them from all tort liability arising from employment disclosures.”¹⁶³ Second, the court found the state’s reference immunity statute was inapplicable to the *Muroc* facts because the information provided by the administrator’s past employer was unsolicited, rather than provided “upon request,” as required by the California shield law.¹⁶⁴

Recently, a New Mexico state appeals court held, as did the *Muroc* court, that under the RESTATEMENT (SECOND) OF TORTS § 311, an employer owes a

(ii) that he has not the knowledge which he professes.

RESTATEMENT (SECOND) OF TORTS § 310 (1965).

158. Section 311 of the RESTATEMENT (SECOND) OF TORTS states in relevant part:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

RESTATEMENT (SECOND) OF TORTS § 311 (1965).

159. *Muroc*, 929 P.2d at 591. The *Muroc* court rejected arguments from the former employer that once an employer decided to provide a reference, they would be forced to include all negative information, including unproven rumors about former employees. *See id.* This risk, the school district argued would simply encourage employers to adopt “no comment” policies or merely to confirm only employee’s positions, salaries and dates of employment. *Id.* at 590. The *Muroc* court found that an employer’s qualified privilege for providing a reference would provide sufficient protection to encourage the exchange of reference information in the typical situation. *See id.* at 590-91.

160. *Muroc*, 929 P.2d at 591.

161. *See id.* According to the RESTATEMENT (SECOND) OF TORTS 315 cmt. c (1965), a “special relationship” is found where the defendant has “a duty to take action for the aid or protection of the plaintiff.” *Id.* For example, special relationships have been found to exist between physiotherapist-patient, state parole boards and parolees, bartenders and patrons. *See Adler & Pierce, supra* note 3, at 1442 n.296 (collecting cases).

162. *See Muroc*, 964 P.2d at 591.

163. *Id.* *See also* CAL. CIV. CODE § 47c (West 1992 & Supp. 1997).

164. 964 P.2d at 591. *See also* CAL. CIV. CODE § 47c.

duty of care to a third-party victim when making employment recommendations.¹⁶⁵ In *Davis v. Board of County Commissioners*, law enforcement personnel provided an unqualifiedly favorable employment reference to an employee who had resigned instead of facing disciplinary action for documented sexual harassment.¹⁶⁶ The employee was hired by a psychiatric hospital where he was then accused of sexually harassing a female inmate.¹⁶⁷ In reversing summary judgment for the employer, the court held that once the defendants elected to make recommendations, they owed a duty of care “in regard to what they said and what they omitted from their references.”¹⁶⁸ The court found that the defendants had created a “special relationship” with the plaintiff by undertaking to supply a reference.¹⁶⁹ In acknowledging that the issue of “foreseeability” was one for the jury, the court wrote:

We are not persuaded that reasonable people, who had the information possessed by [defendants], would not have foreseen potential victims like Plaintiff, and could not have foreseen how the omission of objective information, like [defendant’s] report and disciplinary actions taken, would not pose a threat of physical harm to persons like Plaintiff.¹⁷⁰

The court rejected defendants’ argument that expansion of a tort duty would have a “chilling effect” on the willingness of employers to give references.¹⁷¹ Instead, the court concluded that the state’s common law qualified privilege and its shield law provided an adequate counter-balance to the imposition of a “sufficiently restricted” duty not to misrepresent in an employment reference when there is a foreseeable risk of harm.¹⁷²

In *Fluid Technology, Inc. v. CVJ Axles, Inc.*, the defendant provided a reference for a former bookkeeper asserting that she had been a “fine employee,” despite the fact she had been terminated for stealing and had consequently been convicted of the theft.¹⁷³ The Colorado Court of Appeals found the plaintiff had stated a claim for relief under the RESTATEMENT (SECOND) OF TORTS § 552(1) which provides:

One who, in the course of business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the

165. See *Davis v. Board of County Comm’rs*, 987 P.2d 1172, 1180 (N.M. Ct. App. 1999).

166. *Id.* at 1175-76.

167. See *id.*

168. *Id.*

169. *Id.* at 1180.

170. *Davis*, 964 P.2d at 1180.

171. *Id.* at 1181.

172. *Id.* at 1181-82.

173. 964 P.2d 614, 615 (Colo. Ct. App. 1998).

information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.¹⁷⁴

The *Fluid Technology* court found that information given “in the course of the defendant’s business, profession, or employment is sufficient indication that he has a pecuniary interest in it”¹⁷⁵

Still other courts have relied on the RESTATEMENT (SECOND) OF TORTS §302B in finding there is a duty of care to make admonitory disclosures in employment references.¹⁷⁶ Section 302B imposes liability:

[W]here the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct.¹⁷⁷

Although no Missouri court has yet imposed an affirmative duty on employers to provide reference information about an employee’s dangerous propensities, and several courts have in fact rejected such a theory,¹⁷⁸ the mere possibility of liability continues to create a disincentive for employer’s to provide references.¹⁷⁹

III. A CRITICAL LOOK AT MISSOURI’S SOLUTION

When Missouri passed its law, it joined the ranks of at least thirty other states that provide some statutory immunity for employers providing references.¹⁸⁰ Nevertheless, a close examination of the language and its

174. *Id.* at 616 (citing RESTATEMENT (SECOND) OF TORTS § 552(1) (1977)).

175. *Davis*, 964 P.2d at 616 (relying on RESTATEMENT (SECOND) OF TORTS § 552(1) cmt. d (1977)).

176. RESTATEMENT (SECOND) OF TORTS § 302B (1965).

177. *Id.*; *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996).

178. *See* Kiren Dosanjh, Annotation, *Former Employer’s or Supervisor’s Tort Liability to Prospective Employer or Third Person for Misrepresentation or Nondisclosure in Employment Reference*, 68 A.L.R.5th 1 (1999). *See also* *Grozdanich v. Leisure Hills Health Ctr.*, 48 F. Supp. 885 (D. Minn. 1999). The court discussed, and then rejected, the possibility that Minnesota might recognize the tort of negligent representation. *See id.* at 888-92. The employee, who was allegedly sexually harassed by her supervisor, sued the supervisor’s former employer for issuing a favorable reference of the supervisor despite the former employer’s knowledge of instances of alleged sexual assault and harassment on the part of supervisor. *See id.* at 886-87.

179. *See* Alex B. Long, Note, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177, 187-88 (1997).

180. *See* ALASKA STAT. § 09.65.160 (Michie 1996); ARIZ. REV. STAT. ANN. § 23-1361 (West Supp. 1996); CAL. CIV. CODE § 74(c) (West 1992 & Supp. 1997); COLO. REV. STAT. § 8-2-114 (Supp. 1999); FLA. STAT. ANN. § 768.095 (West Supp. 1997); GA. CODE ANN. § 34-1-4 (Supp. 1996); IDAHO CODE § 44-201 (Supp. 1996); 745 ILL. COMP.STAT. ANN. 46/10 (West Supp. 1997); IND. CODE ANN. § 22-5-3-1 (Michie 1997); IOWA CODE ANN. § 91B.2 (West Supp. 1999); KAN. STAT. ANN. § 44-119a (Supp. 1996); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997); ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1996); MD. CODE ANN., Cts. & Jud. Proc. § 5-

possible implications indicates that it contains several ambiguities that may detract from the law's ability to encourage employers to abandon their "no comment" or neutral job reference policies.

A. *Who Receives Immunity Under the New Statute?*

An "employer" under the new Missouri statute includes "any individual, organization, partnership, political subdivision, corporation or other legal entity which has or had in the entity's employ one or more individuals performing services for the entity."¹⁸¹ As introduced, the new Missouri statute included protection for an employer's agent responding to a reference request, but the language was deleted from the bill before its passage.¹⁸² This omission may create litigation regarding who is clothed with immunity to respond to a reference.¹⁸³

The United States Supreme Court has held that, if an agent is guilty of defamation, the principal is liable if the agent was apparently authorized to make the defamatory statement.¹⁸⁴ This decision might limit litigation when a plaintiff attempts to hold an employer liable for the defamatory statements of its personnel department.¹⁸⁵ It may do little, however, to discourage court battles regarding whether supervisory personnel, by virtue of their titles alone, manifest apparent authority to make defamatory statements or whether employers are liable for unauthorized statements made by non-supervisory employees under common-law agency principles.¹⁸⁶

423 (Supp. 1996); MICH. COMP. LAWS ANN. § 423.452 (West Supp. 1997); MO. ANN. STAT. § 240.152 (West Supp. 2000); NEV. REV. STAT. § 41.755 (1997); N.M. STAT. ANN. § 50-12-1 (Michie Supp. 1996); N.C. GEN. STAT. § 1-539.12 (1997); N.D. CENT. CODE § 34-02-18 (Supp. 1997); OHIO REV. CODE ANN. § 4113.71 (Banks-Baldwin Supp. 1997); OKLA. STAT. ANN. tit. 40, § 61 (West Supp. 1997); OR. REV. STAT. § 30.178 (1998); R.I. GEN. LAWS § 28-6.4-1 (Supp. 1996); S.C. CODE ANN. § 41-1-65 (Law. Co-op Supp. 1996); S.D. CODIFIED LAWS § 60-4-12 (Michie Supp. 1996); TENN. CODE ANN. § 50-1-105 (Supp. 1996); H.B. 341, 76th Leg. (Tex. 1999) (enacted) (to be codified at TEX. CODE ANN., ch. 103), UTAH CODE ANN. § 34-42-1 (Supp. 1996); WIS. STAT. ANN. § 895.487 (West 1997); WYO. STAT. ANN. § 27-1-113 (Michie Supp. 1996).

181. MO. ANN. STAT. § 290.152.1(1).

182. As introduced, the bill that would have extended the immunity to "any person delegated to act on the employer's behalf." H.B. 441 of 1/18/99, *supra* note 33. According to the bill's main sponsor, Representative Riback Wilson, this language was deleted because lobbyists for employees feared it created a gray area that might allow an employer to blame an underling for the content of a reference in an attempt to escape liability. *See id.*

183. *See* Jennifer L. Aaron, Comment, *The Tug-of-War with Employment Information: Does Louisiana Revised Statutes [sic] 23:291 Really Help Employers Stay Out of the Mud?*, 58 LA. L. REV. 1131, 1150 & n.156 (1998).

184. *See id.* at 1150 & n.156 (citing *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Co.*, 456 U.S. 556, 566 (1982)).

185. *See* Aaron, *supra* note 183, at 1150 n.156.

186. *See id.* at 1150 n.156.

The new statute could be amended to clarify who may respond to a request for a reference on the employer's behalf while simultaneously maintaining an employer's immunity under the law.¹⁸⁷ By extending protection to the employer "and/or his expressly authorized designee," as suggested by one legal commentator, the statute would be "more protective of the interests of the employee's business reputation," since it would remove unauthorized gossip and conjecture from the protection of the statute.¹⁸⁸

B. *Who May Request Information*

To be protected under the new Missouri statute, an employer must respond only upon request from a "prospective employer."¹⁸⁹ A prospective employer includes any employer "to which an individual has made application or employment, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment"¹⁹⁰ or a person that the employer "reasonably believes to be a prospective employer."¹⁹¹ Requiring a written request before statutory immunity attaches to a reference may shield employers from claims for negligent hiring.¹⁹² The written requests could

187. A number of state statutes that define the term "employer" within the statute specifically include an employer's "agent" in the definition. *See, e.g.*, LA. REV. STAT. ANN. § 291(C)(1); MO. ANN. STAT. § 290.152.1(1); NEV. REV. STAT. § 41.755(3)(b); OHIO REV. CODE ANN. § 4113.71(A)(2); S.C. CODE ANN. § 41-1-65(A)(1). Although not specifically defining "employer" within the statute, at least six other states provide reference immunity for an employer's agent who provides a reference. *See* 745 ILL. COMP. STAT. ANN. 46/10; IOWA CODE ANN. § 91b.2.1; GA. CODE ANN. § 34-1-4(b); N.C. GEN. STAT. § 1-539.12(c); N.D. CENT. CODE § 34-10-18(1); S.D. CODIFIED LAWS § 60-4-12. According to Mike Kaemmerer, who lobbied for the bill on behalf of the Missouri Merchants and Manufacturers Association, protection for an employer's "agent" under the new law was not an issue that was discussed. *See* Interview with Mike Kaemmerer, lobbyist for the Missouri Manufacturers Association, October 21, 1999 (on file with author). However, it should be noted that the definition of "employer" in the new Missouri bill, which includes "political subdivision[s]," provides protection for a much broader spectrum of the work force than is covered under Missouri's Service Letter Statute. *Compare* MO. ANN. STAT. § 290.152.1, with MO. REV. STAT. 290.140.

188. Aaron, *supra* note 183, at 1151. Aaron also suggests that "[b]y limiting the immunity from liability to situations involving designees or authorized employees, the law would give employers an incentive to appoint and train designees, perhaps reducing the instances of defamation." *Id.*

189. MO. ANN. STAT. § 290.152.1(2).

190. *Id.*

191. *Id.* This phrase did not appear in the original bill creating the statute. *See* H.B. 441 of 1/18/99, *supra* note 33. According to one of the bill's sponsors, Representative Riback Wilson, this phrase was added to protect employers who feared that people fishing for information might represent themselves as a prospective employer. *See id.* Representative Riback Wilson says that Missouri businesses wanted protection if they inadvertently released information to the wrong person. *See id.*

192. *See* Swerdlow, *supra* note 149, at 1671-72.

serve as “evidence that the employer investigated the candidate’s fitness for the position before hiring.”¹⁹³

Restricting the statutory protection to responses made at the request of a prospective employer, fails to give statutory protection to employer responses made pursuant to a request from a current or former employee.¹⁹⁴ There appears to be no real justification for limiting the new statutory immunity to requests for references from prospective employers since the key to the common law qualified privilege is that the information be divulged upon request, rather than volunteered.¹⁹⁵

Accordingly, the new statute could be amended so that its language mirrors the Service Letter Statute.¹⁹⁶ Under the Service Letter Statute, an employee must send a request via certified mail and specifically identify the statute

193. *Id.* at 1671.

194. Nearly half of the states with shield laws provide protection to employers when responding to requests, verbal or written, from either a prospective employer or a current or former employee. *See* ALASKA STAT. § 09.65.160; COLO. REV. STAT. § 8-2-114(3); FLA. STAT. ANN. § 768.095; IDAHO CODE § 44-201(2); IOWA CODE ANN. § 91B.2(1); LA. REV. STAT. ANN. § 291(A); MD. CODE ANN. § 5-423(a)(1); MICH. COMP. LAWS ANN. § 423.452.2; N.C. GEN. STAT. § 1-539.12(a); OHIO REV. CODE ANN. § 4113.71(B); OR. REV. STAT. § 30.178.1; R.I. GEN. LAWS § 28-6.4-1(c); TENN. CODE ANN. § 50-1-105; WIS. STAT. ANN. § 895.487(2). At least five additional states provide some immunity from civil liability for employers providing references without a request for the information. *See* GA. CODE ANN. § 34-1-4(b); IND. CODE ANN. § 22-5-3-1(b); ME. REV. STAT. ANN. § 598; N.D. CENT. CODE § 34-02-18(2); WYO. STAT. ANN. § 27-1-113(a).

195. Pursuant to the RESTATEMENT (SECOND) OF TORTS § 595 (1977), whether a reference is made in response to a request is one factor in determining whether the publication is privileged:

(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the recipient or a third person, and

(b) the recipient is one to whom the publisher is under legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

(a) *the publication is made in response to a request rather than volunteered by the publisher or*

(b) a family or other relationship exists between the parties.

Id. (emphasis added). *See also* RESTATEMENT (SECOND) OF TORTS § 596 (1977) (“An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.”).

196. *See* MO. REV. STAT. § 290.140.1 (“Whenever any employee . . . requests in writing by certified mail . . . with specific reference to the statute . . . it shall be the duty of the superintendent or manager . . . to issue to such employee, within forty-five days after receipt of such request, a letter”)

before the duty to respond arises on the part of the employer.¹⁹⁷ A request for a service letter made by regular mail, rather than certified mail, does not give rise to a duty on the part of the employer to respond, even if the employer in fact receives the request.¹⁹⁸

C. *How to Respond*

To come within the safe harbor of Missouri's reference immunity statute, an employer must respond "in writing" to a request concerning a current or former employee.¹⁹⁹ Requiring a written response under reference immunity statutes, rather than extending protection to verbal recommendations, affords additional protection to employers.²⁰⁰ A written response may protect employers against claims for negligent referral because an employer "would have direct evidence regarding the extent of its knowledge about the position for which the applicant was being considered, and thus, the extent to which the plaintiff's harm was foreseeable."²⁰¹ A written response also creates additional protection for employees because they will have a written copy of any defamatory reference to use as evidence in a lawsuit challenging its accuracy. Proscribing a written response also insures that employees know exactly what information is being shared with their prospective employers, thereby circumventing the so-called "wink and nod" approach.²⁰² This approach may allow employers who purport to give only "no comment" or neutral job references to convey a message about the employee through voice tone or inflection.²⁰³

D. *What Information May or Must be Provided*

Under Missouri's reference immunity statute, qualified immunity attaches when an employer discloses "the nature and character of service rendered by such employee to such employer and the duration thereof," and "truly state[s] for what cause, if any, such employee was discharged or voluntarily quit."²⁰⁴

197. See MO. REV. STAT. § 290.140.1.

198. See *Bartareau v. Executive Bus. Prods., Inc.*, 846 S.W.2d 248, 250 (Mo. Ct. App. 1993).

199. MO. ANN. STAT. § 290.152.2(1).

200. See Swerdlow, *supra* note 149, at 1671-72.

201. *Id.* at 1672.

202. See *supra* notes 22-25 and accompanying text (discussing the "wink and nod" approach).

203. *Id.*

204. MO. ANN. STAT. § 290.152.2(2)-(3). This is the same language as is used in the Missouri Service Letter Statute. See MO. REV. STAT. § 290.140.1. As originally introduced, the new law would have amended the Service Letter Statute by further defining the information to be included in a service letter. See H.B. 441 of 1/18/99, *supra* note 33. Thus, the Service Letter Statute would have been amended to conform to the newly proposed sections addressing employer liability for issuing written references. See *id.* The proposed language would have required that the letter include "(1) Date and duration of employment; (2) Most recent pay level; (3) Most recent job description and duties; (4) Wage history for the most recent two years or the

A statutory definition of the information an employer may disclose may be a key ingredient in the protection of employees from publication of immaterial defamatory information.²⁰⁵ It may also encourage employers to include pertinent information to try and insulate themselves from liability for punitive damages for providing a reference.²⁰⁶ As currently written, however, the definition of the required response under the statute is ambiguous.²⁰⁷

The statute merely states that an employer “may” respond to a request for a reference in writing and lists two categories of information that an employer “may” divulge under the statute.²⁰⁸ Although the two categories of information listed are joined by the word “and,”²⁰⁹ there is nothing in the statute’s language requiring an employer to include both categories of information in a response.²¹⁰ To address this ambiguity, the statute could be amended to require that employers wishing to insulate themselves from liability for punitive damages when providing a reference be required to include certain information. One of the major purposes of the act is to aid Missouri employers in making better-informed hiring decisions.²¹¹ As the statute reads now, a court could conclude that an employer is protected even if he chooses to include only one category of information specified in the statute.²¹²

Moreover, at least one Missouri court has held that the common law qualified privilege protects a wide variety of information that may be included

length of employment, whichever is shorter; and (5) Whether the employee was discharged or voluntarily quit the service and the reason for the separation.” *Id.* According to one of the measure’s sponsors, Representative Riback Wilson, there was considerable opposition to amending the Service Letter Statute from lobbyists for larger employers who feared that making a change in the contents of letters required under the statute would increase costs and confuse those businesses and human resource managers already accustomed to conforming with the Service Letter Statute’s dictates. *See* Riback Wilson interviews, *supra* note 33. Representative Riback Wilson says that following a public hearing, the bill was amended so that it no longer amended the Service Letter Statute to conform to the new law, but rather, made the new law conform to the Service Letter Statute. *See id.*; House Comm. Sub. for H.R. 441, 90th Leg. 1st Reg. Sess. (Mo. 1999) version dated March 4, 1999 *available in* 1999 MO H.B. 441 (Westlaw, MO-BILLS database).

205. *See* Oliver, *supra* note 3, at 692 (asserting that a specific definition of job performance would discourage plaintiffs from arguing that references fall outside the scope of the definition and would discourage employers from including irrelevant information).

206. *See id.*

207. *See generally* MO. ANN. STAT. § 290.152.2(1).

208. *Id.* § 290.152.2(2)-(3) (These categories include the nature, character and duration of service rendered, and the true cause, if any, of the employee’s voluntary or involuntary separation from employment).

209. *Id.*

210. *See generally* MO. ANN. STAT. § 290.152.

211. *See supra* notes 33-37 and accompanying text (discussion of statute’s purposes).

212. *See* MO. ANN. STAT. § 290.152.2.

in a reference.²¹³ The Missouri Court of Appeals held that so long as the communication is made in good faith, “the person making the statement is not limited to facts that are within his personal knowledge, but may, and should, pass on to his inquirer all relevant information that has come to him, regardless of whether he believes it to be true or not.”²¹⁴ It is doubtful the Missouri General Assembly intended to narrow the common law qualified privilege since one of the stated purposes of the new law is to encourage the free-flow of information between employers.²¹⁵

Furthermore, the legislature chose to adopt the language in the Service Letter Statute that has spawned the majority of litigation under that statute relating to reference claims.²¹⁶ Accordingly, the new statute should be amended to clarify and expand the information an employer may share and still be protected by the statutory qualified immunity.²¹⁷

The Louisiana reference immunity statute, for example, defines “job performance” to include, but not limited to, “attendance, attitude, awards, demotions, duties, efforts, evaluations, knowledge, skills, promotions, and disciplinary actions.”²¹⁸ A recent scholarly critique of the Louisiana law indicates that three years after its passage no cases had yet been decided applying the statute.²¹⁹ Thus, no empirical evidence exists to suggest that the Louisiana definition of “job performance” will be a portion of the statute that is frequently litigated. Clearly, the Louisiana statute gives employers much more guidance regarding the information to be included in a job reference than the new Missouri law does.

In summary, at a minimum, the new statute could be amended to clarify that an employer must include both categories of information to gain the

213. *See* *Cash v. Empire Gas Corp.*, 547 S.W.2d 830 (Mo. Ct. App. 1976).

214. *Id.* at 833.

215. *See supra* notes 33-37 and accompanying text (reporting the purposes of the act as viewed by the sponsor of the new bill).

216. *See supra* notes 55-89 and accompanying text (discussing litigation under the Service Letter Statute).

217. Most states do not explicitly provide immunity for the disclosure of the reasons for an employee’s separation from employment. *See, e.g.*, ALASKA STAT. § 09-65.160; 745 ILL. COMP. STAT. ANN. 46/10; OHIO REV. CODE ANN. § 4113.71(B); TENN. CODE ANN. § 50-1-105. At least four other states with shield laws provide complete immunity to employers for providing certain basic information about employees, such as wage rates and dates of employment, but provide only qualified immunity if an employer discloses the reasons for an employees’ separation from employment. *See, e.g.*, KAN. STAT. ANN. § 44-119a(b)-(d). It appears that only two states specifically provide for some type of employer immunity if an employer discloses an illegal or wrongful act, however, neither of these states require that an employee actually be convicted of a crime before immunity attaches to the disclosure. *See* GA. CODE ANN. § 34-1-4(b); NEV. REV. STAT. § 41-755(1)(c).

218. LA. REV. STAT. ANN. § 23:291.

219. *See* Aaron, *supra* note 183, at 1150.

statutory protection. Additionally, the information protected under the statute could be expanded to give employers more guidance when they attempt, in good faith, to comply with the law.

E. Who Receives a Copy?

Lobbyists for Missouri employee groups worked hard to ensure that employees would have a right to obtain a copy of any response protected by the new statute.²²⁰ The Missouri statute requires employers to send a copy of any response made pursuant to the statute to the affected employee at the employee's last known address.²²¹ The new law also allows an employee to request a copy of any letter provided under the statute "for up to one year following the date of such letter."²²² The provision of the statute addressing available damages, however, is silent as to any penalty an employer may face for failing to provide a copy of the reference to the employee.²²³

It is important to guarantee that employees are aware of the contents of any reference letter sent to prospective employers. To assure employees receive this benefit, the statute could be amended to allow an award of damages against an employer who fails to mail a copy of any response to the employee's last known address or provide a copy upon request of the employee.²²⁴ This amendment would create no additional burden for employers while ensuring an employee is aware of the information being shared with his or her prospective employer.

F. When is the Statutory Privilege Forfeited?

Missouri's statute creates an implied assumption that employers are replying in good faith when responding to reference requests.²²⁵ To overcome the good faith presumption, an employee must prove that the response "was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false."²²⁶ This standard is nearly identical

220. See Riback Wilson interviews, *supra* note 33.

221. See MO. ANN. STAT. § 290.152.3.

222. *Id.* Originally, the bill proposing the new law provided only for a copy to be sent to the affected employee at his or her last known address. See H.B. 441 of 1/18/99, *supra* note 33. According to Representative Riback Wilson, one of the bill's sponsors, the provision was added in consideration of employees who did not want anyone to know where they lived, in particular, victims of domestic violence. See Riback Wilson interviews, *supra* note 33.

223. See MO REV. STAT. § 290.152.5.

224. See Riback Wilson interviews, *supra* note 33.

225. See MO. REV. STAT. § 290.152.4. The vast majority of states explicitly state that an employer is presumed to be acting in good faith. See, e.g., ARIZ. REV. STAT. ANN. § 23-1361; IDAHO CODE § 44-201; R.I. GEN. LAWS § 28-6.4-1.

226. MO. ANN. STAT. § 290.152.4. As introduced, the proposal would have required a plaintiff to prove that the response "was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false *at a time when the employer had*

to that needed to overcome the qualified privilege that attaches to employee references under Missouri common law.²²⁷ Legal commentators who have called for a uniform standard to overcome the qualified privilege in reference cases seem to agree that the standard chosen by Missouri legislators is an appropriate one.²²⁸

G. What Burden of Proof is Required?

The Missouri statute does not define the standard of proof required to overcome an employer's privilege for providing a reference.²²⁹ Legal commentators appear to agree that the standard of proof should be defined within the statute.²³⁰ These scholars also seem to agree that the more stringent "clear and convincing" standard rather than the "preponderance of the evidence" standard, should be used when defining the burden of proof necessary to overcome the qualified immunity that attaches to letters of reference.²³¹ The more burdensome clear and convincing standard may make

serious doubt whether such response was true." H.B.441 of 1/18/99, *supra* note 33. However, the underlined portion of the standard was deleted prior to the bill's passage. According to the law's co-sponsor, Representative Riback Wilson, this language was deleted at the request of employer groups who felt that the omission of this language would offer them better protection from liability under the statute. *See* Riback Wilson interviews, *supra* note 33.

227. *See* Snodgrass v. Headco Indus., Inc., 630 S.W.2d at 154-55 (citing MAI 23.10(2)). The standard also mirrors the standard necessary to overcome the qualified privilege in a public-figure defamation action, as well as the standard necessary to overcome the qualified privilege to a defamation action under the RESTATEMENT (SECOND) OF TORTS. *Compare* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964), defining "actual malice" as knowledge that the published statement was "false or with reckless disregard of whether it was false or not," with RESTATEMENT (SECOND) OF TORTS § 600 (1977), regarding "abuse" of the qualified privilege which may be shown if false and defamatory matter is published when the publisher (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity", *id.*, with the new Missouri statutory standard for overcoming the qualified privilege which requires a showing that the response be "false and made with knowledge that it was false or with reckless disregard for whether such response was true or false." MO. ANN. STAT. § 290.152.4.

228. *See* Oliver, *supra* note 3, at 756-58; Saxton, *supra* note 19, at 83-85; Adler & Pierce, *supra* note 3, at 1458-59.

229. At least eight other states do not define an employee's burden of proof. *See, e.g.*, CAL. CIV. CODE ANN. § 47(c); OKLA. STAT. ANN. tit. 40, § 61. The majority of states require a showing by a preponderance of the evidence to overcome an employer's statutory qualified immunity. *See, e.g.*, COLO. REV. STAT. ANN. § 8-2-113(3); MICH. COMP. LAWS ANN. § 423.452(2). A minority of jurisdictions requires the stricter clear and convincing standard to overcome the employer's presumption of good faith. *See, e.g.*, FLA. STAT. ANN. § 768.095; UTAH CODE ANN. § 34-42-1(3).

230. *See* Oliver, *supra* note 3, at 756-58.

231. *See id.* at 756-58; Saxton, *supra* note 19, at 110; Adler & Pierce, *supra* note 3, at 1456 ("[W]e recommend this higher standard to signal society's view that liability ought to attach in employment-reference cases only in compelling circumstances.").

employers more comfortable including detailed information, both positive and negative, in an employee reference.²³²

It should be noted, however, that these legal commentators are not addressing statutes, like the new Missouri statute, wherein employees are completely disabled from receiving punitive damages if an employer abuses the statutory qualified immunity.²³³ To strike a better balance between an employer's protection under the Missouri statute, and the availability of a remedy to a prevailing plaintiff, the preponderance standard seems better suited to the Missouri statutory scheme. Plaintiffs are already foreclosed from a punitive damage remedy under the new law, and the strict "clear and convincing standard" might make it too difficult for the truly aggrieved employee to obtain any relief at all.

H. *Unique Features of the Missouri Law*

The new Missouri law contains several unique features that do not appear in other states' shield laws. First, Missouri's statute is the only one that attempts to limit any successful plaintiff under the statute to an award of compensatory damages. Second, the Missouri statute attempts to address an employer's liability when the prospective employer receives the requested reference after the applicant has already been hired. These features are designed to make the Missouri statute more effective than other states' statutes in encouraging employers to share reference information.

1. The Unavailability of Punitive Damages

Missouri appears to be the only state that specifically addresses the available damages under its reference immunity statute.²³⁴ An employer who violates the section of the statute proscribing the allowable contents of a reference "shall be liable for compensatory damages but not punitive damages."²³⁵ However, the new Missouri statute places the bar to a punitive damage award in a subsection that is distinct from the subsection giving employers qualified immunity for providing a reference.²³⁶ A narrow reading of the statute might actually allow for an award of punitive damages if an employee can show that the statutory qualified privilege has been abused.

To understand this ambiguity, it may be helpful to parse the new statute. In pertinent part, subsection 2 of the new statute provides:

232. See Oliver, *supra* note 3, at 757.

233. See *id.*

234. MO. ANN. STAT. § 290.152.5.

235. *Id.*

236. See MO. ANN. STAT. § 290.152.4-5.

2. An employer *may*:

- (1) Respond in writing to a written request concerning a current or former employee from an entity or person which the employer reasonably believes to be a prospective employer of such employee; and
- (2) Disclose the nature and character of service rendered by such employee to such employer and the duration thereof; and
- (3) Truly state for what cause, if any, such employee was discharged or voluntarily quit such service.²³⁷

While subsection 5 of the new statute reads:

5. Any employer who violates the provisions of subsection 2 of this section shall be liable for compensatory damages but not punitive damages.²³⁸

It is difficult to conceive of a damage award that would punish employers who failed to comply with a voluntary requirement.

Missouri lawmakers also chose to place the immunity for an employer in a separate subsection stating:

4. For purposes of this section, an employer shall be immune from civil liability for any response made pursuant to this section or for any consequences of such response, unless such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false.²³⁹

This portion of the statute appears merely to clothe employment references with the same qualified privilege given to references under Missouri's common law.²⁴⁰ Under Missouri's common law, if a defamation plaintiff meets the burden outlined in subsection 4, the plaintiff may be entitled to seek punitive damages in addition to compensatory damages.²⁴¹ Under this interpretation, the new Missouri statute does not protect employers from an award of punitive damages, even though limiting an employers liability was one of the purposes of the bill.²⁴²

For example, in a reference Employer A states that an employee was terminated for insubordination. Employer A fails to include, however, the nature, character or duration of the employee's service to the employer. A court could then find that the employer failed to comply with subsection 2 of the statute. Thus, the employee would not be entitled to punitive damages

237. MO. ANN. STAT. § 290.152.2 (emphasis added).

238. *Id.* § 290.152.5.

239. *Id.* § 290.152.4.

240. *See supra* note 227 (comparing the standard necessary to overcome the qualified privilege under the common law with that required by the new statute).

241. *See supra* note 113 (discussing the availability of punitive damages in a common law defamation action).

242. *See supra* notes 33-37 and accompanying text (discussing the new statute's purposes).

under subsection 5 of the statute, which provides that no punitive damages are available for a violation of subsection 2 of the statute.

Nevertheless, the Court could find that in addition to violating subsection 2 of the statute, the employer's response was made with reckless disregard for whether the response was true or not, thereby violating subsection 4 of the statute. Subsection 4 of the statute does not limit an employee's available remedies and merely outlines the standard for overcoming the statutory qualified immunity. This standard mirrors the standard for overcoming the qualified privilege that attaches to employment references under Missouri common law. Therefore, the court could apply common law defamation principles and conclude that the plaintiff is entitled to seek punitive damages.

Thus, the statute may actually both prohibit and enable a plaintiff to seek punitive damages under the same section.²⁴³ Clearly, such a result was not one that the legislature intended when the statute was drafted. To address this ambiguity, the new Missouri statute could be amended to clearly prohibit an award of punitive damages against an employer who responds to a reference request.

2. Protection after Hiring Has Occurred

The Missouri statute appears unique in providing that qualified immunity applies "regardless of whether the employee becomes employed by the prospective employer prior to receipt of the former employer's written response."²⁴⁴ This provision would extend an employer's statutory qualified immunity to situations in which an employee is hired by an employer prior to receipt of a written response made pursuant to the statute, but then loses the job after the response is received by his new employer.²⁴⁵ Presumably, this would absolve a former employer from liability based, for example, on a claim of tortious interference with economic advantage.²⁴⁶

IV. A PROPOSAL FOR FUTURE CONSIDERATION

The state legislature should consider (1) amending the Missouri employer reference immunity statute to require an employer to respond to a proper request from a current or former employee or prospective employer; (2) placing a limited duty to warn on employers when responding to requests from

243. See *supra* note 113 (discussing availability of punitive damages under a common law defamation claim in Missouri).

244. MO. ANN. STAT. § 290.152.2(3).

245. See Aaron, *supra* note 183, at 1152-53 (suggesting Louisiana's employer immunity statute might not cover a situation where an employee has already been hired when the reference is requested); LA. REV. STAT. ANN. § 23:291 (West Supp. 1997).

246. See *supra* note 45 (discussing the tort of intentional interference with economic advantage).

prospective employers in certain occupations; (3) allowing an award of attorneys' fees and costs to a prevailing party; and (4) repealing the Missouri Service Letter Statute.²⁴⁷

A. *Make the Shield Law Mandatory*

Despite the passage of voluntary "shield laws" in two-thirds of the states, and proposals from a variety of legal commentators attempting to encourage the free flow of information, employers maintain a "name, rank, and serial number" mentality.²⁴⁸ Perhaps the time has come for a mandatory shield law that (1) rewards employees who deserve a good recommendation; (2) attempts to weed-out those employees who may be dangerous to their co-workers or the general public; and (3) protects employers from large damage awards.

During the 1999 legislative session, the state's large employers lobbied against a mandatory shield law because they feared it would create another opportunity for litigating employee reference claims.²⁴⁹ It would appear, however, that the only way to avoid litigation under the statute that was enacted would be for employers to choose simply not to use it.

Making the employer immunity statute mandatory will create another avenue for employees to challenge allegedly defamatory references. Nevertheless, in return for the creation of this new statutory cause of action employers would receive a number of benefits. Employers will enjoy immunity from an award of punitive damages even if the reference is found to violate the statute. Requiring employers to give a more complete reference will, in turn, increase the information they receive about an applicant. Thus, employers will be able to make better-informed hiring decisions. The ability to make more informed hiring decisions should allow employers to choose the most qualified applicant, leading to decreased turn over and training costs. Better-informed hiring decisions might also create a corresponding decrease in an employer's potential liability for negligent hiring because employers will have sufficient information to avoid hiring a potentially dangerous employee.

The burden created by a mandatory reference immunity statute would initially fall disproportionately on employers.²⁵⁰ Missouri employers would be required to educate themselves and their human resource personnel on properly

247. It is doubtful that such a proposal could garner any support in Missouri's current political climate. See Riback Wilson interviews, *supra* note 33 (indicating that a statute imposing a duty on an employer to respond to a reference request would not pass in the current political environment because lobbyists for large businesses feared it would create another opportunity for litigation). See also *infra* notes 296-313 and accompanying text (outlining statutory language that might be employed to enact the proposals contained in this Comment).

248. See *supra* notes 2-25 and accompanying text.

249. See *supra* note 204 (discussing employer concerns over amended the Service Letter Statute).

250. See *id.*

responding to a request issued under the statute. However, the statute would also give employers specific statutory guidance regarding the type of information to be included in any mandatory response. Additionally, absent a proper request from an employee or employer, no duty to respond would arise on the part of the employer.²⁵¹

One of the main arguments against amending the current Service Letter Statute, rather than creating a new employer reference immunity statute, came from employers already required to respond under the Service Letter Statute.²⁵² These employers feared they would be required to expend additional time and money to retrain their human resource personnel.²⁵³ Although this argument eventually won the day and the lawmakers did not amend the Service Letter Statute, the fact that employers already have policies in place to ensure compliance with the Service Letter Statute supports the contention that employers are capable of instituting policies and procedures enabling them to comply with the new law. Thus, it can be argued that complying with a mandatory reference immunity statute would require only an initial expenditure to establish proper policies and procedures but would not impose an undue burden on employers.

Finally, it is conceded that if employers are required to respond to a proper request made under the statute, they may no longer be able to avoid liability under a negligent misrepresentation theory by simply choosing to remain silent.²⁵⁴ Few courts, however, have embraced this theory in the employment context in the years following the *Muroc* decision.²⁵⁵ Moreover, Missouri corporate employers may not remain silent in the face of a proper request under the Service Letter Statute.²⁵⁶ Still, it appears no Missouri court has held an employer liable for negligent misrepresentation for failing to include negative information in a service letter.

Nevertheless, to address the possibility that Missouri courts might imply a “duty to warn” from an employer’s required response under a mandatory reference statute, this Comment suggests that the legislature strictly limit any such duty. First, any statute creating a duty to warn should include a specific definition of the information that must be included in a reference. Second, the

251. See *supra* notes 197-98 and accompanying text (discussing similar requirement under Missouri Service Letter Statute).

252. See Riback Wilson interviews, *supra* note 33.

253. See *id.*

254. See *Davis v. Board of County Comm’rs*, 987 P.2d 1172, 1181-83 (N.M. Ct. App. 1999) (concluding that expanding liability for negligent misrepresentation into the employment reference context will not “have a chilling effect on employer willingness to give references, whether good or bad . . .”).

255. See *supra* notes 150-79 and accompanying text (discussing the tort of negligent misrepresentation or referral).

256. See MO. REV. STAT. § 290.140.1.

duty to include this information should be further narrowed to apply only to requests for references from employers whose employees pose a high risk of injury to third persons.²⁵⁷

B. Theoretical Support for Imposing a Very Limited Duty to Warn

Our tort law system has been very reluctant to impose an affirmative duty on individuals to warn or protect other people.²⁵⁸ Under the common law, an employer has no duty to respond to a reference request from a prospective employer and disclose an employee's unfavorable traits, even if those characteristics may suggest a propensity for danger.²⁵⁹ However, calls for imposing a duty to warn have been sounded by legal commentators for nearly a decade.²⁶⁰

Janet Swerdlow, one of the earliest authors to propose that a duty to warn be placed on employers, based her proposal on the seminal case of *Tarasoff v. Regents of the University of California*.²⁶¹ In *Tarasoff*, a psychologist told campus police to detain a student because the student had confided to the therapist that he intended to kill an unnamed, but readily identifiable female student.²⁶² Although the patient was detained for a short while, neither the female student nor her family was warned of the possible imminent danger.²⁶³

257. See *supra* notes 150-79 (discussing negligent referral cause of action).

258. RESTATEMENT (SECOND) OF TORTS § 314 (1977) ("The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.")

259. See Saxton, *supra* note 19, at 66.

260. See Swerdlow, *supra* note 149, at 1670 ("To protect society from potential dangers while not unduly exposing employees to a risk of being defamed, it is necessary to impose a duty to warn."); Saxton, *supra* note 19, at 91 ("This section proposes that [S]tates should . . . impose a limited duty on employers to respond to reference inquiries In appropriate circumstances, an employer's breach of this duty could cause the employer to be liable in tort for injuries caused to third parties by the employer's former employee, if the employer withheld reference information that might have prevented the injuries."); Buckhalter, *supra* note 148, at 310 ("The law can best encourage the disclosure of reference information by imposing an affirmative duty of disclosure on employers."); Oliver, *supra* note 3, at 755 ("[T]o encourage employers to abandon their policies . . . state legislatures [should] adopt 'good faith' reference statutes that also place a narrow duty to disclose information regarding a departing employee's or former employee's violent or dangerous behavior."). But see Adler & Pierce, *supra* note 3, at 1447 ("If employers are to have a general duty to warn of a former employee's dangerous propensities - - and we remain open but unconvinced on that point - - we prefer that they duty be to alter public authorities about the danger, if it is sufficiently grave, clear, and imminent, rather than to notify the prospective employers."); J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115 (1998) ("[D]isclosure obligations might well produce more harm than good.")

261. 551 P.2d 334 (Cal. 1976).

262. See *id.* at 341.

263. See *id.*

Shortly thereafter, the patient killed the female student.²⁶⁴ The victim's parents sued the Regents of the University of California based on their "failure to warn of a dangerous patient."²⁶⁵

The *Tarasoff* court noted that the common law has created an exception to the general "no duty rule" in cases where a "special relationship" exists between the defendant and the dangerous person or his or her foreseeable victim.²⁶⁶ The court found that the bond between a psychotherapist and a patient created a "special relationship" that warranted placing an affirmative duty to warn on the psychotherapist for the benefit of third persons.²⁶⁷ Likewise, commentators have compared the employer-employee relationship to that of a therapist and a patient "because prospective new employers, their employees and members of the general public may be able to avoid unnecessary exposure to potential harm if former employers are required to disclose information that would warn a prospective new employer of an applicant's dangerous or criminal tendencies."²⁶⁸ Additionally, legal scholars have noted that "an employer may acquire special knowledge of an individual's dangerous or criminal tendencies in the course of the employer-employee relationship."²⁶⁹

Commentators also suggest that the "special relationship" between a former employer and a prospective employer supports imposing a limited duty to warn.²⁷⁰ They assert that the "dependency" of the prospective employer on the former employer is "analogous to the 'dependencies' giving rise to duties

264. *See id.*

265. *Id.* at 341.

266. 551 P.2d at 343.

267. *Id.* The *Tarasoff* court also addressed the fact that the duty to warn might erode the patient's faith in the psychotherapist-patient privilege but concluded "that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins." *Id.* at 347.

268. Saxton, *supra* note 19, at 94.

269. *Id.* at 94.

270. None of the commentators who have proposed the limited duty to warn have gone so far as to require employers to volunteer information about an employee's dangerous propensities:

While employers could conceivably be required to act as "volunteers" in this fashion, administrative and practical concerns suggest that it would not be fair or reasonable to require them to do so; moreover, the prospect of liability for "negligent hiring" should already be strongly encouraging prospective employers to contact their applicants' former employers for reference information.

Saxton, *supra* note 19, at 96. However, at least one author has suggested protecting those employers that see a "moral duty" to volunteer such information. "Balancing the interests involved, the requirement that information be requested is imprudent. Statements made by a former employer compelled by a moral duty to divulge are protected by the jurisprudential qualified immunity if the information is given in good faith." Aaron, *supra* note 183, at 1152.

of protection under the RESTATEMENT (SECOND) OF TORTS.”²⁷¹ For example, comment b to the RESTATEMENT (SECOND) OF TORTS § 314A indicates that “[t]he law appears . . . to be working slowly toward recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.”²⁷² Janet Swerdlow asserts that “[b]ecause it is foreseeable that certain information regarding the job applicant’s suitability for employment would not be known by anyone other than the applicant’s former employer, [the prospective employer] is dependent upon [the former employer] to provide this valuable information.”²⁷³

It should be noted that when Swerdlow wrote her article, the California Supreme Court had not yet decided *Muroc*.²⁷⁴ Thus, current supporters of an employer’s limited duty to warn base the need for such a duty on cases like *Muroc*.²⁷⁵ By extending liability only to employers who voluntarily respond to a job reference request, *Muroc* encourages employers to retain their “no comment” policies.²⁷⁶ Commentators also highlight the increase in workplace violence as a basis for imposing a duty to warn on employers.²⁷⁷

271. See Saxton, *supra* note 19, at 95 (footnote omitted). Under RESTATEMENT (SECOND) OF TORTS § 314A (1977), the following are examples of “dependency” relationships and their corresponding duties:

- (1) A common carrier is under a duty to its passengers to take reasonable action
 - (a) to protect them against unreasonable risk of physical harm, and
 - (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
- (2) An innkeeper is under a similar duty to his guests.
- (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
- (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

272. RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965).

273. Swerdlow, *supra* note 149, at 1661.

274. See *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997); *supra* notes 151-64 and accompanying text (examining the *Muroc* decision).

275. See generally Oliver, *supra* note 3, at 737-48 (discussing recent case law leading to her conclusion that a duty to warn should be imposed on employer’s responding to references).

276. See, e.g., Oliver, *supra* note 3, at 753-54; Bradley Saxton, *Employment Reference in California after Randi W. v. Muroc Joint United School District: A Proposal for Legislation To Promote Responsible Employment Reference Practices*, 18 BERKELEY J. EMP. & LAB. L. 240 (1997). See also *Davis v. Board of County Comm’rs*, 987 P.2d 1172, 1179 (N.M. Ct. App. 1999) (while recognizing the tort of negligent misrepresentation in the employment referral context, noting that to avoid liability the defendants “could have remained silent in response to requests for information . . .”).

277. See Oliver, *supra* note 3, at 691-92; Markita D. Cooper, *Beyond Name, Rank and Serial Number: “No Comment” Job Reference Polices [sic], Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL’Y & L. 287, 292-98 (1998).

J. Bradley Buckhalter, a recent advocate of imposing a limited duty to warn on employers, asserts that holding employers liable for failing to disclose an employee's dangerous propensities would comport with general tort doctrine by giving "effect to both the fault and foreseeability principle . . ."²⁷⁸ By withholding information about an employee whom the employer knows with reasonable certainty will likely present a continuing risk of harm to others, Buckhalter asserts that the employer "chooses to engage in conduct that ultimately result in harm to innocent victims."²⁷⁹ Accordingly, the choice to withhold such information "places the employer within the realm of legal fault," warranting departure from the "no duty to act" rule.²⁸⁰ Buckhalter further suggests that an employer owes a duty to former employee's potential victims because "the employer knows what the victim does not: that a former employee poses a risk of harm."²⁸¹

It is clear that theoretical support abounds among legal commentators for imposing a duty to warn on employers to protect innocent third parties. Nevertheless, most of these commentators agree that this duty should be strictly limited.

1. Limiting the Duty to Warn

Several limitations on the proposed duty to warn would be prudent.²⁸² First, in his assessment of this issue, Professor Bradley Saxton suggests that it would be necessary to limit the types of information about former employees that would require disclosure.²⁸³ The required disclosure should be limited to ensure that only information that appears reasonably necessary to warn the prospective employer of the employee's "propensity to engage in violent or dangerous conduct posing a threat of physical injury to others."²⁸⁴ Although this standard may seem workable in hindsight, as it was in *Muroc*,²⁸⁵ how likely is it that the average employer is prepared to judge, in advance, whether an employee or former employee has such a "propensity"? Rather than forcing employers to speculate as to a given employee's "propensity" for violence, specific categories of behavior can be defined in the statute that are indicative of an employee's tendency to engage in harmful conduct in the workplace.²⁸⁶

278. See Buckhalter, *supra* note 148, at 294.

279. *Id.* at 294.

280. *Id.*

281. *Id.* at 295.

282. See, e.g., Saxton, *supra* note 19, at 96-99; Long, *supra* note 179, at 214-219 (advocating against a blanket duty to warn on all employers).

283. See Saxton, *supra* note 19, at 96-97, 109.

284. *Id.*

285. *Muroc*, 929 P.2d at 589.

286. See Cooper, *supra* note 277:

As an additional safeguard for employees who fear one minor outburst at the office will harm their chances for future employment, the duty to include admonitory information in a reference can be limited to certain occupations in which an employee's contact with third persons creates a high risk of potential harm.²⁸⁷

Missouri law also supports imposing a duty to warn when an applicant seeks a position that carries a high risk of potential harm to others. One Missouri statute provides that a criminal records check be performed, with the employee's consent, for certain "providers," including day care homes and centers; employers of nurses; public or private "youth services" agencies, such as schools; and employment settings in which an applicant would come "in contact with minors, patients or residents."²⁸⁸ Another Missouri statute requires people seeking employment with certain state agencies, including "any state agency which provides programs, care or treatment for or which exercises supervision over minors," undergo a criminal records check.²⁸⁹

To conclude, rather than rely on the traditional tort law principles that impose a duty to warn based on a "special relationship," the Missouri statute could provide clearer and more specific requirements for a duty to warn by: (1) carefully defining the type of admonitory information an employer is required to include in a reference, and (2) limiting the reach of the duty to warn to employment settings in which there is a high risk of harm to third parties.

C. *Costs and Attorney's Fees*

The Missouri statute currently does not provide for an award of costs and attorneys' fees to a party who prevails in a suit brought under the statute. The

The proposed affirmative duty to disclose workplace violence in job references is limited. It does not require disclosure of displays of anger, loss of temper, or frustration on the job. Nor would the duty require employers to disclose incidents with purely economic consequences, such as theft, embezzlement, or similar offenses. The statute requires disclosure of violent conduct that physically injured or posed a significant risk of physical injury to employees, customers, or clients in the workplace.

Id. at 326 (footnotes omitted). These categories of behavior can be defined using recent court decisions holding employers liable for the foreseeable acts of violent employees as well as police profiles developed to assist employers in identifying employees with a propensity for violence in the workplace. See, e.g., *supra* notes 150-79 and accompanying text (discussing recent cases in which employers have been found liable for failing to disclose an employee's harmful conduct to a prospective employer); MISSOURI CAPITOL POLICE, MO. DEPT. OF PUB. SAFETY, VIOLENCE IN THE WORKPLACE, at 3-4 (visited Feb. 22, 2000) <<http://www.dps.state.mo.use/dps/mcp.study/wrkvio.html>> [hereinafter MISSOURI CAPITOL POLICE].

287. See Long, *supra* note 179, at 217 (suggesting restricting the duty to warn to "situations in which a high risk of danger exists or in which the consequences of dangerous employees are likely to severe").

288. MO. REV. STAT. § 43.540 (1994).

289. MO. REV. STAT. § 43.543 (1994).

shield laws of at least two other states contain a section addressing attorneys' fees and costs.²⁹⁰ Additionally, the model statutes of several legal commentators have proposed fee-shifting provisions.²⁹¹ The fee-shifting rule is designed to encourage employers to adopt more open reference policies by abating fears that they will be forced to defend even reasonable and defensible reference practices.²⁹² Moreover, a fee-shifting provision creates incentives for both plaintiffs and defendants to settle any litigation early if they find their position to be legally indefensible.²⁹³ Finally, the proposed fee-shifting rule might more fully compensate an aggrieved employee under the statute who is effectively prohibited from an award of punitive damages.²⁹⁴

D. *Repeal the Missouri Service Letter Statute*

A mandatory reference immunity statute would eliminate the need for Missouri's Service Letter Statute which has created a somewhat confusing body of law regarding the availability of punitive damages, despite the 1982 amendment intended to limit such awards.²⁹⁵ Those employees covered by the Service Letter Statute, which entitles them to request a reference, would not lose this benefit. Employees formerly covered by the Service Letter Statute would be included within the coverage of the mandatory reference immunity statute, which also would entitle employees to request a reference and to receive a copy of any reference made pursuant to the statute.

E. *Proposed Statute*

The following proposed statute combines the suggestions for reform of the new Missouri statute in this Comment with those of several legal commentators who have recently written on the subject of employment references. This proposal is forwarded solely for discussion and is merely intended to reflect the continuing need to attempt to balance the interests of employees, employers and the general public in creating a safe and effective work environment:

290. See ARIZ. REV. STAT. ANN. § 23-1361(I) (a court "shall award court costs, attorneys fees and other related expenses to any party that prevails in any civil proceeding in which a violation of this section is alleged"); OHIO REV. CODE ANN. § 4113.71(C) (Banks-Baldwin Supp. 1997) (allowing for an award of reasonable attorney's fees and court costs of the defendant if there is a jury verdict in favor of the defendant and "the court finds by a preponderance of the evidence that the lawsuit constituted frivolous conduct").

291. See, e.g., Long, *supra* note 179, at 220-21; Saxton, *supra* note 19, at 52, 110-12.

292. See Saxton, *supra* note 19, at 104.

293. See *id.*

294. See *id.*

295. See *supra* notes 55-89 (discussing Missouri Service Letter Statute).

1. As used in this section, the following terms shall mean:

(1) “Employer” means any individual, organization, partnership, political subdivision, corporation or other legal entity, and/or such entity’s expressly authorized designee, which has or had in the entity’s employ one or more individuals performing services for the entity within this state;²⁹⁶

(2) “Employee” means any person, paid or unpaid, performing services for an employer, as defined in this section;²⁹⁷

(3) “Prospective employer” means any employer, as defined in this section, to which an individual has made application for employment, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment;²⁹⁸

(4) “Job performance” includes, but is not limited to, attendance, awards, dates of service, duties, level of pay, promotions, skills, and reasons for separation from employment;²⁹⁹

(5) “Harmful or Violent Conduct” includes, but is not limited to, battery, assault, threats of violence, physical fighting, possession of weapons, physical harassment, child molestation and sexual harassment;³⁰⁰

(6) “Workplace” means at the employers place of business or at a site wherein the employee is acting at the direction of the employer or upon the employer’s behalf.³⁰¹

2. Any former or current employee or prospective employer may request in writing by certified mail addressed to the manager, owner, supervisor or registered agent of such employer, with specific reference to this statute and, if applicable, with specific reference to subsection 4 of this section, a letter setting forth information pertaining to the job performance of the employee.³⁰²

3. Any employer who receives a proper request made pursuant to subsection 2 of this section from a current or former employee, prospective employer, or from an entity or person the employer reasonably believes to be a prospective employer shall, within thirty (30) working days of receipt of such letter, respond in writing setting forth information pertaining to the job performance of such employee. Any employer who responds by letter pursuant to this

296. See MO. ANN. STAT. § 290.152.1; Aaron, *supra* note 183, at 1151; *supra* notes 181-86 and accompanying text.

297. See MO. ANN. STAT. § 290.152.1.

298. See *id.*

299. See LA. REV. STAT. ANN. § 423.452; MO. REV. STAT. § 290.140.1; *supra* notes 204-19 and accompanying text.

300. See Cooper, *supra* note 277, at 337 app. B; MISSOURI CAPITOL POLICE, *supra* note 286, at 3-4; *supra* notes 282-87 and accompanying text.

301. See Cooper, *supra* note 277, at 337 app. B.

302. See MO. REV. STAT. § 290.140.1.

subsection shall be immune from liability in a civil action by the employee or any other person for any consequences of the disclosure. This immunity shall not apply if:³⁰³

(1) it can be shown by preponderance of the evidence that such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false.³⁰⁴

4. Any employer who receives a proper request made pursuant to subsection 2 of this section from a current or former employee, prospective employer, or from an entity or person the employer reasonably believes to be a prospective employer, and the current or former employee engaged in harmful or violent conduct in the workplace shall, within thirty (30) working days of receipt of such letter, respond in writing setting forth such information. Such information must be disclosed if the prospective employer employs personnel in one of the following categories:³⁰⁵

- (1) school personnel;
- (2) those who in the course of their duties have regular contact with minors;
- (3) police personnel;
- (4) department of corrections personnel;
- (5) nursing home personnel;
- (6) health care providers;
- (7) day care providers; or
- (8) common carrier personnel.³⁰⁶

Any employer who responds by letter pursuant to this subsection shall be immune from liability in a civil action by the employee or any other person for any consequences of the disclosure. This immunity shall not apply if:³⁰⁷

(1) it can be shown by a preponderance of the evidence that such response was false and made with knowledge that it was false or with reckless disregard for whether such response was true or false.³⁰⁸

303. See MO. ANN. STAT. § 290.152.2, -.4; MO. REV. STAT. § 290.140.1.

304. See MO. ANN. STAT. § 290.152.4; *supra* notes 229-33, 282-87 and accompanying text.

305. See MO. ANN. STAT. §§ 290.152.2, 290.140; Long, *supra* note 179, at 220-21; *supra* notes 282-87 and accompanying text.

306. See Long, *supra* note 179, at 220-21; *supra* notes 282-87 and accompanying text.

307. See MO. ANN. STAT. § 290.152.2-.4.

308. See MO. ANN. STAT. § 290.152.2.

5. Any employer found not to be immune pursuant to subsection 3 or subsection 4 of this section shall be liable for compensatory, but not punitive damages.³⁰⁹

6. The provisions of this section shall apply regardless of whether the employee becomes employed by the prospective employer prior to receipt of the employer's response.³¹⁰

7. The employer shall send a copy of any letter provided pursuant to subsection 3 or subsection 4 of this section, requested by a prospective employer, to the current or former employee at the employee's last known address. The current or former employee may request from the employer a copy of the letter provided pursuant to subsection 3 or subsection 4 of this section for up to one year following the date of the letter.³¹¹

8. An employer who fails to issue any letter properly requested pursuant to subsection 2 of this section or fails to issue any copy of such letter properly requested pursuant to subsection 7 of this section shall be liable for nominal, compensatory and punitive damages.³¹²

9. A court, in its discretion costs, may award attorneys' fees and other related expenses to any party that prevails in any civil proceeding in which a violation of this section is alleged.³¹³

V. CONCLUSION

The passage of the new Missouri reference immunity statute will be largely meaningless if both employers and employees are unaware of it.³¹⁴ Despite the nearly one hundred year history of the Service Letter Statute in Missouri, at least one Missouri lobbyist believes very few employers and employees are actually aware of its existence.³¹⁵ It is likely the new Missouri statute will share this fate unless there is an educational campaign to inform employers and employees of the statute's passage.³¹⁶ As employers learn more about the protection afforded by the new law, their anxieties about providing reference

309. See MO. ANN. STAT. § 290.152.5; *supra* notes 234-42 and accompanying text.

310. See MO. ANN. STAT. § 290.152.2.

311. See MO. ANN. STAT. § 290.152.3.

312. See MO. REV. STAT. 290.140.2; *supra* notes 220-24 and accompanying text.

313. See TEX. CODE ANN. ch. 103; *supra* notes 290-94 and accompanying text.

314. See Riback Wilson interviews, *supra* note 33. Representative Riback Wilson indicated she has already had several invitations from employer groups to speak about the new statute. See *id.*

315. Telephone Interview with St. Louis County Associate Circuit Judge Mary Schroeder, who prior to assuming the bench lobbied for the new Missouri law on behalf of the Missouri Association of Trial Attorneys (Oct. 21, 1999).

316. *Id.*

information may lessen.³¹⁷ Alternatively, an employee would have a written reference to share with prospective employers that accurately reflects the employee's job performance.

The new Missouri reference immunity statute is a step toward opening the channels of communication between employers regarding employee references. The statute attempts to protect employee interests by requiring that employees receive a copy of any response made pursuant to the statute. However, it remains to be seen how Missouri employers, employees, attorneys and courts will answer some of the questions raised by the statute. What effect will the new statute have on current law? Will courts read the statute to expand an employer's common-law qualified immunity? Will courts simply rely on traditional principles in deciding cases under the new statute making its passage largely unnecessary? Will the courts give the statute preclusive effect as to other available avenues of redress? Will the new statute merely create another opportunity for litigating employment references in Missouri? Will Missouri courts imply a duty to warn prospective employers about employees with dangerous propensities?

The unique features of the new Missouri reference immunity statute show careful deliberation by lawmakers and lobbyists. Among the most important features is the attempt to limit the availability of punitive damages in an employee reference claim. No other state has tried this approach. Yet the Missouri law places a very high burden on plaintiffs seeking to challenge false, misleading or defamatory information contained in a reference, while limiting their available remedies. The new statute attempts to ensure employees will receive a copy of any reference made pursuant to the statute, but provides no remedy for a violation of this provision of the law.

Only time will tell if Missouri employers are still damned if they do, and damned if they don't.

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317. See Forster, *supra* note 10 (citing a statement by Sharon Horrigan, State Legislative Affairs Manager, Society for Human Resource Management).

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