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# BEYOND NAME, RANK AND SERIAL NUMBER: "NO COMMENT" JOB REFERENCE POLICIES, VIOLENT EMPLOYEES AND THE NEED FOR DISCLOSURE-SHIELD LEGISLATION

Markita D. Cooper*

*They are reluctant, if not totally fearful, of telling you about an employee. . . . If it's someone who's blemished, they will never say, "No, we'd never rehire him." Regarding character, we are wandering in a wasteland.*[1]

## INTRODUCTION

As Paul Calden calmly walked into a crowded cafeteria in a Florida office building, no one knew that their former coworker would transform an ordinary lunch hour into a scene of death and terror. But within minutes of entering the cafeteria, Calden shot five of his former supervisors. The attack left three people dead and two seriously injured. Thirty others witnessed the shooting rampage, as Calden opened fire and proclaimed, "This is what you get for firing me." All of the victims were supervisors and executives employed by Fireman's Fund Insurance, and all had been involved in terminating Calden's employment with the company.

Fireman's Fund hired Calden after he left a job with Allstate Insurance Company. During his nine-month tenure at Allstate, Calden made death threats against coworkers, confronted peers and supervisors, and brought a pistol to the office. Allstate fired Calden after he brought the gun to work. Although company policy prohibited giving references, managers did not

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[1] Tim Weiner, Fearing Suits, Companies Avoid Giving Job References, N.Y. Times, May 8, 1993, at 37 (quoting Alan Schonberg, chief executive officer of Management Recruiters International of Cleveland, Ohio).

follow the policy. Instead, Calden received a reference letter explaining that he had voluntarily resigned as part of a corporate restructuring. Allstate said nothing to Fireman's Fund about Calden's history of violent conduct in the workplace.[2]

The survivors and families of those killed subsequently sued Allstate,[3] alleging that the insurance company knew Calden had engaged in violent behavior while working there.[4] The complaint charged that Allstate had fraudulently failed to disclose Calden's true work history and failed to warn Fireman's Fund of the danger posed by Calden.[5] Moreover, the plaintiffs alleged that Allstate had an affirmative duty to disclose Calden's violent propensities.[6] After more than a year of litigation, Allstate settled the case for an undisclosed sum.[7]

Paradoxically, if Allstate had followed its policy of *not* providing references—saying nothing about Calden or providing only his dates of employment and salary information—existing law effectively would have immunized Allstate from suit. Without Allstate's misleading reference, there would have been no legally cognizable grounds for recovery. If Allstate had provided only a "name, rank, and serial number" reference disclosing Calden's dates of employment and salary history, the company would have had no legal obligation to tell a prospective employer about Calden's history of workplace violence.[8]

Following both conventional wisdom and legal advice, many employers provide only dates of employment and salary information in response to reference inquiries.[9] By responding to a reference inquiry with limited

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2 The story of this shooting is culled from local news reports. See, e.g., Paul de la Garza & Lisa Frederick, Man Kills Three in Tampa Cafe, St. Petersburg Times, Jan. 28, 1993 at 1A; Fired Employee Kills 3 Bosses in Tampa Firm, Sun-Sentinel (Ft. Lauderdale), Jan. 28, 1993, at 1A. See also Plaintiffs' Amended Wrongful Death Complaint at 3-6, Jerner v. Allstate Ins. Co. (Fla. Cir. Ct. 1995) (No. 93-09472); infra notes 128-140 and accompanying text.

3 The plaintiffs also sued Calden's estate. See Plaintiffs' Amended Wrongful Death Complaint, supra note 2, at 1. Calden committed suicide within hours of the shootings. See de la Garza & Frederick, supra note 2.

4 Plaintiffs' Amended Wrongful Death Complaint, supra note 2, at 4-5, 8, 11.

5 Id. at 5.

6 Id. at 8-11.

7 Allstate settled the case in October 1995. Allstate Settles Suit on Reference for Killer, Nat'l L.J., Oct. 16, 1995, at B2.

8 See discussion infra at Part II, Section A.

9 For example, in a 1995 survey, nearly 40 percent of responding human resource professionals agreed that they should "refuse to provide job-related information to prospective employers, even if the information is honest and factual." In addition, 63 percent of respondents reported that they or members of their organizations had "refused to provide information about a former employee

information, employers seek to avoid defamation and other claims based on negative references.[10] The trend towards increased use of "no comment" reference policies has been widely reported in the legal, business, and popular press.[11] In addition, recognizing that fear of litigation drives employers to adopt no-reference policies, many legislators and human resource management lobbyists have pushed for statutes that provide qualified immunity against lawsuits arising out of job reference practices.[12]

Before the publicity over the *Allstate* case, only five states provided for job reference-related qualified immunity by statute.[13] In 1995, nine additional states placed such legislation on the books.[14] By 1997, a clear trend had emerged in state legislatures, with more than half of the states

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out of fear of a lawsuit." Society for Human Resource Management ("SHRM"), Reference Checking Leaves Employers in the Dark: Legal Concerns a Stumbling Block, SHRM Survey Says (News Release, June 26, 1995); SHRM, Reference Checking Survey (1995); see also Robert S. Adler & Ellen R. Peirce, Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381, 1383-87 (1996); Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform, 13 Yale L. & Pol'y Rev. 45 (1995). The popular press also has taken note of this trend. See, e.g., James Walsh, Checking References: Amid Fear of Lawsuits, Employers Grow Wary of Giving References, Star Trib. (Minneapolis), Feb. 4, 1997, at 1A; Weiner, supra note 1, at 37.

10 See discussion infra Part II.

11 As Saxton observed:

> The lay press, including business-oriented journals, has been fairly consistent in reporting that "no comment" reference strategies are being widely employed; the commentators have also been consistent in attributing the prevalence of those strategies to employers' negative perceptions of the current legal environment .... Attorneys who have written or otherwise commented publicly about reference practices also have generally confirmed that "no comment" reference strategies are widely used by employers today.

Saxton, supra note 9, at 48.

12 See discussion infra Part III.

13 Ironically, Florida, the scene of the *Allstate* events, was the first state to adopt a statute providing employers with such a qualified immunity. Florida enacted its shield statute in 1991. Fla. Stat. Ann. § 768.095 (West 1997). However, the events leading to the *Allstate* litigation occurred before the Florida legislature enacted the reference shield law. By 1994, Alaska, California, Colorado, and Georgia also had enacted job reference immunity legislation. Alaska Stat. § 09.65.160 (Michie 1996); Cal. Civ. Code § 47(c) (West Supp. 1998); Colo. Rev. Stat. § 8-2-114 (1997); Ga. Code Ann. § 34-1-4 (Supp. 1997).

14 Ind. Code. Ann. § 22-5-3-1 (Michie 1997); 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. 1997); N.M. Stat. Ann. § 50-12-1 (Michie Supp. 1997); Okla. Stat. Ann. tit. 40, § 61 (West Supp. 1998); Or. Rev. Stat. § 30.178 (Michie Supp. I 1996); Tenn. Code Ann. § 50-1-105 (Supp. 1997); and Utah Code Ann. § 34-42-1 (1997).

having enacted reference shield statutes.[15] Specifically, twenty-nine states had passed legislation designed to protect employers from suits based on job references.[16] Eleven additional states currently have bills pending.[17] Although much of the rhetoric surrounding reference shield laws concerns the increasing difficulty of obtaining job references,[18] the flurry of legislative activity following *Allstate* suggests that the *Allstate* case and other high profile workplace violence situations played a significant role in state legislatures' decisions to enact reference shield legislation.[19]

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[15] Twelve additional states had enacted reference shield statutes by the end of 1996. See Ariz. Rev. Stat. Ann. § 23-1361 (West Supp. 1997); Del. Code Ann. tit. 19, § 708 (Supp. 1996); Idaho Code § 44-201 (1997); 745 Ill. Comp. Stat. Ann. 46/10 (West Supp. 1997); Md. Code. Ann., Cts. & Jud. Proc. § 5-423 (Supp. 1997); Mich. Comp. Laws Ann. § 423.452(2) (West Supp. 1997); Ohio Rev. Code Ann. § 4113.71 (Anderson Supp. 1996); R.I. Gen. Laws § 28-6.4-1 (Supp. 1997); S.C. Code Ann. § 41-1-65 (Law. Co-op. Supp. 1997); S.D. Codified Laws § 60-4-12 (Michie Supp. 1997); Wis. Stat. Ann. § 895.487 (West 1996); and Wyo. Stat. Ann. § 27-1-113 (Michie 1997).

[16] This total includes statutes enacted in Iowa, North Carolina and North Dakota during 1997. Iowa Code § 91B.2 (signed by governor on May 26, 1997), available in LEXIS Statenet 1997; N.C. Gen. Stat. § 1-539.12 (Supp. 1997); N.D. Cent. Code § 34-02-18 (Supp. 1997).

[17] As of this writing, bills were pending in Alabama, Hawaii, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, Vermont, and Washington. See H.B. 303, 1998 Reg. Sess. (Ala. 1998); S.B. 194, 1998 Reg. Sess. (Ala. 1998); H.B. 3540. 19th Leg. (Haw. 1997); H.B. 2069, 77th Leg., 1997 Reg. Sess. (Kan. 1997); S.B. 2060, 181st Gen. Ct., 1997 Reg. Sess. (Mass. 1997); H. File 1069, 80th Leg. Sess. (Minn. 1997); H. File 1070, 80th Leg. Sess. (Minn. 1997); S. File 752, 80th Leg. Sess. (Minn. 1997); H.B. 1345, 89th Gen. Ass., 2d Reg. Sess. (Mo. 1998); Leg. B. 790, 95th Leg., 1st Reg. Sess. (Neb. 1997); Ass. B. 911, 208th Leg. (N.J. 1998); Ass. B. 1350, 208th Leg. (N.J. 1998); Ass. B. 2838, 207th Leg. (N.J. 1997); Ass. B. 2841, 207th Leg. (N.J. 1997); S.B. 1870, 207th Leg. (N.J. 1997); H.B. 338, 182d Gen. Ass, 1997-98 Reg. Sess. (Penn. 1997); H.B. 166, 64th Biennial Sess. (Vt. 1997); S.B. 139, 64th Biennial Sess. (Vt. 1997); H.B. 1886, 55th Leg., 1997 Reg. Sess. (Wash. 1997).

[18] See, e.g., Armond Budish, Employers Giving References Protected from Suits, Cleveland Plain Dealer, Apr. 28, 1996, at 3F (describing the Ohio shield statute and noting that the statute "is designed to promote accurate reporting by an employee's previous employers so prospective employers can make well-informed decisions"); G. Daniel Ellzey & Charles F. Thompson, Jr., Bill Protects Employers When They Provide References, S.C. Bus. J., May 1996, at 1 (stating that sponsors of shield law "meant to provide employers added protection from legal liability and to encourage honest and useful job references"); Randolph Heaster, Labor Criticizes Bill Governing Ex-Employees, Kansas City Star, Apr. 7, 1995, at B1 (explaining view of legislation's cosponsor: "[t]he bill originated because of complaints from public and private employers that they could not get certain information about people applying for jobs").

[19] Numerous press reports analyzing the statutes have noted such a connection. See, e.g., David Heckelman, Senate Rejects Extended Immunity for Work Records, Chi. Daily L. Bull., May 21, 1996, at 1 (noting view of State Sen. Chris Lauzen, sponsor of the Illinois shield bill, that bill "was intended to address situations in which employers have failed to report violent conduct by former employees, fearing that they might be sued for defamation"); Tannette Johnson-Elie, Bill Could Ease Fear of Giving References: State Legislation Gives Employers Immunity, Milwaukee J. Sentinel, June 2, 1996, at 1 (identifying lobbyists who asserted that the statute would help employers protect themselves from people with histories of workplace violence as a catalyst for the Wisconsin statute); Diana Kunde, Bill Aims to End Silence Over Job References, Dallas Morning News, Sept. 8, 1996, at 1H (discussing litigation that "helped spur" the need for shield legislation and focusing

State lawmakers intend the recently enacted statutes to remedy the problem of employers who refuse to disclose information about former employees' job performance.[20] Under the statutes, an employer sued based on a job reference will not be held liable if the employer acted in good faith.[21] According to its proponents, statutory immunity encourages employers to break the code of silence and speak about their employees' work performance.[22]

Although no formal studies have analyzed the impact of reference shield statutes, anecdotal reports indicate that the new statutes have had little effect on employers, the majority of which are adopting "wait and see" attitudes.[23] In part, such a conservative posture may be justified because the statutes generally offer little more protection than what already exists at common law.[24] Until fears of job reference-related lawsuits and liability are overcome,[25] employers have little incentive to provide references. This failure to cooperate becomes critical when employers maintain

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on *Allstate* as "[o]ne suit in particular [that] has gained attention"); Nita McCann, Employers Who Give Honest Job References May Not Need Further Legal Protection, Miss. Bus. J., Sept. 23, 1996, at 1 (noting that *Allstate* has called attention to how vague reference policies arising from employers' fears of lawsuits can lead to "bloodshed," and as a result, states are enacting shield laws); States Adopt "Good Faith" Employment Reference Laws, Legal Intelligencer, July 3, 1996, at 4, available in LEXIS, News Library, LGLINT File (noting that "high profile cases of workplace violence . . . have brought to the forefront the importance of reference checking and receiving good information about an employee's past work history").

20 See infra Part III, Section A.

21 See infra note 102 and accompanying text.

22 See infra Part III, Section B.

23 See infra Part III, Section C.

24 Alex B. Long, Note, Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation, 39 Wm. & Mary L. Rev. 177, 221-222 (1997). But see Adler & Peirce, supra note 9, at 1451-52 (arguing that some statutes "appear to narrow and to undermine existing legal protections unwittingly").

25 Long, supra note 24, at 223. Although the statutes reduce the likelihood that an employer ultimately will be held liable in a job reference-related suit, employers fear not only liability, but lawsuits themselves. Many commentators have noted that employers face high costs in defending lawsuits, even when they prevail. See, e.g., Adler & Peirce, supra note 9, at 1424; Markita D. Cooper, Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication, 72 Notre Dame L. Rev. 373, 374-75 (1997); O. Lee Reed & Jan W. Henkel, Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame, 26 Am. Bus. L.J. 305, 316-18 (1988); Saxton, supra note 9, at 76; Long, supra note 24, at 191-92, 222-23. Of course, no statute that stops short of giving employers absolute immunity will preclude lawsuits, nor will statutes alone prevent lawsuits challenging employer references. See Long, supra note 24, at 225-28 (arguing that the statutory approach must be combined with other mechanisms, such as educating employers on how to avoid reference-based defamation claims, and correcting the misconception that employers face a great risk of being sued for providing job references).

no-reference policies for employees who have engaged in violent conduct on the job.[26]

This Article proposes a legislative model that combines qualified immunity with a limited affirmative duty for employers, requiring them to disclose information about violent workplace conduct by employees for whom a reference is requested.[27] Part I describes job reference policies and practices and the incidence of workplace violence. Part II discusses an employer's potential common law tort liability when an employee receives an unfavorable job reference. Part III provides an overview of current reference shield law provisions. Part IV critiques these laws and proposes that legislatures adopt "disclosure-shield" statutes. These statutes would combine the principles of qualified immunity (as incorporated into existing reference shield statutes) with a limited affirmative duty to disclose any incidents of workplace violence engaged in by an employee for whom a reference is sought.

## I. TWO TRENDS IN THE 1990S WORKPLACE: NO COMMENT" JOB REFERENCE POLICIES AND THE INCREASING INCIDENCE OF WORKPLACE VIOLENCE

Until the 1980s, employers could count on receiving references for prospective employees.[28] References were a routine and traditional feature of gathering information about potential hires.[29] Employers freely ex-

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[26] This Article focuses on the problems of "no comment" references regarding employees who have engaged in violent conduct in the workplace. While I acknowledge the general problem of declining employer references, this Article concerns what I believe to be the most crucial problem posed by "no comment" references, that is, silence regarding workers who pose a danger of violent harm to others. In addition, the proposal in this Article focuses on violent conduct but does not include misconduct such as theft, embezzlement, dishonesty, or similar issues that result in primarily economic losses. In my view, the case for imposing a duty to disclose is far more compelling when the potential harm is personal injury rather than an economic loss.

[27] For the perspectives of scholars examining the general issue of "no comment" references and reform proposals, see generally Adler & Peirce, supra note 9; Saxton, supra note 9; Long, supra note 24; Janet Swerdlow, Note, Negligent Referral: A Potential Theory for Employer Liability, 64 S. Cal. L. Rev. 1645 (1991).

[28] Ramona L. Paetzold & Steven L. Willborn, Employer (Ir)rationality and the Demise of Employment References, 30 Am. Bus. L.J. 123, 134 (1992) (noting that 1965 through 1969 and 1985 and 1989 were time periods during which employers shifted away from giving detailed employment references); see also Deborah S. Kleiner, Is Silence Truly Golden?, HRMag., July 1993, at 117 (noting that just two decades ago, few employers had formal reference policies).

[29] As one commentator observed in the late 1970s, "[T]he number of employer references . . . has increased dramatically. References for former employees are now written by the millions." Charles D. Tiefer, Comment, Qualified Privilege to Defame Employees and Credit Applicants, 12 Harv. C.R.-C.L. L. Rev. 143, 146 (1977). However, even at that time, some employers provided references equivalent to today's "name, rank, and serial number" policies, "simply stat[ing] whether the employee actually worked for them, and if so, for how long and at what job, and other simple objective information." Id. at 147; see also James W. Fenton, Jr. & Kay W. Lawrimore, Employment

changed references, oftentimes on an informal basis.[30] The manager providing the reference had discretion to say whatever he or she thought was appropriate, with little or no guidance from formal company policies.[31] A firmly established workplace tradition, references were available "upon request."[32]

As highly publicized defamation cases received attention in the 1980s, employers became wary of providing references.[33] Based on the advice of lawyers and human resource experts, many employers instituted formal policies limiting the information contained in job references to dates of employment, job duties, and salary history.[34] In some instances, employers chose to refrain from providing references altogether.[35]

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Reference Checking, Firm Size, and Defamation Liability, J. Small Bus. Mgmt., Oct. 1992, at 88 (describing routine reference checks as "a time-honored ritual of employers").

30 Kleiner, supra note 28, at 117 (noting that in the past "references were given on an ad hoc basis").

31 Id.

32 David Grant, Giving a Reference: Just Name, Rank, and Salary History?, Legal Times, Nov. 30, 1987, at 16 ("It has been traditional in the American workplace for employers to request and provide employee job references."); see also Tiefer, supra note 29, at 146 (stating that the number of employment references has increased dramatically "[o]ver the last two centuries").

33 See James G. Frierson, Preventing Employment Lawsuits: An Employer's Guide to Hiring, Discipline, and Discharge 229-30 (BNA 1995). Frierson observes a "significant trend" since the 1980s of employers refusing to give references or restricting references to job title and time of employment and observes that the trend "is, in large part, an overreaction to some successful defamation lawsuits against companies that gave bad references." Id. at 229 (referring specifically to the $1.9 million verdict in Frank B. Hall & Co. v. Buck, 687 S.W.2d 612 (Tex. Ct. App. 1984), as the catalyst that ignited the limited reference trend).

34 Robert S. Adler & Ellen R. Peirce, Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381, 1386 (1996) (observing that employers have adopted nondisclosure policies "in hopes of avoiding costly lawsuits"); Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform, 13 Yale L. & Pol'y Rev. 45, 47-48 (1995) (noting that lay press and attorneys consistently link the widespread use of "no comment" reference policies with employers' "negative perceptions of the current legal environment"); Valerie L. Acoff, Note, References Available on Request . . . Not!—Employers Are Being Sued for Providing Employee Job References, 17 Am. J. Trial Advoc. 755, 770 (1994) (attributing the proliferation of "no comment" or "no reference" policies to "[t]he rapidly increasing threat of litigation arising out of employment references"); Grant, supra note 32, at 16 (asserting that "[t]he increase in employment-related defamation actions is the single most important reason why many employers now only grudgingly disclose information about former employees."); Martha Middleton, Employers Face Upsurge in Suits over Defamation, Nat'l L.J., May 4, 1987, at 1 (attributing chilling effect on exchange of information between employers to threat of litigation and expense of defending claims). But see Paetzold & Willborn, supra note 28, at 140-41 (acknowledging that employers perceive a threat of defamation liability but arguing that employers' reluctance to provide references is based on misinformation and biased perceptions).

35 For example, in a 1989 survey, what is now the International Association of Corporate and Professional Recruiters found that approximately 41 percent of respondents worked for companies

The following advice from human resource management texts is typical of the 1990s approach to job references:

- Always take a conservative approach with potential employers. Adopt a policy of simply confirming the facts of employment, dates, duties, and positions held. The more derogatory information you supply a prospective employer (such as "The ex-employee is not eligible for re-hire because . . ."), the greater the chance you will face a defamation lawsuit. Remember, bad references lead to expensive lawsuits![36]
- The safest policy for an employer to follow is to provide only a statement of fact that the former employee was employed [for a certain time period] . . . without any comment regarding the quality of the employment or whether or not the individual was fired or left voluntarily.[37]

The increasing difficulty of obtaining references is well documented. In 1988, the Bureau of National Affairs ("BNA") conducted a survey examining employee recruiting and selection procedures.[38] BNA reported that 20 percent of the responding firms found it difficult to obtain or confirm "any information beyond simple factual data about a job applicant."[39]

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with written policies that explicitly prohibit providing outside references. Saxton, supra note 34, at 47 (citing Nat'l Ass'n of Corp. and Prof'l Recruiters, Inc., Fourth Annual Membership Survey Results (1989)). More recent surveys by the Association have not included data on reference policies. Id. In a 1995 survey by the Society for Human Resource Management ("SHRM"), 38 percent of respondents agreed that "human resource professionals should refuse to provide job-related information to prospective employers, even if the information is honest and factual." Society for Human Resource Management, Reference Checking Leaves Employers in the Dark: Legal Concerns a Stumbling Block, SHRM Survey Says (News Release, June 26, 1995) [hereinafter "SHRM News Release"]; see also SHRM, Reference Checking Survey (1995) [hereinafter "SHRM Reference Survey"].

36 Steven Mitchell Sack, From Hiring to Firing 297 (1995). In summarizing strategies for reducing defamation claims, Sack emphasizes this advice, recommending that employers "[a]void giving negative references to prospective employers." Id. at 305.

37 Cliff Roberson, Hire Right/Fire Right: A Manager's Guide to Employment Practices that Avoid Lawsuits 39 (1992).

38 Recruiting and Selection Procedures, Personnel Policies Forum Survey No. 146 (BNA), May 1988.

39 Id. at 24. In addition, 68 percent of respondents reported generally that some types of information were difficult to obtain. Thirty-one percent noted difficulty obtaining performance appraisals, while 18 percent reported difficulty ascertaining why an applicant had left a previous job. An unspecified percentage indicated experiencing problems confirming "salary data, personality information, attendance records, and rehire eligibility status." Id.

In surveys conducted just a few years later, the number of respondents reporting difficulty in obtaining reference information from other employers increased dramatically.[40] In a 1993 survey by the independent research firm Robert Half International, 75 percent of responding executives reported that companies were providing less information about former employees than they had three years earlier.[41] In addition, 68 percent of respondents reported that reference checking had become more difficult.[42] Discussing the survey results, Max Messmer, chairman and chief executive officer of Robert Half International, identified a link between restrictive job reference policies and employers' concerns about being sued.[43] Mr. Messmer concluded, "[O]ur litigious society is increasingly forcing former employers into taking a position of 'no comment' beyond verification of employment dates and salary."[44]

A 1995 survey by the Society for Human Resource Management ("SHRM") reported similar results.[45] In that survey, 63 percent of respondents reported that they or members of their organization's human resources staff had refused to provide information regarding a former employee out of fear of a lawsuit.[46] In addition, 17 percent reported that their companies had been challenged by a disgruntled former employee over an

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[40] Robert Half Int'l, Inc., Survey Shows Employers Find It Harder to Check References (Press Release, Jan. 1993) (poll of 200 Fortune 1000 executives); SHRM Reference Survey, supra note 35. But see Fenton & Lawrimore, supra note 29, at 92-93. In their research, Fenton and Lawrimore found that the willingness to provide references varied by size of the company:

> Results from this research, addressing a firm's willingness to provide past employee work reference information, clearly show differences between small versus large business. The results of this research indicate that large firms are very cautious in sharing past employee information. This may be explained by the presence of Human Resource Management expertise, which is associated more with large business. These individuals are versed in the law of defamation and are likely to exercise greater caution in behalf of the firm in responding to employment reference check requests.

Id. (citation omitted).

[41] Robert Half Int'l, Inc., supra note 40, at 2. Nine percent of the 200 hundred Fortune 1,000 executives surveyed reported that companies were providing more information, while 10 percent perceived no change. Id. at 3.

[42] Id. at 1, 3 (finding that 10 percent of respondents said reference checking had become easier, and 17 percent reported no perceived change).

[43] Id. at 2.

[44] Id.

[45] SHRM attempted to poll a random sample of 5,000 SHRM members who identified themselves as working "in the employment function." SHRM received 1,331 responses. SHRM News Release, supra note 35.

[46] Id.

allegedly inaccurate reference.[47] When asked "should HR professionals refuse to provide job-related information to prospective employers, *even if it is honest and factual*?," 38 percent of the respondents answered "yes."[48] Ironically, although a substantial number of the respondents embraced policies of silence, they also noted the importance of reference checking. Seventy-three percent agreed that "[i]n seeking to hire the best possible employees, . . . reference checking . . . [has] become more important now than in the past."[49]

This response reflects the tension between employers' defensive no-reference strategies and the need for meaningful exchange of reference information. However wise a strategy to avoid litigation, "name, rank, and serial number" and "no comment" reference policies hamper employers' efforts to obtain information about prospective employees. At a minimum, refusing to provide reference information inhibits the flow of workplace communication. Employers face roadblocks that prevent them from obtaining meaningful information about prospective employees. Employees suffer as well. "No comment" and "name, rank, and serial number" reference policies hamstring excellent workers who deserve—but cannot obtain—positive references from their employers.[50] Finally, such policies neutralize employers' efforts to screen job candidates, thereby increasing the likelihood that employees will be forced to work with incompetent or dangerous colleagues.[51]

When a job applicant has engaged in violent conduct in his or her previous workplace, the former employer's fear of lawsuits and the resulting difficulty prospective employers have obtaining information can have dangerous consequences. From headline-making murders to unreported violent altercations and attacks, workplace violence is a serious problem. In a 1993 survey conducted by SHRM, 32 percent of respondents reported that since 1989, at least one act of violence had occurred where they worked.[52] More than one-third of the violent incidents occurred after 1991.[53] A 1994 survey conducted by the American Management Associa-

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47 Id.

48 Id. (emphasis added).

49 Id.

50 Richard C. Reuben, Employment Lawyers Rethink Advice, A.B.A. J., June 1994, at 32 (observing that the "name, rank and serial number" approach to references "punishes good employees who deserve the benefit of a positive referral").

51 Negligence, Defamation Claim Dangers Are Assessed at BNA IER Conference, 213 Daily Lab. Rep. A-3, A-4 (BNA) (Nov. 5, 1987).

52 SHRM News Release, supra note 35, at 2.

53 Id.

tion reported similar results. Nineteen percent of respondents reported having experienced at least one incident of actual violence and an additional 33 percent experiencing threatened violence in the workplace since 1990.[54] Coworkers and supervisors were responsible for 27 percent of the workplace attacks and 37 percent of the threats of physical harm.[55]

Notwithstanding the increasing prevalence of workplace violence, 54 percent of managers responding to the 1995 SHRM survey stated that the information they received about violent behavior was inadequate.[56] With an estimated more than two million physical attacks and an additional six million workers threatened with physical harm every year,[57] employers, policymakers, and the public are demanding a response to the risk of workplace violence. Former employers obviously are in the best position to advise prospective employers about employees' past violent conduct in the workplace, and to do so at relatively low cost. It is imperative that the legal system encourages them to act, and protect them when they do so.

## II. SILENCE MADE GOLDEN: POTENTIAL COMMON LAW TORT LIABILITY RELATING TO UNFAVORABLE JOB REFERENCES

Both employers and employees perceive the workplace as a litigious environment. With the reported surge in the incidence of lawsuits in the 1980s, workplace defamation gained attention as a real and perceived threat to employers.[58] Well publicized news accounts of multimillion dollar verdicts exacerbate employers' fears about lawsuits by employees, liability for exorbitant judgments, and the large costs of defending frivolous

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54 Am. Mgmt. Ass'n, Workplace Violence: Policies, Procedures, & Incidents, Summary of Key Findings (65th Annual Human Resources Conference Onsite Survey), Apr. 9-13, 1994 (surveying 500 human resource managers working in private sector companies).

55 Fear and Violence in the Workplace: A Survey Documenting the Experience of American Workers (Northwestern National Life Ins. Co.), 1993, at 11 [hereinafter "Fear and Violence"]. This study surveyed 600 private sector workers, excluding business owners and sole proprietors. Id. at 2.

56 SHRM News Release, supra note 35.

57 Fear and Violence, supra note 55, at 2 (survey findings for the period July 1992 to July 1993).

58 This perception may be skewed. Commentators have observed that reports of large jury verdicts may have created an exaggerated fear of liability among employers. See James G. Frierson, Preventing Employment Lawsuits: An Employer's Guide to Hiring, Discipline, and Discharge 229-30 (BNA 1995); see also Ramona L. Paetzold & Steven L. Willborn, Employer (Ir)rationality and the Demise of Employment References, 30 Am. Bus. L.J. 123, 140-41 (1992) (arguing that employers' fears of reference-based defamation claims may be driven by media reports of large jury awards and that employers do not hear of smaller awards or awards that are reduced or reversed on appeal).

claims.[59] Concurrently, media reports create incentives for employees to bring lawsuits alleging real and perceived wrongs by employers. Employees typically bring lawsuits against employers for wrongful termination.[60] Alternatively, if an employee receives a negative job reference without being fired, the reference alone may provide sufficient grounds to establish tort liability.[61] When an employee is precluded from a job opportunity as a result of an unfavorable reference, he or she may sue the reference giver, alleging defamation[62] or interference with prospective contractual relations.[63]

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[59] See, e.g., Sigal Constr. Corp. v. Stanbury, 586 A.2d 1204 (D.C. 1991) (upholding plaintiff's remitted award of $250,000 for a defamation claim); Frank B. Hall & Co. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984) (awarding plaintiff $1.9 million in defamation claim); see also Roger B. Jacobs, Defamation and Negligence in the Workplace, 40 Lab. L.J. 567, 571 (1989) (observing that between 1980 and 1989 there were forty workplace defamation awards exceeding $1 million); John Bruce Lewis et al., Defamation in the Workplace: A Survey of the Law and Proposals for Reform, 54 Mo. L. Rev. 797, 798 (1989) (noting that "[v]erdicts of more than $1 million in these cases are not unusual and some verdicts have reached as high as $6 million"); Gregory Stricharchuk, Fired Employees Turn the Reason for Dismissal into a Legal Weapon, Wall St. J., Oct. 2, 1986, at 33 (citing $112,000 as the average amount of damages awarded in cases where the former employee received a favorable jury verdict). But see Paetzold & Willborn, supra note 58, at 140-41 (arguing that although large jury verdicts tend to receive attention, employers are unaware of the final outcome of cases after appeal, remittitur or new trial, where jury awards are reduced, and that cases where plaintiffs lose or receive small awards "may be forgotten or discounted").

[60] See, e.g., *Sigal*, 586 A.2d at 1206 (statements describing project manager as "detail oriented to the point of losing sight of the big picture" and commenting that "[w]ith a large staff [he] might be a very competent [project manager]"); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (noting description of plaintiff as "a poor salesperson" who was "not industrious[,] . . . would not get products out, was hard to motivate and could not sell").

[61] See Ronald M. Green & Richard J. Reibstein, Employer's Guide to Workplace Torts 63 (1992) (noting that defamation claims arise "in a broad range of employment-related matters, including . . . terminations [and] post-employment references"); Martha Middleton, Employers Face Upsurge in Suits over Defamation, Nat'l L.J., May 4, 1987, at 1 (observing that "defamation actions are being attached to or are taking the place of wrongful discharge suits"); Gabriella Stern, Companies Discover that Some Firings Backfire into Costly Defamation Suits, Wall St. J., May 5, 1993, at B1 (noting that "[l]awyers say more ex-employees are using defamation suits to fight firings").

[62] Numerous commentators have written about defamation claims based on references. See, e.g., Robert S. Adler & Ellen R. Peirce, Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381, 1393-1412 (1996); James W. Fenton, Jr. & Kay W. Lawrimore, Employment Reference Checking, Firm Size, and Defamation Liability, J. Small Bus. Mgmt., Oct. 1992, at 88; Mark P. Gergen, A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation, 74 Tex. L. Rev. 1693, 1714-26 (1996); Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform, 13 Yale L. & Pol'y Rev. 45, 69-73 (1995); Edward R. Horkan, Note, Contracting Around the Law of Defamation and Employment References, 79 Va. L. Rev. 517, 520-26 (1993); see generally Paetzold & Willborn, supra note 58; Robert A. Prentice & Brenda J. Winslett, Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation? 25 Am. Bus. L.J. 207 (1987); David Grant, Giving a Reference: Just Name, Rank, and Salary History?, Legal Times, Nov. 30, 1987, at 16; Deborah S. Kleiner, Is Silence Truly Golden?, HRMag., July 1993, at 117; Workers Refused Jobs

### *A. Defamation*

An employee who wishes to sue based on a negative job reference most likely will choose to bring a defamation claim.[64] The *Restatement (Second) of Torts* ("*Restatement*") identifies the elements of a cause of action for defamation:

> To create liability for defamation there must be:
>
> a) a false and defamatory statement concerning another;
>
> b) an unprivileged publication to a third party;
>
> c) fault amounting at least to negligence on the part of the publisher; and
>
> d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[65]

A reference that imputes the commission of a crime or impugns the employee's ability or fitness for work is considered defamatory.[66] Conse-

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Due to Bad References Winning Suits Against Ex-Employers, Lawyer Says, Daily Lab. Rep. (BNA) (Apr. 3, 1990), at A-3.

[63] See, e.g., Adler & Peirce, supra note 62, at 1412-14; Green & Reibstein, supra note 61, at 162-64; Saxton, supra note 62, at 64-65.

[64] Journalists and academic commentators have noted a rising number of workplace defamation claims. See generally Richard J. Larson, Defamation at the Workplace: Employers Beware, 5 Hofstra Lab. L.J. 45 (1988); Lewis et al., supra note 59, at 798; David C. Martin & Kathryn M. Bartol, Potential Libel and Slander Issues Involving Discharged Employees, 13 Employee Rel. L.J. 43 (1987); David Yulish & Brian Heshizer, Defamation in the Workplace, 40 Lab. L.J. 355 (1989); Ann M. Barry, Comment, Defamation in the Workplace: The Impact of Increasing Employer Liability, 72 Marq. L. Rev. 264 (1989); Laurence Shore, Comment, Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege, 38 Emory L.J. 871 (1989); Grant, supra note 62, at 16; Arlen W. Langvardt, Defamation in the Business Setting: Basics and Practical Perspectives, Bus. Horizons, Sept./Oct. 1990, at 66; Tamar Lewin, Boss Can Be Sued for Saying Too Much, N.Y. Times, Nov. 27, 1987, at B26; Robbin T. Sarrazin, Defamation in the Employment Setting, Tenn. B.J., May/June 1993, at 18; Stern, supra note 61, at B1; Stricharchuk, supra note 59, at 33. But see Paetzold & Willborn, supra note 58, at 123 (determining that the relative number of defamation claims probably has not increased, employees seldom recover, and the size of recoveries has declined, based on a survey of reported workplace defamation cases between 1965-1970 and 1985-1990).

According to some estimates, workplace defamation claims account for approximately one-third of all defamation suits. Lewis, supra note 59, at 798; Stricharchuk, supra note 59, at 33. Of course, not all such claims are successful, and appellate courts reverse many plaintiffs' verdicts. See O. Lee Reed & Jan W. Henkel, Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the standard Required to Overcome the Qualified Privilege to Defame, 26 Am. Bus. L.J. 305, 318.

[65] Restatement (Second) of Torts § 558 (1977) [hereinafter "Restatement"].

quently, a former employer who cautions a prospective employer about an employee's violent conduct may expose itself to a defamation claim because the conduct may be criminal, and certainly impugns the employee's fitness for employment.

Under certain circumstances, an employer will not be held liable. For example, an employer will escape liability if the employee consented to the reference, typically by signing a release.[67] In contrast, the defenses of truth and qualified privilege provide limited protection for employers. Truth, for example, is a jury question and is difficult to prove:[68]

> [T]he facts surrounding the basis of the defamatory statement—whether a dismissal or resignation—are rarely free of dispute. If the facts are debatable in the least, the employee may allege defamation, and "[e]ven if the employer is correct and the statements made in the job reference are true, juries tend to be more sympathetic toward the plaintiff ('the little guy') and not the employer."[69]

Similarly, the common law qualified or conditional privilege is not a reliable safe harbor. Generally, the privilege protects references given by former employers to prospective employers. Because the privilege is qualified or conditional, the reference provider loses the protection if he or she abuses the privilege. Employers, likely to be concerned about how a jury may view their conduct in hindsight,[70] may accordingly opt for the safer policy of silence.

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[66] See William J. Holloway & Michael J. Leech, Employment Termination: Rights And Remedies 245-46 (2d ed. 1993).

[67] Restatement, supra note 65, §§ 581A, 583, & 593. Although an employee may sign a release authorizing the employer to provide reference information, a release is not necessarily a guarantee that the employer will be protected from defamation liability if the information released is false and defamatory. For example, the court in Kellums v. Freight Sales Centers, Inc., 467 So.2d 816, 817 (Fla. Dist. Ct. App. 1985), found that the release was unenforceable because public policy precludes a party from absolving itself from tortious conduct.

[68] Markita D. Cooper, Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication, 72 Notre Dame L. Rev. 373, 436 (1997) (quoting Lewis v. Equitable Life Assurance Co., 389 N.W.2d 876, 889 (Minn. 1986) ("[T]he issue of truth raises thorny factual questions, to be resolved by the jury. A court will uphold the jury's determination unless it 'is manifestly and palpably contrary to the evidence.'")).

[69] Adler & Peirce, supra note 62, at 1403 (footnote omitted) (quoting Valerie L. Acoff, Note, References Available on Request . . . Not!—Employers Are Being Sued for Providing Employee Job References, 17 Am. J. Trial Advoc. 755, 760-61 (1994)).

[70] William L. Kandel, Current Developments in the Law, Workplace Dishonest and Security: Precautions About Prevention, 16 Empl. Rel. L.J. 79, 86-87 (1990) (observing that qualified privilege provides "no relief" for employers because the "privilege still leaves the door open for judges and juries to decide whether the statements were truthful and lacking 'malice'").

### *B. Interference with Prospective Contractual Relations*

In addition to defamation, aggrieved employees may allege interference with prospective contractual relations.[71] Generally, interference is not raised as an independent cause of action; rather, it is combined with defamation or other bases of liability.[72] To establish a prima facie case of interference with prospective contractual relations, a plaintiff must establish the following elements:

> (1) a relationship between the plaintiff and a third party with the probability of future economic benefit;
>
> (2) knowledge of this relationship by the defendant;
>
> (3) intentional and improper interference by the defendant to prevent the relationship from maturing; and
>
> (4) resulting damage.[73]

In the context of employment references, the claim typically arises when a prospective employer decides against hiring the plaintiff after receiving an unfavorable reference from a previous employer. Generally, the plaintiff's employment prospect must have been "clearly within the grasp

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[71] This tort is also known as interference with prospective economic advantage. See Anderson v. Vanden Dorpel, 667 N.E.2d 1296, 1299 (Ill. 1996).

[72] See, e.g., Delloma v. Consolidation Coal Co., 996 F.2d 168, 170 (7th Cir. 1993) (combining interference claim with other unspecified causes of action that were dismissed before appeal); Scholtes v. Signal Delivery Service, Inc., 548 F. Supp. 487, 490 (W.D. Ark. 1982) (combining interference claim with wrongful discharge claim); Marshall v. Brown, 190 Cal. Rptr. 392, 394 (Cal. Ct. App. 1983) (combining interference claim with causes of action for slander and misrepresentation); Stelzer v. Carmelite Sisters, 619 S.W.2d 766, 767 (Mo. Ct. App. 1981) (combining interference and slander with a business expectancy); Geyer v. Steinbronn, 506 A.2d 901, 904 (Pa. Super. Ct. 1986) (combining interference and defamation).

[73] Mark A. Rothstein et al., Employment Law § 9.17 (1994); see also, Restatement, supra note 65, § 766B. Courts have used variations of this formula in stating elements of the cause of action in cases based on unfavorable job references. See, e.g., *Anderson*, 667 N.E.2d at 1299 (describing the following elements: "(1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference"); *Stelzer*, 619 S.W.2d at 767 (describing the following elements: "(1) a contract or a valid business relationship or expectancy; (2) the defendant's knowledge of the contract or relationship; (3) defendant must intentionally interfere and induce or cause a breach of the contract or relationship; (4) the absence of justification; and (5) defendant's conduct must result in damages"); *Geyer*, 506 A.2d at 910 (stating that plaintiff bears burden of establishing "a) the existence of a proper prospective contractual relationship between the plaintiff and a third party, b) the defendant must act for the purpose of causing the specific type of harm to plaintiff, c) the act must be unprivileged, and d) actual harm must result").

of the employee absent the negative reference."[74] The typical plaintiff either received a job offer contingent upon a reference check or the reference check was the only step needed before the prospective employer extended an offer of employment.

Under the traditional approach to interference with prospective contractual relations, the defendant bears the burden of justifying his or her actions, or demonstrating that the conduct was privileged. Many jurisdictions have shifted the burden of proof to the plaintiff, thereby requiring the plaintiff to show as a part of his or her prima facie case that the defendant's interference was unjustified.[75] Courts' interpretations of what constitutes improper motive vary. For some courts, hostile motive or ill will may be relevant to proving improper, intentional interference, but malevolent motive is not a prerequisite to liability.[76] In other courts, interference is not privileged if the reference was given in bad faith[77] or if the statements made were not relevant to the subject or purpose of the reference inquiry.[78] In either case, if there is no evidence that the former employer acted with improper motive, even if the reference contained false information, the plaintiff cannot recover for interference with prospective economic advantage.[79] Interference must be improper as well as intentional.

### *C. Common Law Qualified Immunity*

Generally, employers who provide job references enjoy a qualified or conditional privilege that insulates them from liability for defamation.[80]

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[74] Adler & Peirce, supra note 62, at 1413; see also *Anderson*, 667 N.E.2d at 1300 (finding that plaintiff's progression past initial series of interviews did not by itself constitute reasonable expectancy of employment).

[75] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 130, at 1011 (5th ed. 1984).

[76] Rothstein et al., supra note 73, at 295-96 ("While actual malice, in the sense of ill will, spite, or hostility, generally need not be proven, as a practical matter its presence often affects the justification calculus."); see also *Scholtes*, 548 F. Supp. at 497 ("[M]alice which would remove the protection of privilege is not limited to hate, vindictiveness or animosity but may be found in reckless disregard of the right of another or such conscious indifference to results as could be regarded as willfully wrong.").

[77] See, e.g., *Stelzer*, 619 S.W.2d at 768.

[78] *Scholtes*, 548 F. Supp. at 497.

[79] Turner v. Halliburton Co., 722 P.2d 1106, 1117 (Kan. 1986).

[80] Some argue that a similar qualified privilege applies to causes of action for interference with prospective advantage. For the purposes of this discussion, the primary focus will be defamation liability. Defamation claims pose the greatest potential litigation threat arising out of a negative employment reference. See Saxton, supra note 62, at 64 (observing that defamation is "[t]he most important common law doctrine affecting employer reference practices"). See also discussion supra

Section 595 of the *Restatement* describes circumstances under which the privilege may arise. It provides, in pertinent part:

> Protection of Interest of Recipient or a Third Person
>
> 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 a 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 . . . .[81]

Although § 595 does not specifically address employment, Comment i discusses the application of the privilege in the employment context. Comment i provides:

> *Character of servant.* Under many circumstances, a former employer of a servant is conditionally privileged to make a defamatory communication about the character or conduct of the servant to a present or prospective employer. The defamatory imputations, however, must be made for the purpose of enabling that person to protect his own interests, and they must be reasonably calculated to do so. Accordingly, only information that is likely to affect the honesty and efficiency of the servant's work comes within the privilege . . . . Imputations that have no connection with the work that the servant is to perform, or with the position that

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note 64 and accompanying text, which cite reports that reference cases account for nearly one-third of all libel cases and that a plaintiff employee has a 77 percent chance of prevailing in a defamation suit against her employer.

[81] Restatement, supra note 65, § 595.

> he will occupy in the third person's employment, are outside the scope of the privilege.[82]

Accordingly, the privilege protects a defamatory job reference when the reference contains information about a prospective employee's work performance that is relevant to the prospective employer's hiring decision.[83] Most jurisdictions follow this approach.[84] In jurisdictions that conform with the *Restatement*, an employer who provides a defamatory reference is protected by common law qualified immunity as long as the employer does not abuse the privilege. An employer will lose the qualified privilege if the plaintiff proves the referring employer acted with malice[85] or communicated the defamatory reference information to persons other than the prospective employer.[86] The existence of the qualified privilege is

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[82] Id., § 595 cmt. i.

[83] See, e.g., Gore v. Health-Tex, Inc., 567 So.2d 1307, 1308 (Ala. 1990); Melcher v. Beeler, 110 P. 181, 184 (Colo. 1910); Kellums v. Freight Sales Ctrs., Inc., 467 So.2d 816, 817 (Fla. Dist. Ct. App. 1985); Kenney v. Gilmore, 393 S.E.2d 472, 473 (Ga. Ct. App. 1990); Russell v. American Guild of Variety Artists, 497 P.2d 40, 46 (Haw. 1972); Quinn v. Jewel Food Stores, Inc., 658 N.E.2d 1225, 1234 (Ill. Ct. App. 1995); Chambers v. American Trans Air, Inc., 577 N.E.2d 612, 615 (Ind. Ct. App. 1991); Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98, 103-04 (Iowa 1985); Lester v. Powers, 596 A.2d 65, 70 (Me. 1991); Bagwell v. Peninsula Reg'l Med. Ctr., 665 A.2d 297, 317 (Md. Ct. Spec. App. 1995), cert. denied, 669 A.2d 1360 (Md. 1996); Gonyea v. Motor Parts Fed. Credit Union, 480 N.W.2d 297, 300 (Mich. Ct. App. 1991); Baker v. Bhajan, 871 P.2d 374, 378 (N.M. 1994); Rainey v. Shaffer, 456 N.E.2d 1328, 1332 (Ohio Ct. App. 1983); Walsh v. Consolidated Freightways, Inc., 563 P.2d 1205, 1210 (Or. 1977); Swanson v. Speidel Corp., 293 A.2d 307, 309-10 (R.I. 1972); Hett v. Ploetz, 121 N.W.2d 270, 272-73 (Wis. 1963).

[84] Adler & Peirce, supra note 62, at 1408-09.

[85] Depending on state law, malice may be based on the employer's motivation for providing the false reference information or the employer's attitude toward the truth or falsity of the information contained in the reference. Courts focusing on motivation typically define malice as ill will, spite or improper motive. In states that base malice on the referring employer's attitude toward truth or falsity of the content of the reference, the courts require the plaintiff to prove that the employer knew the reference was false or acted with reckless disregard for its truth or falsity. Alternatively, the standards of some states consider both the referring employer's motivation and attitude toward the truth or falsity of the information in determining whether or not the employer abused the privilege. See generally Deborah Daniloff, Note, Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace, 40 Hastings L.J. 687, 708-711 (1988) (describing qualified privilege standards); Pamela G. Posey, Note, Employer Defamation: The Role of Qualified Privilege, 30 Wm. & Mary L. Rev. 469, 487-491 (1989); Donald P. Duffala, Annotation, Defamation: Loss of Employer's Qualified Privilege to Publish Employee's Work Record or Qualification, 24 A.L.R.4th 144 (1983).

[86] See Restatement, supra note 65, § 604.

a question of law, unless there is a factual dispute.[87] Whether the employer abused the privilege is a question of fact.[88]

Today's employers are concerned not only about the limited protection of qualified immunity, defamation liability, and interference with potential contractual relations, but also with other potential claims arising out of job references, negative or otherwise.[89] Former employees may raise claims under other tort or statutory theories.[90] Even where the plaintiff only claims defamation, the employer's qualified privilege may provide little practical protection. Issues of abuse are jury questions, and the standards regarding abuse of qualified immunity are complex and unclear. However, the difficulty of identifying a firm standard of qualified immunity has been identified as a key factor in the growing trend toward "no comment" and "name, rank and serial number" reference policies.[91]

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[87] See, e.g., Sigal Const. Corp. v. Stanbury, 586 A.2d 1204, 1213 n.17 (D.C. 1991); Cash v. Empire Gas Corp., 547 S.W.2d 830, 833 (Mo. Ct. App. 1976); *Baker*, 871 P.2d at 379; see also Restatement, supra note 65, § 619; Keeton, supra note 75, § 115, at 835.

[88] See, e.g., Jones v. Central Peninsula Gen. Hosp., 779 P.2d 783, 790 (Alaska 1989); Dominguez v. Babcock, 727 P.2d 362, 366 (Colo. 1986). See also Restatement, supra note 65, § 619; Keeton supra note 75, § 115, at 835.

[89] In addition to the limitations on the circumstances in which qualified immunity can be invoked, in jurisdictions that recognize the doctrine of compelled self-publication defamation, an employer who does not give references may still face defamation liability for communicating a defamatory explanation for dismissal directly to the employee. The self-publication doctrine does not require direct communication between the defendant employer and the prospective employer. Liability may attach even if the statement is communicated to the employee and no one else. See, e.g., McKinney v. County of Santa Clara, 168 Cal. Rptr. 89, 94-95 (Cal. Ct. App. 1980); Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 889-90 (Minn. 1986). For detailed analysis of compelled self-publication defamation, see generally Cooper, supra note 68; Louis B. Eble, Self-Publication Defamation: Employee Right or Employee Burden?, 47 Baylor L. Rev. 745 (1995); Arlen W. Langvardt, Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication, 26 Duq. L. Rev. 227 (1988); Deanna J. Mouser, Self-Publication Defamation and the Employment Relationship, 13 Indus. Rel. L.J. 241 (1991/1992); Howard J. Siegel, Self-Publication: Defamation Within the Employment Context, 26 St. Mary's L.J. 1 (1994).

[90] For example, third parties may make claims based on references or inadequate background checks. In addition, the United States Supreme Court recently recognized that a negative reference could be the basis for a race discrimination claim under Title VII. See Robinson v. Shell Oil Co., 117 S. Ct. 843, 848-49 (1997).

[91] See, e.g., Saxton, supra note 62, at 74, 77 (arguing that inconsistencies in qualified privilege standards create uncertainty regarding the legal standards governing potential exposure to defamation claims, thereby encouraging "no comment" reference policies); see also Reed & Henkel, supra note 64, at 318-20 (arguing that malice standards are vague and confusing); Daniloff, supra note 85, at 708-11 (critiquing qualified privilege standards as vague, confusing and unevenly applied); Posey, supra note 85, at 483-91 (referring to the qualified privilege as "the confused privilege" and analyzing the myriad standards applicable to qualified privilege).

## III. STATE LEGISLATURES TAKE ACTION: REFERENCE SHIELD LEGISLATION

As discussed above, many employers have adopted "no comment" or "name, rank and serial number" reference policies to avoid potential tort liability. In an effort to break this silent stalemate, and to increase workplace safety and efficiency, legislators have intervened with reference shield statutes.[92] Before the 1990s, employers seeking to avoid liability for their job reference practices looked to the common law qualified and conditional privileges that apply to defamation claims.[93] However, by the mid-to-late 1990s, a majority of states had enacted some form of reference shield statute.[94] The following section examines the emerging reference shield legislation trend.

### *A. Impetus for Shield Laws and Legislative Intent*

Reference shield statutes are intended to promote the increased flow of information about prospective employees between former and potential employers.[95] These initiatives are a direct response to efforts by human resource organizations to raise awareness about workplace violence and the need to screen out violent employees.[96] Well publicized, high-profile incidents of workplace violence have also spurred legislators to action.[97]

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92 See, e.g., Jim McKay, Job Reference Roulette, Pittsburgh Post-Gazette, Aug. 6, 1995, at C1 (observing that a national lobbying effort seeks legislation to provide employers with "greater flexibility" in obtaining information concerning prospective employees); Francis A. McMorris, Ex-Bosses Face Less Peril Giving Honest Job References, Wall St. J., July 8, 1996, at B1 (stating that shield laws were "intended to make the workplace safer and more efficient"); States Adopt 'Good Faith' Employment Reference Laws, Legal Intelligencer, July 3, 1996, at 4, available in LEXIS, NEWS Library, LGLINT File (quoting Sharon Horrigan, Society for Human Resource Management ("SHRM") legislative affairs manager, "[t]he flurry in legislative activity over the last two years was spurred by employers' fears of being sued for providing truthful job references").

93 See discussion supra Part II, Section A.

94 See supra notes 15-16 and accompanying text, and discussion infra Part III, Section B.

95 For example, the declaration supporting the Illinois Employment Record Disclosure Act reads: "The Legislature finds that it is in the public interest to protect from civil actions an employer that provides truthful, performance-related information about an employee or former employee to an employment reference inquiry." 745 Ill. Comp. Stat. Ann. 46/5 (West Supp. 1997). See also Robert S. Adler & Ellen R. Peirce, Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381, 1420 (1996); David E. Rovella, Laws May Ease the Risky Business of Job References, Nat'l L.J., Oct. 23, 1995, at B1.

96 For example, lobbying by SHRM has been a catalyst in the trend toward reference shield legislation. In fact, SHRM proudly claims credit for the proliferation of shield laws. See Bill Leonard, SHRM Leads Fight for State Reference-Checking Laws, HR News (SHRM Press Release, Oct. 1995). Workplace violence is a key concern for SHRM as it pushes for shield legislation. As Sharon Horrigan, legislative affairs manager for SHRM observed in 1996, "Last year's surge of concern about the increasing incidence of violence in the workplace told human resource departments that we need to screen employees better." Diane Stafford, Taking Fear out of References,

Advocates of reference shield laws contend that the laws benefit not only the public generally, but individual employers and employees as well. Reference shield laws ensure that good employees receive the benefit of good references[98] and also increase the chances that employers receive useful information when screening prospective employees.[99] More importantly, reference shield laws facilitate the exchange of information that may alert prospective employers to job applicants who are incompetent, potentially violent, or pose other potential problems in the workplace.[100]

### *B. Shield Law Provisions*

The basic thrust of reference shield statutes is to protect employers by giving them qualified immunity when they provide job references.[101] Most

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Laws Protect Employers who Give out Information About Former Employees, Kansas City Star, Feb. 8, 1996, at B1.

97 See supra note 19 and accompanying text.

98 See Bill Day, Check Protection, Des Moines Bus. Rec. Aug. 5, 1996, at 4 (quoting an insurance executive lobbying for the legislation: "[W]e're trying to help good employees. You have to be neutral on everybody, and that's really not fair."); Joanna Sullivan, Bosses Ask for Leeway, Baltimore Bus. J., Feb. 23, 1996, at 1 (discussing views of shield legislation advocates who believe employees are harmed because good and bad employees receive similar treatment in references); Tell the Truth: Encourage Accurate Job References, Montgomery Advertiser (Ala.), Mar. 22, 1996, at 10A (editorial urging approval of shield bill and deploring "name, rank, and serial number" references as unfair to good employees who would benefit from references).

99 See Armond Budish, Employers Giving References Protected From Suits, Cleveland Plain Dealer, Apr. 28, 1996, at 3F (stating that the shield law is "designed to promote accurate reporting by an employee's previous employers so prospective employers can make well-informed decisions"); Randolph Heaster, Labor Criticizes Bill Governing Ex-Employees, Kansas City Star, Apr. 7, 1995, at B1 (discussing criticisms of shield bill and proponents' response that bill will meet employers' need for certain information about job applicants); Judi Russell, Law Backs Employer Candor in Job References, New Orleans CityBusiness, July 22, 1996, at 6 (asserting that the shield law "takes some of the guesswork out of hiring").

100 See Terry Boyd, Mum's the Word on Ex-Employee Job References, Bus. First-Louisville, Oct. 23, 1995, at 1 (describing the role of job references in identifying employees who might potentially embezzle or defraud a new employer); Tannette Johnson-Elie, Bill Could Ease Fear of Giving References: State Legislation Gives Employers Immunity, Milwaukee J. Sentinel, June 2, 1996, at 1 (describing state legislation that would provide employers immunity for disclosing an employee's history of violence and other workplace problems to potential employers); Christi Parsons, Bosses Might Tell All About Ex-Workers: Bill Would Protect Them on References, Chi. Trib., May 15, 1996, at 1 (discussing the job-hopping strategies of violent and incompetent employees).

101 This Article focuses on legislation currently in effect. Additional states are considering or have considered enacting reference shield legislation. See supra note 17 and accompanying text. For a detailed survey of shield law provisions, see Alex B. Long, Note, Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation, 39 Wm. & Mary L. Rev. 177 (1997).

The overwhelming majority of statutes provide qualified immunity. The Kansas statute, in addition to providing qualified immunity for disclosures of general information about an employee, also provides absolute immunity for certain, specific information. The absolute immunity covers

statutes set forth a rebuttable presumption that an employer who provides a reference acts in good faith.[102] This presumption protects employers who act in good faith, even when they provide a negative reference containing false information. The employee or former employee may rebut the good faith presumption by establishing a lack of good faith.

The scope of qualified immunity varies by state. Under some statutes, an employer who knowingly provides false or misleading reference information will lose the immunity.[103] In some states, an employer may forfeit immunity by recklessly providing false reference information.[104] Under

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typical neutral reference disclosures: 1) date of employment, 2) pay level, 3) job description and duties, and 4) wage history. Kan. Stat. Ann. § 44-119a(b) (Supp. 1996). Absolute immunity also attaches to specified information accessible to the employee, including: 1) written evaluations conducted before departure and available to the employee, and 2) whether the employee was voluntarily or involuntarily released from his or her position and the reasons for the separation. Kan. Stat. Ann. § 44-119a(c) (Supp. 1996).

[102] See, e.g., Alaska Stat. § 09.65.160 (Michie 1996); Ariz. Rev. Stat. Ann. § 23-1361.C (West Supp. 1997); Colo. Rev. Stat. § 8-2-114(2)(a) (1997); Del. Code Ann. tit. 19, § 709(a) (Supp. 1997); Fla. Stat. Ann. § 768.095 (West 1997); Ga. Code Ann. § 34-1-4(b) (Supp. 1997); Idaho Code § 44-201(2) (1997); 745 Ill. Comp. Stat. Ann. 46/10 (West Supp. 1997); Me. Rev. Stat. Ann. tit. 26, § 598 (West Supp. 1997); Md. Code Ann., Cts. & Jud. Proc. § 5-423(b) (Supp. 1997); Mich. Comp. Laws Ann. § 423.452(2) (West Supp. 1997); Okla. Stat. Ann. tit. 40, § 61.A (West Supp. 1998); Or. Rev. Stat. § 30.178 (Michie Supp. I 1996); R.I. Gen. Laws § 28-6.4-1(c) (Supp. 1997); S.D. Codified Laws § 60-4-12 (Michie Supp. 1997); Tenn. Code Ann. § 50-1-105 (Supp. 1997); Wis. Stat. Ann. § 895.487(2) (West 1997); Wyo. Stat. Ann. § 27-1-113(a) (Michie 1997). Some statutes formulate the good faith presumption slightly differently. See, e.g., Ind. Code Ann. § 22-5-3-1(b) (Michie 1997) ("An employer that discloses information about a current or former employee is immune from civil liability . . . unless it is proven . . . that the information disclosed was known to be false at the time the disclosure was made."); Kan. Stat. Ann. § 44-119a (a) (Supp. 1996) ("[A]n employer . . . who discloses information about a current or former employee to a prospective employer of the employee shall be qualifiedly immune from civil liability."); La. Rev. Stat. Ann. § 23:291.A (West Supp. 1997) ("Any employer that . . . provides accurate information about . . . [an] employee's job performance . . . shall be immune from civil liability . . . provided such employer is not acting in bad faith."); Utah Code Ann. § 34-42-1(2) (1997) ("There is a rebuttable presumption . . . [of] good faith when the employer provides information . . . at the request of the prospective employer . . . .").

[103] See Alaska Stat. § 09.65.160 (Michie 1996); Ariz. Rev. Stat. Ann. § 23-1361.D (West Supp. 1997); Colo. Rev. Stat. § 8-2-114(2)(a) (1997); Del. Code Ann. tit. 19, § 709(a) (Supp. 1997); Fla. Stat. Ann. § 768.095 (West 1997); Idaho Code § 44-201(2) (1997); 745 Ill. Comp. Stat. Ann. 46/10 (West. Supp. 1997); Ind. Code Ann. § 22-5-3-1(b) (Michie 1997); La. Rev. Stat. Ann. § 23:291.A (West. Supp. 1997); Me. Rev. Stat. Ann. tit. 26, § 598 (West Supp. 1997); Md. Code Ann., Cts. & Jud. Proc. § 5-423(b)(2) (Supp. 1997); Mich. Comp. Laws Ann. § 423.452(2)(a) (West Supp. 1997); N.M. Stat. Ann. § 50-12-1 (Michie Supp. 1997); Ohio Rev. Code Ann. § 4113.71(B)(1) (Anderson Supp. 1997); Okla. Stat. Ann. tit. 40, § 61.A (West Supp. 1998); Or. Rev. Stat. § 30.178 (Michie. Supp. I 1996); R.I. Gen. Laws § 28-6.4-1(c) (Supp. 1997); S.C. Code Ann. § 41-1-65(D) (Law. Co-op. Supp. 1997); S.D. Codified Laws § 60-4-12 (Michie Supp. 1997); Tenn. Code Ann. § 50-1-105 (Supp. 1997); Utah Code Ann. § 34-42-1(3)-(4) (1997); Wis. Stat. Ann. § 895.487(2) (West 1997); Wyo. Stat. Ann. § 27-1-113(b) (Michie 1997).

[104] See Alaska Stat. § 09.65.160(1) (Michie 1996); Ariz. Rev. Stat. Ann. § 23-1361.D (West Supp. 1997); Idaho Code § 44-201(2) (1997); Md. Code Ann., Cts. & Jud. Proc. § 5-423(b)(2) (Supp. 1997); Mich. Comp. Laws Ann. § 423.452(2)(b) (West Supp. 1997); Okla. Stat. Ann. tit. 40,

some statutes, an employer may also lose the immunity if it acts with malicious purpose in providing false reference information.[105] Ten states strip the job reference provider's immunity if the reference violates civil rights laws.[106] Disclosure of confidential information rebuts the good faith presumption under some statutes as well.[107] Finally, employees in seven states face a stiff burden of proof when rebutting the good faith presumption; they must prove the employer's bad faith by clear and convincing evidence.[108]

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§ 61.A (West Supp. 1998); S.C. Code Ann. § 41-1-65(D) (Law. Co-op. Supp. 1997); S.D. Codified Laws § 60-4-12(1) (Michie Supp. 1997); Tenn. Code Ann. § 50-1-105(4) (Supp. 1997); Utah Code Ann. § 34-42-1(3)-(4) (1997).

[105] See Alaska Stat. § 09.65.160 (1) (Michie 1996); Colo. Rev. Stat. § 8-2-114(2)(a) (1997); Del. Code Ann. tit. 19, § 709(a) (Supp. 1997); Fla. Stat. Ann. § 768.095 (West 1997); N.M. Stat. Ann. § 50-12-1 (Michie Supp. 1997); Ohio Rev. Code Ann. § 4113.71(B)(1) (Anderson Supp. 1997); Or. Rev. Stat. § 30.178 (Michie Supp. I 1996); R.I. Gen. Laws § 28-6.4-1(c)(3) (Supp. 1997); S.D. Codified Laws § 60-4-12(1) (Michie Supp. 1997); Tenn. Code Ann. § 50-1-105(3) (Supp. 1997); Wis. Stat. Ann. § 895.487(2) (West 1997); Wyo. Stat. Ann. § 27-1-113(b) (Michie 1997). The statutes that use "malicious purpose" or similar language do not define the term. Presumably, maliciousness under the shield statutes echoes common law standards and requires some form of bad motive, evil intent, or intent to harm the person who is the subject of the reference. See, e.g., Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980) ("[T]o demonstrate malice in a defamation action the plaintiff must prove that the defendant 'made the statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff.'" (quoting McKenzie v. William J. Burns Int'l Detective Agency, Inc., 183 N.W. 516, 517 (Minn. 1921))).

[106] Alaska Stat. § 09.65.160(2) (Michie 1996) ("presumption of good faith is rebutted upon a showing that the employer . . . disclosed information in violation of a civil right" protected under state or federal law); Colo. Rev. Stat. § 8-2-114(2)(a) (1997) ("presumption of good faith may be rebutted upon a showing . . . that the information disclosed was . . . violative of a civil right"); Fla. Stat. Ann. § 768.095 (West 1997) (rescinding qualified immunity of employers who violate any right protected by the state's civil rights law); 745 Ill. Comp. Stat. Ann. 46/10 (West Supp. 1997) ("presumption of good faith . . . may be rebutted . . . [if] the information [was] disclosed . . . in violation of a civil right"); N.M. Stat. Ann. § 50-12-1 (Michie Supp. 1997) ("immunity shall not apply when the reference information supplied . . . violated any civil rights"); Ohio Rev. Code Ann. § 4113.71(B)(2) (Anderson Supp. 1997) (rescinding an employer's immunity if "the disclosure . . . constitutes an unlawful discriminatory practice" under state law); Or. Rev. Stat. § 30.178 (Michie Supp. I 1996) ("presumption of good faith is rebutted upon a showing that the information disclosed . . . violated any civil right" under state law); R.I. Gen. Laws § 28-6.4-1(c)(4) (Supp. 1997) ("presumption of good faith is rebuttable upon a showing . . . that the information disclosed was . . . [v]iolative of the . . . employee's civil rights"); Tenn. Code Ann. § 50-1-105(5) (Supp. 1997) ("presumption of good faith is rebuttable upon a showing . . . that the information disclosed was . . . violative of the . . . employee's civil rights"); Wis. Stat. Ann. § 895.487(2) (West 1997) (stating that the presumption of good faith is rebuttable upon a showing that the employer made the reference in violation of the state employment discrimination statute).

[107] Del. Code Ann. tit. 19, § 709(a) (Supp. 1997); Ga. Code Ann. § 34-1-4(b) (Supp. 1997); S.D. Codified Laws § 60-4-12(2) (Michie Supp. 1997) (defining confidentiality according to state or federal law).

[108] Fla. Stat. Ann. § 768.095 (West 1997); Idaho Code § 44-201(2) (1997); Me. Rev. Stat. Ann. tit. 26, § 598 (West Supp. 1997); Md. Code Ann., Cts. & Jud. Proc. § 5-423(b) (Supp. 1997); S.D.

The reference shield statutes in Arizona and Ohio are unique. They include "loser pays" or "fee-shifting" provisions,[109] which entitle prevailing parties to recover the costs of litigating their claims.[110] Proponents argue that fee-shifting provisions protect employers from frivolous lawsuits.[111] For example, one commentator argues that a proposed fee-shifting framework would impose a duty of mandatory disclosure in circumstances where "employers may be most tempted to retreat to a 'no comment' policy—i.e., when an honest reference will disclose that the applicant involved poses a risk of injury to others."[112]

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Codified Laws § 60-4-12 (Michie Supp. 1997); Utah Code Ann. § 34-42-1(3) (1997); Wis. Stat. Ann. § 895.487(2) (West 1997).

[109] The Arizona statute provides that "[a] court *shall* award court costs, attorney fees and other related expenses to *any party that prevails* in any civil proceeding in which a violation of [the reference shield law] is alleged." Ariz. Rev. Stat. Ann. § 23-1361.I (West Supp. 1997) (emphasis added). Compare the Ohio law, which provides that the "loser pays" provision applies only for the benefit of prevailing employers. Ohio Rev. Code Ann. § 4113.71(C) (Anderson Supp. 1996). The Ohio statute reads:

> If the court finds that the verdict of the jury was in favor of the defendant, the court shall determine whether the lawsuit . . . constituted frivolous conduct . . . . If the court finds by a preponderance of the evidence that the lawsuit constituted frivolous conduct, it may order the plaintiff to pay reasonable attorney's fees and court costs of the defendant.

Id.

[110] Such provisions contrast with the typical "American rule" under which parties pay their own costs of litigation. See Adler & Peirce, supra note 95, at 1461-62; Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform, 13 Yale L. & Pol'y Rev. 45, 76, 99 (1995).

[111] See, e.g., Catherine Candisky, "Loser Pay" Amendment Won't Stay in House Bill, Columbus Dispatch (Ohio), Mar. 12, 1995, at 4B (discussing legislative debate concerning "loser pays" provision in Ohio shield law and reporting that the sponsor of the legislation, State Rep. Bill M. Harris, "said his intent was to protect business owners like himself from frivolous employee lawsuits"); see also Saxton, supra note 110, at 99 & n.162 (arguing that fee shifting in litigation based on unfavorable employment references will "discourage plaintiffs from filing marginal claims").

[112] Saxton, supra note 110, at 106-107. Saxton proposes a fee-shifting rule that would permit a prevailing party to recover reasonable attorneys' fees and expenses incurred in litigating a claim based on a job reference. According to Saxton, fee-shifting will encourage employers to provide references "because plaintiffs bringing unwarranted claims against employers *may* be required to reimburse the employer for the fees incurred" to defend the claim. Id. at 102-103 (emphasis added). Although Saxton contends that fee-shifting will provide incentives for employers to provide references, this author remains unconvinced that "loser pays" provisions will have the effect that Saxton predicts. Because most plaintiffs will be unlikely to have the financial resources to pay the attorneys' fees and costs incurred by defendant employers, it seems unlikely that employers will take much comfort in the slim possibility that the they will recover costs of litigation. Moreover, many employers will remain concerned about the non-economic costs of litigation: morale, time, productivity and disruption. These costs cannot be reimbursed through a fee-shifting arrangement. Regardless of the merits of the fee-shifting concept, Saxton recognizes a critical policy objective: to encourage employers to discontinue their use of "no comment" reference policies when asked for references regarding violent employees.

As a general proposition, the twenty-nine existing reference shield statutes should ease employers' concerns about job reference-related litigation risks.[113] The statutes do not, however, do enough to encourage employers to disclose cases of violent workplace conduct. In the absence of a legally imposed, mandatory duty to disclose violent workplace behavior, employers may refrain from responding to a reference inquiry, even when a simple, honest disclosure could reduce the potential for devastating physical harm in the next workplace. Without an obligation to disclose violent behavior, even the best statutes do not go far enough.

### *C. Limited Impact of Existing Shield Laws*

The long-term impact of reference shield laws remains unclear. Anecdotal evidence suggests that, to date, such legislative initiatives have fallen short of encouraging employers to abandon "name, rank and serial number" reference policies. There appears to be little change in employers' level of comfort with providing references, even after states have adopted reference shield statutes.[114]

In 1991, Florida became one of the first states to enact shield legislation.[115] Notwithstanding several years of legislative protection, reports indicate that many Florida employers remain reluctant to provide references.[116] These employers are not convinced that the shield law will pro-

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[113] For a table listing reference shield laws in effect as of this writing, see Appendix A.

[114] Bill Leonard, Reference-Checking Laws: Now What?, HRMag., Dec. 1995, at 57 (noting that although Florida passed its reference shield law in 1992, most employers still only verify dates of employment and salary ranges of former employers); see also Ellen Forman, Truth or Consequences: Divulging a Former Employee's Unacceptable Work Performance Can Open a Pandora's Box for any Company, Sun-Sentinel (Ft. Lauderdale), Jan. 6, 1997, at 3 (noting that even after the enactment of the Florida shield law, "many companies are still sticking to confirmation of employment, position, dates of employment and salary").

[115] Fla. Stat. Ann. § 768.095 (West 1997).

[116] As one commentator observed:

> [T]he standard . . . means companies should be able to breathe easier, but they have been slow to change. Associated Industries of Florida, a lobbying group representing 6,000 companies that pushed for the [Florida] bill's passage, still has a better-safe-than-sorry attitude. "To protect ourselves [against litigation] . . . we just don't say anything."

Lauren Picker, Job References: To Give or Not to Give, Working Woman, Feb. 1992, at 21 (quoting Jon Shebel, president of Associated Industries of Florida); accord, Leonard supra note 114, at 57 ("Florida passed a fairly comprehensive reference-checking law in [1991]. Yet the policy of many employers in Florida is still to verify only dates of employment and salary ranges of former employees.").

tect them from lawsuits by disgruntled employees.[117] Employers are concerned with minimizing the threat of litigation and its associated costs.[118] Thus, many employers adopt cautious personnel policies to avoid litigation. In the words of one Florida management lobbyist: "It seems that employers have been reluctant to test the law . . . and are reluctant to rewrite corporate policies, until they see that the law really works.[119] Such reluctance is not limited to employers in Florida.[120] Although the legislation strives to encourage employers to change their reference policies, the practical reality may be that "educating employers and getting them to change their ways is something akin to rerouting the Mississippi River."[121]

In contrast, other observers believe shield laws are slowly effecting employer behavior. To support this contention, they point to employment lawyers who advise employers to disclose an employee's past violent con-

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[117] See Jeff Richgels, Giving References Has Become a Sticky Wicket, Capital Times (Madison, Wis.), Feb. 12, 1997, at 1C (noting that "while the [Wisconsin reference shield]law may prevent someone from winning a suit it doesn't prevent them from bringing one . . . [w]hich is a big incentive to stick to name, rank and serial number."); see also Forman, supra note 114, at 3 ("[A]ttorneys say the Florida statute, and others like it, probably haven't achieved the objective of creating a legal environment where full references can be given honestly . . . 'It's pretty good legal protection to win the lawsuit, but it's not protection from being sued.'" (quoting Allan Weitzman, a labor attorney in Boca Raton, Fla.)).

[118] As Reed and Henkel observed: "[T]he fear of litigation which leads employers to turn off the spigot of employee-related information is a reasonable response from the employers' viewpoint. Litigation itself is an inefficient, costly, time-consuming process. Even when defamation defendants win, they lose, given the resource commitments required by even successful litigation." O. Lee Reed & Jan W. Henkel, Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame, 26 Am. Bus. L.J. 305, 318 (1988) (citations omitted); see also Markita D. Cooper, Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication, 72 Notre Dame L. Rev. 373, 439 (1997).

[119] Leonard, supra note 114, at 57. (quoting Ann Carson, legislative director for the SHRM Florida state council).

[120] See, e.g., Doerner, Saunders, Daniel & Anderson, Providing References for Former Employees Just Got Safer, Okla. Empl. Law Letter, Oct. 1995, available in LEXIS, LEGNEW Library, NWLTRS File ("Unfortunately, when it is all said and done, neutral references may still be the safest way to go for Oklahoma employers."); Diana Kunde, Bill Aims to End Silence Over Job References, Dallas Morning News, Sept. 8, 1996, at 1H ("Even with a protective law, litigation-shy employers will be slow to change . . . ."); Steven Oberbeck, Employers Still Cautious About Giving References: Past is Taboo for Employers Despite Law, Salt Lake Trib., Oct. 6, 1996, at E1 (noting that even after enactment of state shield law, "some of Utah's major employers say the fear of winding up in litigation still puts a chill in efforts to give or gather information about former workers or prospective employees"); States Adopt 'Good Faith' Employment Reference Laws, Legal Intelligencer, July 3, 1996, at 4, available in LEXIS, NEWS Library, LGLINT File ("Even in states that have passed employer-immunity laws, fear continues to stop them from giving honest references.").

[121] Leonard, supra note 96.

duct when asked for a reference.[122] Perhaps, over time, increasing numbers of lawyers and their employer-clients will embrace this approach.[123] However, if employers can maintain policies of silence without legal ramifications, many employers will continue to refrain from disclosing.

Another problem with current legislative initiatives is that many employers may not be aware of their state reference shield law or the extent of protection provided by the law. For example, proprietors and managers of smaller businesses are less likely to have access to resources such as legal newsletters and human resource publications. Similarly, smaller businesses are less likely to have ongoing relationships with lawyers who can advise them about the laws and how reference policies could change as a result.[124] Assuming that some employers who currently are unaware of shield statutes would change their policies after learning about the statutes, the effectiveness of any significant new legislative initiatives depends on the dissemination of information about the laws in the popular press, as well as professional and trade journals.

As long as "name, rank and serial number" and "no comment" references remain the predominant strategy in the workplace, shield laws cannot create the environment of open and freely given references for which they were enacted. To the extent that employers continue to adhere to such reference policies when asked about violent employees, the legislation's failure is a resounding and disturbing one. Accordingly, legislatures should fill the gap with bolder legislative approaches that encourage employers to share information when prospective employers seek references for employees who have engaged in violent conduct toward other persons in the workplace.

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[122] For example, one news account noted that although shield laws do not require employers to disclose an employee's past violent behavior, some lawyers advise clients to do so. McMorris, supra note 92, at B1. In the same article, Garry Mathiason, a San Francisco management lawyer is quoted: "For the first time, we are saying—with great caution—if there is a safety-sensitive issue, you should make a disclosure." Id.

[123] The effectiveness of reference shield laws perhaps could be measured by a formal, empirical study of employer reference-giving behavior in states that have shield laws in effect. As of this writing, no such empirical studies have been conducted regarding reference-giving behavior in states that have adopted shield laws.

[124] As a news report regarding the newly enacted Louisiana shield law noted: "[A]s employers become more familiar with the law, communication will begin to flow again. But word has been slow to percolate through offices . . . . 'It's an educational process. The employer community is just not really familiar with the statute.'" Russell, supra note 99 (quoting Warren Privette, a member of SHRM in Louisiana). Similarly, news of the enactment of Oregon's reference shield law appeared in an article summarizing "'lesser known' amendments" to the state's employment laws. See Perkins Coie, LLP, Summary of Recent "Lesser Known" Amendments to Oregon Laws Affecting Employers, Or. Empl. L. Letter, Oct. 1995, available in LEXIS, LEGNEW Library, NWLTRS File.

## IV. COMBINING THE SHIELD WITH A LIMITED AFFIRMATIVE DUTY: MAKING THE CASE FOR DISCLOSURE-SHIELD STATUTES

### *A. The Case for Legislative Change*

If employers consistently apply "no comment" and "name, rank, and serial number" reference policies as a matter of course, they may avoid defamation claims. While such bland references yield nothing defamatory, they also yield little, if any, substantive information to guide prospective employers. As a result, prospective employers may make poor decisions, hiring individuals who are incompetent or have difficulty getting along with coworkers. The consequences of an inappropriate hire can include economic losses, lost productivity, decreased efficiency, and lost morale. The significance of such losses should not be minimized, and many commentators have expressed concern that the decline in references has negatively affected the workplace.[125]

In some cases, however, an employer who receives no information faces consequences beyond those of economics, productivity, and efficiency. These situations involve employees who have engaged in violent conduct in the workplace, yet whose behavior remains undisclosed under a "name, rank, and serial number" or "no comment" policy. Because allegations of violent behavior are more likely to give rise to defamation suits,[126]

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[125] See generally James W. Fenton & Kay W. Lawrimore, Employment Reference Checking, Firm Size, and Defamation Liability, J. of Small Bus. Mgmt., Oct. 1992, at 88; William L. Kandel, Current Developments in the Law, Workplace Dishonest and Security: Precautions About Prevention, 16 Empl. Rel. L.J. 79, 83-85 (1990); Valerie L. Acoff, Note, References Available on Request . . . Not!—Employers Are Being Sued for Providing Employee Job References, 17 Am. J. Trial Advoc. 755, 770 (1994); Deborah Daniloff, Note, Employer Defamation: Reasons and Remedies for Declining References and Chilled Communications in the Workplace, 40 Hastings L.J. 687, 708-711 (1988); Deborah S. Kleiner, Is Silence Truly Golden?, HRMag., July 1993, at 117; Arlen W. Langvardt, Defamation in the Business Setting: Basics and Practical Perspectives, Bus. Horizons, Sept. 1990, at 66; Martha Middleton, Employers Face Upsurge in Suits over Defamation, Nat'l L.J., May 4, 1987, at 1.

[126] Of course, truth and qualified privilege would provide defenses to such claims; these defenses, however, raise factual questions to be resolved by a jury. See supra Part II, Section A. Juries generally tend to be sympathetic toward the employee plaintiff. Markita D. Cooper, Between a Rock and a Hard Case: Time for a New Doctrine of Compelled Self-Publication, 72 Notre Dame L. Rev. 373, 437-38 (1997); Acoff, supra note 125, at 760-61. Thus, a plaintiff whose case turns on the resolution of the factual questions of truth or abuse of qualified privilege may have increased leverage for settlement or may be more confident in proceeding through trial. Employers may perceive that unsympathetic jurors will not agree with their assessment of the facts. Consequently, if there is no legal obligation to disclose information regarding incidents of violence, many employers are likely to take a conservative approach and remain silent.

these are "the circumstances in which employers may be most tempted to retreat to a 'no comment' policy."[127]

Consider the events leading to the lawsuit in *Jerner v. Allstate Insurance Co.*[128] In *Jerner*, Paul Calden engaged in repeated violent and bizarre behavior while working for Allstate in Tampa, Florida. Calden made death threats against coworkers,[129] typed a list of coworkers with the word "blood" written beside their names,[130] "fought bitterly" over a parking space,[131] and generally frightened coworkers and supervisors with bizarre and confrontational behavior.[132] Finally, when Calden brought a pistol to work in his briefcase,[133] Allstate fired him. Although Allstate had a policy against giving references, Calden received a recommendation letter stating that he had resigned voluntarily as part of an organizational restructuring.[134] The letter did not mention Calden's violent conduct.[135] Calden used

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[127] Bradley Saxton, Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform, 13 Yale L. & Pol'y Rev. 45, 106 (1995).

[128] See Amended Wrongful Death Complaint, at 17, Jerner v. Allstate Ins. Co. (Fla. Cir. Ct. 1995) (No. 93-09472).

[129] Vickie Chachere, Documents Detail Gunman's Bizarre Past, Tampa Trib., Aug. 8, 1995, at 1.

[130] Linda Gibson, Survivors Can Sue for Failure to Warn, Nat'l L.J., Aug. 21, 1995, at A8.

[131] Marty Rosen et al., "I'll Take a Few People With Me," St. Petersburg Times, Jan. 30, 1993, at 1B.

[132] For example, Calden refused to participate in a photograph of management trainees, explaining that his image would not appear in a photograph. He also told coworkers that he came from another planet. Chachere, supra note 129, at 1; Bill Duryea & Marty Rosen, Killer's Character Belied His Actions, St. Petersburg Times, Jan. 29, 1993, at 1B; Gibson, supra note 130, at A8.

[133] Chachere, supra note 129, at 1; Gibson, supra note 130, at A8.

[134] Apparently, Calden's supervisor, John Deufel, was alarmed by Calden's behavior and persuaded him to resign "with a phony story about corporate restructuring and an offer of extra severance pay if he quit immediately." Gibson, supra note 130, at A8. Why and how Calden received the letter remains a mystery. Although Deufel fabricated the restructuring story to induce Calden's resignation, Deufel denied suggesting that the story be incorporated in a letter of recommendation. Id.

[135] Amended Wrongful Death Complaint, supra note 128, Exhibit A. The letter, addressed "To Whom It May Concern" read as follows:

> RE: PAUL CALDEN
>
> Due to organization [sic] restructuring Paul Calden's position at Allstate Insurance Company has been eliminated.
>
> As a result, Paul Calden has voluntarily resigned to pursue new career opportunities.
>
> This action is in no way a reflection upon Paul's job performance.

Id. The letter was signed by Catherine S. Brune, Regional Vice President of Allstate's Florida Regional Operations Center. Brune later said she had never heard about any odd behavior by Calden. Chachere, supra note 129, at 1.

the recommendation to obtain a job with Fireman's Fund Insurance.[136] His confrontational behavior continued at Fireman's Fund and the company terminated him.[137] Eight months after his termination, Calden walked into the cafeteria where Fireman's Fund employees ate lunch and methodically shot five of his former supervisors with 10 blasts from a semiautomatic handgun.[138] The shooting killed three victims, partially blinded one, and paralyzed another.[139] According to a Tampa police officer, Calden did not shoot randomly: "All of the people were the management team who were involved in his firing."[140]

With a few additional hypothetical facts, Calden's case serves as an even more chilling example of the potential dangers arising from an employer's refusal to provide information about an employee's violent behavior to a prospective employer. Suppose, for example, that Allstate had adhered to its policy of refusing to give references. Allstate would have followed the practice of many employers: giving no reference or providing only "name, rank and serial number" information. Current law, including the emerging reference shield laws, would not require Allstate to provide any information about Calden's behavior to a prospective employer.[141]

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[136] Gibson, supra note 130, at A8.

[137] Anne Hull, Victims Sue Gunman's Former Boss, St. Petersburg Times, June 23, 1994 at 1B; Chachere, supra note 129, at 1.

[138] Paul de La Garza & Lisa Frederick, Man Kills Three in Tampa Cafe, St. Petersburg Times, Jan. 28, 1993, at 1A.

[139] Chachere, supra note 129, at 1.

[140] Duryea & Rosen, supra note 132, at 1B (quoting Tampa police Sgt. Harold Sells); see also de la Garza & Frederick, supra note 138, at 1A.

[141] Although the shield laws do not expressly require employers to provide references, some lawyers have expressed concern that the statutes may create a duty to disclose reference information upon request. See, e.g., Holland & Hart, New Idaho Law May Impact Employers' Ability to Refuse to Give References, Idaho Empl. L. Letter (May 1996), available in LEXIS, NEWS Library, NWLTRS File ("Potentially, the prospective employer who requested but was refused a reference could bring a lawsuit against the employer who followed a nondisclosure policy and failed to warn of the employee's criminal behavior."). Cf. Matkov, Salzman, Madoff & Gunn, Employers Can Now Say "Johnny Was a Bad Performer" Without Fear of Civil Liability, Ill. Empl. L. Letter (Aug. 1996) ("Nothing in the Act *requires* employers to provide employment references that are anything other than neutral."). The Ohio and Oklahoma statutes expressly state that no new cause of action is created. Ohio Rev. Code Ann. § 4113.71.D(1) (Anderson Supp. 1996) ("This section does not create a new cause of action or substantive legal right against an employer."); Okla. Stat. Ann. tit. 40, § 61.C (West Supp. 1998) ("Failure to comply with any provision of this section shall not give rise to any liability or causes of action which did not exist prior to the effective date of this section."). Such language demonstrates that the Ohio and Oklahoma legislatures did not intend the shield laws to create any affirmative duty that does not exist under the common law.

The shield statute trend is a recent development. As of this writing, there is only one reported case interpreting a state shield statute. See Steele v. McDonald's Corp., 686 N.E.2d 137 (Ind. Ct. App. 1997). Plaintiff Steele was a convicted felon who obtained a job at McDonald's restaurant

Allstate would not have had to disclose that Calden brought a gun to work, threatened coworkers, or routinely confronted other employees.

Suppose also that Calden's shooting rampage occurred within weeks after he began working for Fireman's Fund.[142] Management at Fireman's Fund would not have had time to observe Calden engage in similar violent behavior. For Fireman's Fund, as the hiring employer, the best source of information about Calden's workplace behavior was his former employer, Allstate. However, under existing law, a former employer is free to say nothing even when a truthful, factual account would provide information that could be used to avert or minimize the risk of future violent conduct by the employee. With access to this information, a prospective employer could either decline to hire a job applicant with a history of violent behavior or hire that person and monitor his or her behavior. Without the information, the hiring employer loses the opportunity to take appropriate preventive measures.

Existing law provides no incentive for employers to change their behavior regarding references. There are no disadvantages to maintaining a policy of silence when an employer is asked for a reference. Although some emerging precedents suggest that an employer may be held liable for misrepresentation for failure to disclose, these cases generally involve an employer who provides a positive reference without disclosing the employee's dangerous propensities. The alleged event triggering liability in this sort of case is not employer silence or neutrality, but rather, references that include "affirmative misrepresentations" about the employee.

For example, in *Randi W. v. Muroc Joint Unified School District*,[143] Robert Gadams allegedly sexually assaulted plaintiff Randi W., a 13-year

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and, after being promised strict confidentiality, disclosed his felon status to McDonald's. Id. at 139. Steele was later fired for fighting a coworker in self-defense. Id. at 140. Steele was convicted of misdemeanor battery based on false testimony by another McDonald's employee. Id. After being fired by McDonald's, Steele went to work at a Kroger grocery store. Id. He did not disclose his convicted felon status to Kroger. Id. When an unidentified McDonald's employee informed Kroger of Steele's felon status, Kroger fired Steele. Id. Steele sued McDonald's for *inter alia* disclosing his felon status in violation of the promised confidentiality. Id. Citing the Indiana reference shield statute contained in Indiana Code § 22-5-3-1(b), the court held that McDonald's was immune from liability for the truthful disclosure. Id. at 142. However, *Steele* does not appear to involve an actual reference given by McDonald's to Kroger as a prospective employer.

[142] Calden embarked upon his shooting spree two years and eight months after leaving Allstate. Because so much time passed between Allstate's reference and Calden's shooting rampage, Allstate could have argued that the reference was not the proximate cause of the plaintiffs' harm. In theory, such an approach might have been successful. As a practical matter, however Allstate may have decided that settlement was a better option given that the lawsuit would inevitably generate substantial and ongoing negative publicity.

[143] 929 P.2d 582 (Cal. 1997).

old student at the school where Gadams worked as vice-principal. Gadams' previous employer allegedly had provided glowing letters of recommendation without disclosing knowledge of prior charges and complaints of on-the-job sexual misconduct and impropriety.[144] Emphasizing that the defendants' letters of recommendation "contain[ed] unreserved and unconditional praise for former employee Gadams despite defendants' alleged knowledge of complaints or charges of his sexual misconduct with students,"[145] the California Supreme Court concluded that the recommendations "constituted misleading statements that could form the basis for tort liability for fraud or negligent misrepresentation."[146] The court also concluded that under the circumstances alleged, the representations constituted "misleading half-truths,"[147] and invoked the exception to the general rule against liability for nondisclosure or failure to act.[148] Explaining that the facts alleged demonstrated more than mere failure to disclose, the court held that recommending employers owe a duty to prospective employers and third persons, stating:

> Although policy considerations dictate that ordinarily a recommending employer should not be held accountable . . . for failing to disclose negative information regarding a former employee, nonetheless, liability may be imposed if, as alleged here, the recommendation letter amounts to an *affirmative misrepresentation* presenting a foreseeable and substantial risk of physical harm to a third person.[149]

The *Randi W.* opinion emphasizes the affirmative nature of the alleged misrepresentations in Gadams' recommendation. *Randi W.* requires an employer who provides a positive reference about an employee also to disclose, where the employer has actual or constructive knowledge, information about the employee's dangerous conduct. The case does not change the legal effect of the typical "name, rank and serial number" reference. The court acknowledged that the defendant school district would not have been liable had it provided only a "no comment" recommendation or merely verifying dates of employment and similar "name, rank, and

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[144] Id. at 585.

[145] Id. at 584.

[146] Id.

[147] Id. at 591.

[148] Id. at 592-93.

[149] Id.

serial number" information concerning Gadams.[150] The court also pointed out that neither case law nor the *Restatement* "suggest that a former employer has an affirmative duty of disclosure that would preclude such a 'no comment' letter."[151] Accordingly, the district would have had no legal obligation to disclose the misconduct to prospective employers even if the school board was aware that Gadams had molested students.

Aside from *Randi W.*, there have been few job reference cases that invoke the theory of misrepresentation, and even fewer in which the plaintiff's claim has succeeded. In a rare case, *Gutzan v. Altair Airlines, Inc.*,[152] the plaintiff recovered using a negligent misrepresentation theory. In that case, Joseph Farmer sought a job through Romac & Associates ("Romac"), an employment agency.[153] Farmer, who had been convicted of rape while serving in the military in Germany, explained that although he had been convicted and served time in prison, the conviction was the result of a military policy to appease foreign women who brought rape charges.[154] No one at Romac verified Farmer's explanation.[155] In reliance on Romac's assurance that military officials had verified Farmer's explanation of the rape conviction, Altair hired Farmer.[156] One year later, Farmer raped the plaintiff, Rosalie Gutzan, an Altair employee.[157] After the rape, Altair and Romac learned that Farmer had fabricated the explanation of his rape conviction and, further, that he had been convicted of assaulting and raping a coworker while in the military.[158]

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[150] Id. at 589. Interestingly, amicus curiae in *Randi W.* invoked California's statutory qualified privilege—a reference shield law—as a defense to the misrepresentation claims. Id. at 591 (citing Cal Civ. Code § 47c (West Supp. 1998)). After reviewing the legislative materials submitted with the amicus brief, the court concluded that the legislature intended the privilege to apply to actions by former employees rather than to apply as a broad insulation from all tort liability arising from job references. However, the court went on to point out that even if California Civil Code § 47c provided a defense to misrepresentation claims by third persons, the shield law or privilege "by its terms . . . pertains only to communications made 'upon request of' the prospective employer." Id. Because the defendants did not claim they wrote the recommendation letter in response to a prospective employer's request, the privilege did not apply. Id.

[151] Id.

[152] 766 F. 2d 135 (3rd Cir. 1985).

[153] Id. at 137.

[154] Id.

[155] Id.

[156] Id.

[157] Id. at 138.

[158] Id.

Plaintiff sued Altair and Romac. Altair settled plaintiff's claim. The case against Romac proceeded to trial and the jury returned a verdict in favor of plaintiff Gutzan.[159] However, the jury apportioned only ten percent of the liability to Romac.[160] The trial court denied Gutzan's motions for a new trial and to have the judgment set aside.[161] On appeal, Gutzan challenged the jury instructions, arguing that although the jury found that Romac was negligent, the instructions were not sufficiently specific on the issue of negligent misrepresentation.[162] The appellate court affirmed the verdict, noting that "[t]he jury's verdict makes it clear that it understood plaintiff's position that her injury was caused by Altair's reasonable reliance on Romac's misrepresentations."[163]

The defendants' liability in *Gutzan* and potential liability in *Randi W.* hinged on their disclosures about former employees who attacked others in a subsequent employer's workplace. However, if an employer refuses to disclose an employee's violent workplace conduct and makes no partial, misleading, or negligent disclosures, existing common law and reference shield statutes immunize the employer from liability to persons injured as a result of the nondisclosure. Under principles of tort law, courts are reluctant to impose affirmative duties,[164] and job disclosure cases remain faithful to this pattern.

In *Cohen v. Wales*,[165] a child alleged that she had been injured by a grammar school teacher.[166] The plaintiff sued the teacher's previous employer, the Warwick School District, alleging that the Warwick District had recommended the teacher "without disclosing that the teacher had been charged with sexual misconduct."[167] In a two-page opinion, the court affirmed the trial court's order dismissing the complaint.[168] The court held

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[159] Id.

[160] Id. at 137, 140.

[161] Id. at 137.

[162] Id. at 138.

[163] Id. at 139 n.4.

[164] Generally, the common law does not impose a duty to control the conduct of another person or to warn others regarding that person's dangerous conduct. See, e.g., Restatement (Second) of Torts § 314 (1965) (no duty to take action necessary to aid or protect another) [hereinafter "Restatement"].

[165] 518 N.Y.S.2d 633 (1987).

[166] Presumably, the plaintiff was a student who alleged she was sexually molested by the teacher. However, the court's opinion is vague on the facts and describes the plaintiff only as "the infant plaintiff" without further elaboration. Id.

[167] Id.

[168] Id.

that there was no common law duty requiring the previous employer to warn the new employer of the dangerous conduct "in the absence of a special relationship between either the person who threatens harmful conduct or the foreseeable victim."[169]

The court's holding in *Cohen* is consistent with the common law principle that, as a general rule, one does not owe a duty to warn people endangered by a third person's conduct.[170] Traditional tort law distinguishes between misfeasance (active misconduct by a defendant), and nonfeasance (inaction by a defendant),[171] generally imposing liability only for active misconduct. As seen in *Cohen*, however, there are exceptions, including the affirmative duty to act in cases of a "special relationship" between the defendant and the plaintiff or between the defendant and a dangerous third person.[172]

One of the best known cases establishing a duty based on special relationship is *Tarasoff v. Regents of the University of California*.[173] In *Tarasoff*, Prosenjit Poddar told Dr. Lawrence Moore, a psychologist employed by the University of California, that he intended to kill Tatiana Tarasoff.[174] Dr. Moore notified the campus police, who briefly detained Poddar and then released him.[175] No one warned Tarasoff of Poddar's threat.[176] Two months later, Poddar killed Tarasoff.[177]

Tarasoff's mother and father sued several defendants, including Dr. Moore and other university therapists, alleging *inter alia* that the defendants failed to warn Tarasoff of the danger.[178] Citing the general common law rule, the therapists argued that they had no duty to warn Tarasoff.[179]

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[169] Id. at 634. However, even if the court had found a common law duty to warn, it is unlikely that the plaintiff would have prevailed. The sexual assault at issue occurred 11 years after the teacher began working for the Tri-Valley School District. Given the time interval between the recommendation and the teacher's alleged assault, the complaint would have failed to prove proximate cause.

[170] See Restatement, supra note 164, § 314 (no duty to take action necessary to aid or protect another).

[171] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 56, at 373-375 (5th ed. 1984); Restatement, supra note 164, § 314, cmt. c.

[172] Restatement, supra note 164, § 315; Keeton, supra note 171, § 56, at 373-375.

[173] 551 P.2d 334 (Cal. 1976).

[174] Id. at 339.

[175] Id.

[176] Id. at 340.

[177] Id. at 339.

[178] Id. at 341-42.

[179] Id. at 342.

The California Supreme Court rejected the therapists' argument. The court noted an exception to the general rule of no duty where "the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct."[180] In this case, the court found that a special relationship existed between Poddar—the person whose conduct posed danger—and the therapists, which gave rise to an affirmative duty to take action for the benefit of Tarasoff, an endangered third person.[181]

In the absence of a special relationship or some action by the defendant, courts generally refuse to impose affirmative duties to act. Consistent with this pattern, the court in *Cohen v. Wales*[182] refused to consider the letter of recommendation as a basis for imposing a duty to warn. The court stated: "The mere recommendation of a person for potential employment is not a proper basis for asserting a claim of negligence where another party is responsible for the actual hiring."[183]

Other cases echo this theme. In *Moore v. St. Joseph Nursing Home, Inc.*,[184] Jeffrey St. Clair, an employee of Maintenance Management Corporation, murdered Clyde Moore, Sr.[185] Moore's family members sued St. Clair's previous employer, St. Joseph Nursing Home, for failure to disclose information concerning St. Clair's history of violent conduct.[186] During his employment with St. Joseph Nursing Home, St. Clair received twenty-four disciplinary warnings for actions, ranging from alcohol and drug use to "outright violence" in the workplace.[187] After the nursing home terminated his employment, St. Clair applied for a position with Maintenance Management Corporation. St. Clair's job application listed the nursing home as a former employer.[188] According to the nursing home, Maintenance Management never contacted it for a reference regarding St. Clair.[189] The nursing home asserted that even if Maintenance Management had asked for a reference, it would nevertheless have disclosed only St. Clair's dates of employment, despite his record of violent behavior.

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[180] Id. at 343 (citing Restatement (Second) of Torts, §§ 315-320 (1965)).

[181] Id.

[182] Cohen v. Wales, 518 N.Y.S.2d 633 (1987).

[183] Id. at 634 (citation omitted).

[184] 459 N.W. 2d 100 (Mich. Ct. App. 1990).

[185] Id. at 101.

[186] Id. at 101-02.

[187] Id. at 102.

[188] Id.

[189] Id.

After Maintenance Management hired St. Clair, he beat and murdered Moore, a fellow employee. Moore's survivors sued the nursing home, arguing that "a former employer should have a duty to disclose a former employee's dangerous proclivities" when a prospective employer seeks a reference.[190] Plaintiffs attempted to establish the existence of a special relationship, building on the theory of qualified privilege.[191] Arguing that the privilege was based on a special relationship of moral and social duty between former and prospective employers, the plaintiffs contended the privilege required employers to disclose negative information because the employer could do so without defamation liability.[192]

The court reluctantly affirmed the trial court's grant of summary judgment in favor of the nursing home.[193] The court rejected any connection between granting a privilege to disclose negative information and requiring such disclosure, stating:

> There is, however, nothing about the conditional privilege which magically transposes it into a legal obligation requiring employers to disclose adverse information concerning a former employee. Rather, it is quite clear that in Michigan, *a former employer's duty to release information about a past employee is an imperfect obligation of a moral or social character.*[194]

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[190] Id.

[191] Id.

[192] Id.

[193] Id. at 101.

[194] Id. at 102 (emphasis added). To establish a special relationship as basis for the proposed common law disclosure duty, the plaintiffs in *Moore* perhaps should have based the special relationship argument on the nature of the relationship between the former employer and its former employee. As Janet Swerdlow argues, *Restatement (Second) of Torts* §§ 315 and 317 include the employer-employee relationship in the category of special relationships. Janet Swerdlow, Note, Negligent Referral: A Potential Theory for Employer Liability, 64 S. Cal. L. Rev. 1645, 1662 & n.97 (1991). Swerdlow also argues that, in the employment reference context, the special relationship between the employer and employee continues after employment terminates because the former employee has unique information related to the employment. Id. at 1662-1663. See also Saxton, supra note 127, at 94 (arguing that the employer may acquire special knowledge of its employee's dangerous behavior and traditional common law doctrines would support recognizing a special relationship on this basis).

Alternatively, the plaintiffs could have maintained their focus on the relationship between the inquiring prospective employer and the former employer, emphasizing the prospective employer's dependence on the former employer for information. See Saxton, supra note 127, at 95 (endorsing Swerdlow's view that prospective employers who request references stand in a relationship of dependence with current or former employers who possess critical information gained through the working relationship with a violent employee). See also Swerdlow, supra, at 1661-1663.

The *Moore* court also expressed concern about society's interest in the confidentiality of employment records and possible abuse of a disclosure requirement. Noting that "[i]t is all too easy to envision a career destroyed by malefic information released by a disgruntled former employer,"[195] the court saw no reason to expand the qualified privilege to encompass a disclosure requirement. The court emphasized that the position advanced by plaintiffs would be a significant change in the law—one that should be made by the legislature, not courts.[196] Nonetheless, as it affirmed the grant of summary judgment in favor of the defendants, the court expressed sympathy for the position that information about violent employees should be disclosed:

> Although we agree with the trial court that in today's society, with increased instances of child abuse and other types of violence directed towards readily identifiable classes of people, we may have reached a point where people should make this type of information known, we restate our belief that this is a substantive change in our law, *the type of change best left to our Legislature.*[197]

With the exception of cases of affirmative misrepresentations or half-truths, the common law remains firmly fixed in the notion that employers have no duty to disclose information about an employee's violent behavior in job references. However, serious problems exist beyond the realm of misleading half-truths and misrepresentations. As *Moore* suggests, the legislature is the appropriate entity to create an affirmative legal duty requiring employers to disclose information about violent employees in references.

### *B. Ending the Silence About Violence: Creating a Disclosure-Shield Model*

To address the problem of employer silence, this article proposes that legislatures enact limited "disclosure-shield" statutes.[198] The proposal

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[195] Moore v. St. Joseph Nursing Home, 459 N.W.2d 100, 102 (Mich. Ct. App. 1990).

[196] The court noted the Michigan legislature had clearly evidenced its intent to regulate defamation law because the legislature had enacted at least nine statutory provisions relating to libel and slander. Id.

[197] Id. at 103 (emphasis added). However, even if there had been such a duty, the court most likely would have denied plaintiffs' claims because neither the event nor the identity of the victim was foreseeable. As the court stated, "Plaintiffs' decedent was the unfortunate and tragic victim of St. Clair's random violent behavior." Id.

[198] See Appendix B for my proposed model disclosure-shield statute.

builds on the *Tarasoff* notion of the duty to warn, implicitly recognizing a special relationship between the reference-providing employer and its violent employee.[199] The model legislation is tailored to encourage employers to exchange information about violent employees by combining existing reference shield immunities with an obligation to provide more information than "name, rank and serial number" when responding to a prospective employer. Under the model statute, an employer who receives a reference request is required to disclose and describe the facts relating to any violent workplace conduct by that employee. The disclosing employer is shielded from liability for the disclosure, unless the employer provides false information with knowledge of its falsity or in reckless disregard for the information's truth or falsity. The protection extends to claims by an employee arising from a negative reference. The statute also protects the referring employer from claims by hiring employers or other third parties alleging harm caused by a misleading or inaccurate reference. Finally, the legislation requires that the referring employer provide a copy of the written reference to the employee. This additional step allows the employee to examine the reference and, as necessary, rebut or explain the information described in the document.

Noncompliance with the disclosure obligation could lead to tort liability. For example, assume Employer A received a reference request from Employer B regarding an employee who had engaged in violent conduct in Employer A's workplace. Under the model statute, Employer A has a legal duty to inform Employer B of the facts surrounding such incidents. Suppose that instead Employer A provided a "no comment," "name, rank, and serial number" reference or an unconditionally positive reference, and Employer B hired the employee. If the employee subsequently engaged in violent conduct that resulted in personal injury to persons in Employer B's workplace, Employer B and other injured parties could bring a tort action

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[199] Other commentators build on *Tarasoff* by proposing reforms of tort law relating to references. See generally Saxton, supra note 127 (proposing a limited duty of disclosure requiring employers to respond to reference inquiries and disclose unfavorable characteristics of employees that suggest the employee poses a potential risk of physical harm to other persons); Swerdlow, supra note 194, at 1667-73 (proposing a tort of negligent referral requiring employers to provide honest and accurate reference where a job applicant could pose a danger to persons or property). For other discussions recognizing that *Tarasoff* principles could be extended to employment references, see generally John Bruce Lewis et al., Defamation in the Workplace: A Survey of the Law and Proposals for Reform, 54 Mo. L. Rev. 797, 834-35 & n.253 (1989); cf. Ann M. Barry, Note, Defamation in the Workplace: The Impact of Increasing Employer Liability, 72 Marq. L. Rev. 264, 300-01 (1989) (discussing "negligent references" theory). For a contrary view, see Robert S. Adler & Ellen R. Peirce, Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal, 53 Wash. & Lee L. Rev. 1381, 1442-47 (1996) (rejecting the imposition of a duty to give references, rejecting the tort of negligent referral, and criticizing the use of *Tarasoff* as the theoretical foundation for such duties).

against Employer A. In a claim by the employee alleging that referring Employer A had falsely informed Employer B that the employee had engaged in violent workplace conduct, Employer A would not be liable unless it knew the information was false or provided the information in reckless disregard for its truth or falsity.

The proposed disclosure-shield statute promotes disclosure of violent conduct in job references. To meet this disclosure objective, the statute provides guidance as to the kind of conduct employers would be required to disclose. The definition of workplace violence includes assaults and batteries, threats of violence, fighting, possession of weapons in the workplace, harassment and intimidation of coworkers, and sexual harassment involving physical intimidation, assault or battery.[200] This definition captures headline-grabbing cases of extreme violence as well as more prevalent, non-fatal violent incidents.[201]

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.[202] Nor would the duty require employers to disclose incidents with purely economic consequences, such as theft, embezzlement, or similar offenses.[203] 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.[204] This approach strikes a balance between ensuring adequate protection from violent employees and preserving an employee's interest in not having job opportunities foreclosed where his or her conduct did not involve violence against others.

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[200] See Rebecca A. Speer, Beyond 101 California: Four Years After the Tragic Shooting Workplace Violence is Still With Us, S.F. Att'y, July 1997, at 22-23; see also Saxton, supra note 127, at 97; Swerdlow, supra note 194, at 1653.

[201] As the American Management Association concluded following a 1994 survey, "[I]ncidents of workplace violence are not unusual; however, the sorts of incidents involving gunplay or explosives which grab headlines are infrequent." American Management Association, Workplace Violence: Policies, Procedures & Incidents (American Management Ass'n 65th Annual Human Resources Conference Onsite Survey) Apr. 9-13, 1994.

[202] Compare Professor Saxton's proposed disclosure duty, which would include "violent temper." Saxton, supra note 127, at 97.

[203] Of course, state legislatures would be free to include such behavior within the statutory scheme. Cf. Swerdlow, supra note 194, at 1653 (describing conduct that would be covered by the affirmative duty to disclose, including theft, destruction of property, lack of competence and falsification of credentials).

[204] While it is not possible to set forth a "bright-line" definition, the proposed definition sufficiently comports with a common-sense view of what constitutes violent behavior. In any event, the statute should encourage employers to err on the side of disclosure in close cases rather than adhering to a "no comment" policy. See Saxton, supra note 127, at 97.

Although the proposed disclosure-shield framework may be considered a significant departure from common law principles, legislatures are better equipped than courts to consider the competing concerns that give rise to the need for disclosures.[205] Legislators can take a more aggressive approach than judges in balancing competing interests of workplace safety, promoting communication of important information about dangerous employees, and balancing the concerns of individual employees against the societal concerns about workplace violence and a more open flow of reference information. In addition, the reference shield statute provides employers with notice of the obligation accompanying the immunity granted by the statute. Legislatures could, and should, send a strong signal that society will no longer permit employers to hide behind silence policies where disclosure could deter workplace violence. By adding this limited affirmative duty provision to reference shield statutes, legislatures could change employers' incentives in cases of workplace violence and promote workplace safety in the process.[206] Where an employer has knowledge of an employee's violent conduct in the workplace, the duty to release information should be a legally enforceable one rather than a mere "imperfect obligation of a moral or social character."[207]

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[205] In contrast to legislatures, the role of courts is to interpret rather than make broad changes in the law. As Steven Vago noted, "Unlike legislative and administrative bodies, courts do not place issues on their own agendas . . . . Rather, courts are passive; they must wait until matters are brought to them for resolution." Steven Vago, Law and Society 62 (4th ed. 1994).

[206] The proposed duty would specifically address situations of workplace violence and would be limited to information regarding violent behavior. I do not propose creating an affirmative duty for employers to provide references outside the context of violent conduct. Accordingly, the proposed duty is narrower than the "negligent referral" tort proposed by Swerdlow and the model legislation proposed by Saxton. See supra note 199 and accompanying text. In contrast, Adler and Peirce do not favor imposing a general duty to provide employment references. They remain grudgingly "open but unconvinced" regarding a "duty to warn of a former employee's dangerous propensities" and would limit any such duty to "alert[ing] public authorities about the danger, if it is sufficiently grave, clear, and imminent, rather than to notify prospective employers." Adler & Peirce, supra note 199, at 1447. Adler and Peirce argue for "positive incentives . . . rather than the threat of damages, to motivate employers to abandon their no comment stance when queried about references." Id. They propose reforming the qualified privilege and adding an alternative dispute resolution mechanism for job reference cases to encourage employers to provide references. With regard to any duty to warn regarding violent employees, Adler and Peirce would limit such disclosures to cases in which "an employer has learned on a confidential basis that an employee imminently plans to assault a readily identifiable victim or class of victims." Id. at 1445. This duty formula is so narrow that it is of little practical use. Adler and Peirce acknowledge this in a footnote, where they write: "We note in passing that this circumstance would rarely arise with respect to employment references because an employer would usually have little knowledge about an employee's intention to assault someone at the site of a prospective employer." Id. at 1445 n.304. The proposal in this Article reaches a middle ground between a general duty of to provide references and the extremely narrow limited duty that Adler and Peirce support.

[207] Moore v. St. Joseph Nursing Home, Inc., 459 N.W.2d 100, 102 (Mich. Ct. App. 1990).

Finally, states that adopt the model statute should include support for programs to inform and educate employers about the existence of the reference shield laws and the limited disclosure obligation. Human resource management organizations should be involved in educating employers regarding the disclosure-shield laws. Legislatures should assure that information reaches the popular and legal press so that employers will be aware of the existence of the duty. Employers will then be able to seek legal advice about their disclosure responsibility, as well as the immunities provided by the shield portions of the statutes. Because many smaller employers lack access to information about changes in laws, this information process is critical to providing notice so that employers will know their obligations and abandon silence policies in appropriate circumstances.[208]

### *C. Striking a Balance: Costs and Benefits of the Disclosure-Shield Framework*

The disclosure-shield framework will encourage employers to provide reference information in situations where it is most needed—in circumstances where prospective employers can use the information to take appropriate preventive measures regarding job applicants with histories of workplace violence. By promoting the flow of reference information, the limited affirmative duty to disclose will deter workplace violence because dangerous employees will either be excluded from the workplace or monitored more carefully. In addition, a disclosure duty will assist employers in their investigation of prospective employees, increasing prospective employers' access to currently undisclosed information.

Of course, no reform proposal is perfect. As the court recognized in *Moore v. St. Joseph's Nursing Home, Inc.*, the duty to disclose may be abused.[209] A manager who dislikes an employee may use a negative reference to foreclose that person from future employment or to retaliate.[210] Racist managers may be more likely to characterize behavior as "violent" when engaged in by employees of color. Moreover, malevolent motiva-

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[208] Adler and Peirce express concern that "[t]hose most likely to run afoul of the duty will be small companies without knowledge of the duty, and, perhaps, without insurance to cover damages." Adler & Peirce, supra note 199, at 1447. Legislatures can assist small employers by promoting publicity and education regarding the limited duty prescribed by disclosure-shield statutes. See also Alex B. Long, Note, Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation, 39 Wm. & Mary L. Rev. 177, 225-28 (1997).

[209] 459 N.W.2d at 102.

[210] Frances A. McMorris, Ex-Bosses Face Less Peril Giving Honest Job References, Wall St. J., July 8, 1996, at B1 (noting that "the new state laws could be abused by employers intent on retaliating against former employees" and that "[u]nfair and unfavorable evaluations could be used against employees who try to advance their careers by leaving").

tions are not the only potential source of problems. Managers acting in good faith may be mistaken about the facts related to incidents subsequently reported in a reference to a prospective employer. To avoid negligent hiring claims, prospective employers may decline to hire a job applicant after being advised that the applicant engaged in violent conduct in a previous job. Thus, an employee who exercises poor judgment and behaves violently in an isolated workplace incident may become unemployable.[211] Finally, employees who can attribute their violent behavior to a mental disability may allege violations of the Americans with Disabilities Act (ADA) or state disability discrimination laws.[212]

To minimize the negative impact and potential for abuse, disclosure-shield statutes can utilize safeguards fashioned from provisions in existing shield laws. Under the model statute, an employer who provides false information loses the immunity if the employer knew the information was false or disseminated it with reckless disregard for the information's truth or falsity. This creates an incentive for employers to investigate and document alleged incidents of violence before reporting such incidents in references. If they do not investigate and the information is false, the maligned employee would be able to bring a cause of action for defamation or other torts appropriate to the circumstances.

In addition to requiring that the disclosures be in writing,[213] the model legislation requires reference providers to furnish a copy of the written reference to the subject employee before sharing the reference with a pro-

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[211] See infra note 215 and accompanying text.

[212] 42 U.S.C. §§ 12101-12213 (1994). State laws may provide greater protection than what is provided under the federal disability discrimination laws.

[213] Of the existing shield laws, three statutes require information to be in writing. See Kan. Stat. Ann. § 44-119a(c) (Supp. 1996) (providing absolute immunity to employer who responds in writing to prospective employer's written request for information regarding written employee evaluations, information regarding whether separation was voluntary or involuntary and the reasons for separation); S.C. Code Ann. § 41-1-65(C) (Law. Co-op. Supp. 1997) (providing qualified immunity to employer who responds in writing to prospective employer's written request for information regarding "(1) written employee evaluations; (2) official personnel notices that formally record the reasons for separation; (3) whether the employee was voluntarily or involuntarily released from service and the reason for separation; and (4) information about job performance"); S.D. Codified Laws § 60-4-12 (Michie Supp. 1997) (providing qualified immunity to employer who provides a written disclosure in response to prospective employer's written request). In addition, the Indiana statute, while not requiring current or former employers to give written references, protects employers who provide truthful written information. Ind. Code Ann. § 22-5-3-1(a) (Michie 1997) (stating that a person who prevents a discharged employee from obtaining employment faces criminal penalties, but is not prohibited "from informing, in writing, any other person to whom the discharged employee has applied for employment a truthful statement of the reasons for the discharge").

spective employer.[214] If the employee believes the information is erroneous, he or she can take the opportunity to correct or clarify the facts with the current or former employer. A written copy of the information also affords the employee the opportunity to rebut any allegations during interviews with prospective employers. If the prospective employer finds the explanation to be credible and believes there is no further risk of violence, the employee may be offered the new job and a fresh start in the next workplace. A prospective employer also could impose a longer probationary period for the new employee and monitor his or her conduct closely to ensure there are no further violent incidents.

On the other hand, it is equally likely that prospective employers would take a "hands off" approach to job applicants whose references include information about workplace violence. Rather than risk a potential negligent hiring claim in the event the employee subsequently harmed someone in the workplace, many employers may decide not to hire such persons. As a result, many workers would find that one mistake renders them virtually unemployable. Admittedly, this is an unfortunate consequence. Employees who would not again engage in violent behavior might still find it difficult to convince prospective employers to hire them.[215] However, while an individual employee's violent conduct may be a one-time occurrence, many violent employees are repeat offenders.[216] Legislatures must balance the harsh consequences to particular individuals against the benefits to society in promoting and increasing workplace safety. Given the risk posed by persons who have a history of violent workplace conduct, the legislative balance should tip in favor of disclosure. The benefits of deterring repeat violence outweigh the costs to individuals who have exhibited past violent conduct at work.

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[214] Colo. Rev. Stat. § 8-2-114(2)(b) (1997) (employer who provides written information "shall send a copy of the information provided to the last known address of the person who is the subject of the reference"); S.D. Codified Laws § 60-4-12 (Michie Supp. 1997) ("Any written response to the [prospective employer's] written request shall be made available to the employee or the former employee upon written request."); cf. Ind. Stat. Ann. § 22-5-3-1(c) (Michie 1997) (requiring prospective employer, upon prospective employee's written request, to "provide copies of any written communications from current or former employers that may affect the employee's possibility of employment with the prospective employer").

[215] A single incident of misconduct could lead to a lasting stigma that forecloses future employment opportunities. Existing shield laws pose a similar problem. In some cases, disclosure regarding past workplace conduct may exact a harsh penalty against individual employees. As noted in the Wall Street Journal: "Still another concern is the fairness of branding someone a bad employee based on a single act or a single performance review . . . . 'Is somebody unemployed for the rest of their life for getting into a fist fight? . . . That's a real dilemma.'" McMorris, supra note 210, at B1 (quoting Garry Mathiason, a San Francisco attorney).

[216] See, e.g., Jim McKay, Job Reference Roulette, Pittsburgh Post-Gazette, Aug. 6, 1995, at C1 (observing that people who engage in violence and crime in the workplace "often leave a trail of similar behavior that goes unnoticed when employers decline to share what they know").

The proposed statute also provides that employers who use the disclosure laws to discriminate lose the immunity.[217] Employers need to monitor managers' practices to assure that personnel who provide references are not violating applicable state and federal laws prohibiting discrimination. This requirement does not impose additional burdens on employers; employers must comply with anti-discrimination laws with respect to all workplace practices.

As noted above, employers who comply with the disclosure-shield statutes may fear legal challenges under disability discrimination laws. The Americans with Disabilities Act, for example, prohibits discrimination against a "qualified individual with a disability."[218] The ADA also precludes employers from asking applicants whether they have a disability or about the nature of any disability.[219] In light of the ADA's prohibition

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[217] Reference shield statutes in 11 states already provide that discrimination vitiates the immunity. See Alaska Stat. § 09.65.160(2) (Michie 1996) ("presumption of good faith is rebutted upon a showing that [the information was disclosed] in violation of a civil right" protected under state or federal law); Colo. Rev. Stat. § 8-2-114(2)(a) (1997) ("presumption of good faith may be rebutted upon a showing . . . that the information disclosed was . . . violative of a civil right" protected by state law); Fla. Stat. Ann. § 768.095 (West 1997) ("presumption of good faith is rebutted upon a showing that the information disclosed . . . violated any civil right" protected by state law); 745 Ill. Comp. Stat. Ann. 46/10 (West Supp. 1997) ("presumption of good faith . . . may be rebutted . . . [if] the information [was] disclosed . . . in violation of a civil right."); Iowa Code Ann. § 91B.2.2a, available in LEXIS Statenet 1998 (employer loses immunity if the disclosure "violates a civil right of the current or former employee"); N.M. Stat. Ann. § 50-12-1 (Michie Supp. 1997) ("immunity shall not apply when the reference information supplied . . . violated any civil rights"); Ohio Rev. Code Ann. § 4113.71(B)(2) (Anderson Supp. 1996) (immunity does not apply where "disclosure . . . constitutes an unlawful discriminatory practice" under state law); Or. Rev. Stat. § 30.178 (Michie Supp. I 1996) ("presumption of good faith is rebutted upon a showing that the information disclosed . . . violated any civil right" protected under state law); R.I. Gen. Laws § 28-6.4-1(c)(4) (Supp. 1997) ("presumption of good faith is rebuttable upon a showing . . . that the information disclosed was . . . [v]iolative of . . . civil rights" under employment discrimination laws"); Tenn. Code Ann. § 50-1-105(5) (Supp. 1997) ("presumption of good faith is rebuttable upon a showing . . . that the information disclosed was . . . [v]iolative of . . . civil rights" under employment discrimination laws); Wis. Stat. Ann. § 895.487(2) (West 1997) ("presumption of good faith . . . may be rebutted only upon a showing . . . that the employer made the reference in violation" of the state employment discrimination statute).

[218] 42 U.S.C. § 12112(a). The ADA defines "persons with disabilities" to include those who are perceived to have a disability. Section 12102(2) defines "disability," with respect to an individual, as:

> (A) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment."

[219] 42 U.S.C. § 12112(d)(4)(A) ("A covered entity shall not . . . make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.").

against inquiries regarding disabilities, an applicant whose violence is linked to a mental disability conceivably could maintain that a prospective employer's request for a reference that discloses violent conduct constitutes an impermissible inquiry under the ADA. Such an applicant also may challenge the refusal to hire as discrimination on the basis of mental disability. Concerned that disclosing an employee's violent conduct may be construed as taking adverse action based on mental disability, reference providers may fear the disclosure-shield statutes place them at risk for ADA claims as well.

With regard to the inquiry issue, employers providing references in compliance with the disclosure-shield statute should focus on describing the conduct of the employee when providing the reference rather than advising against hiring the applicant because of an actual or perceived mental disability. For example, consider a job applicant with a personality disorder who assaulted a coworker while working at a previous job. The disclosure-shield statute would require the applicant's former employer to disclose the occurrence of the assault in response to a reference request. Nothing in the proposed statutory language requires the employer to reveal that the applicant has a personality disorder or to attribute the assault to the personality disorder.

In any event, it is unlikely that employers who disclose and receive information about violent employees under disclosure-shield laws will face liability for such references under the ADA. The trend in recent cases indicates that courts are likely to reject ADA claims by plaintiffs whose mental disabilities cause them to engage in violent conduct at work. Courts have dismissed such claims on a number of grounds: employees who engage in violent workplace misconduct are not "otherwise qualified" for their positions;[220] accommodation of the employee's conduct would con-

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[220] See, e.g., Lewis v. Zilog, Inc., 908 F. Supp. 931, 946 (N.D. Ga. 1995) (holding that an employee with bipolar disorder who threatened and intimidated coworkers was "not a 'qualified individual with a disability' under the ADA"); Palmer v. Circuit Ct. of Cook Cty. Soc. Serv., 905 F. Supp. 499, 508-09 (N.D. Ill. 1995), aff'd 117 F.3d 351 (7th Cir. 1997) (holding that employee who suffered from paranoia and depression who engaged in workplace confrontations, made hostile, threatening telephone calls to coworkers and supervisors failed to establish that she was otherwise "qualified" for her position); Miles v. General Services Admin., 5 Am. Disabilities Cases (BNA) 351, 354 (E.D. Pa. 1995) (concluding that an employee "who repeatedly harasses fellow employees and who insults and assaults supervisors is not 'otherwise qualified' for his position"); Mazzarella v. U.S. Postal Serv., 849 F. Supp. 89, 97 (D. Mass. 1994) (holding that an employee with a personality disorder who lost control at work, screamed obscenities and destroyed property was not an "otherwise qualified individual"); Carrozza v. Howard County, 847 F. Supp. 365, 367-68 (D. Md. 1994), aff'd, 45 F. 3d 425 (4th Cir. 1995) (holding that employee with bipolar disorder whose behavior was "loud, abusive, and insubordinate" failed to establish that she could perform the essential functions of her job with reasonable accommodation by her employer).

stitute undue hardship;[221] the violent conduct poses a "direct threat" in the workplace;[222] or the violent misconduct constitutes a legitimate reason for the defendant employer's adverse action against the employee.[223] Given the danger posed by employees whose mental disabilities cause them to engage in violent conduct in the workplace, it is not surprising that courts tend to grant summary judgment in favor of employers in such cases.[224] Accordingly, where an employee who has engaged in violent conduct in the workplace and seeks another job, the current or former employer would be free to provide information, and the prospective employer who declined to hire the employee could do so without violating the ADA.

The proposed disclosure-shield framework does not place an undue burden on employers. The proposal does not require employers to provide references in response to every inquiry by a prospective employer. Under the proposed disclosure-shield framework, current or former employers must disclose only in cases where the employee who is the subject of the reference has engaged in violent conduct in the workplace. By adding a limited duty to the shield law structure and tailoring that duty to cases of workplace violence, legislatures can take meaningful steps to increase workplace safety and facilitate dissemination of potentially life-saving information.

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[221] See, e.g., Gordon v. Runyon, 1994 U.S. Dist. LEXIS 4959 (E.D. Pa. 1994), aff'd, 43 F. 3d 1461 (3d Cir. 1994) (finding that it would be unduly burdensome to require the defendant-employer to continue to employ an employee with a mental impairment who, at various times, had possessed mace and a stun gun and engaged in disruptive behavior).

[222] See, e.g., Layser v. Morrison, 935 F. Supp. 562, 569 (E.D. Pa. 1995) (finding that defendant employer was justified in asserting the affirmative defense that employee posed a significant potential for harm after security guard told of having dream about aiming a gun at supervisor); *Palmer*, 905 F. Supp. at 511 (finding that paranoid and depressed employee who engaged in workplace confrontations and made hostile, threatening telephone calls to coworkers and supervisors was a direct threat because of her inability to control her behavior and was dismissed based on her past misconduct, not her alleged disability).

[223] See, e.g., *Lewis*, 908 F. Supp. at 948-51 (finding that the conduct of employee with bipolar disorder, who threatened and intimidated coworkers, constituted legitimate nondiscriminatory reason for negative performance evaluation); Hindman v. GTE Data Servs., Inc., 4 Am. Disabilities Cases (BNA) 182 (M.D. Fla. 1995) (ruling that the threat and danger posed by bringing firearm to work constituted sufficient basis for termination of employee who suffered from chemical imbalance); *Mazzarella*, 849 F. Supp. at 96-97 (finding that losing control at work, screaming obscenities and destroying property constituted legitimate, nondiscriminatory reasons for terminating employee with personality disorder); Marino v. U.S. Postal Serv., 1993 U.S. Dist. LEXIS 20151 (D. Mass. 1993), aff'd 25 F. 3d 1037 (1st Cir. 1994) (finding that hitting a supervisor constituted a legitimate, nondiscriminatory reason for termination of employee with anxiety neurosis).

[224] See. e.g., *Lewis*, 908 F. Supp. 931; *Gordon*, 1994 U.S. Dist. LEXIS 4959; *Mazzarella*, 849 F. Supp. 89; *Carrozza*, 847 F. Supp. 365; *Marino*, 1993 U.S. Dist. LEXIS 20151; cf. Crawford v. Runyon, 37 F.3d 1338, 1341-42 (8th Cir. 1994) (finding that questions of fact existed where employee with depression and stress-related mental disorders, who was terminated for allegedly threatening to kill or harm supervisor, asserted that supervisors lied about his behavior).

## CONCLUSION

In 1993, Paul Calden calmly walked into a Florida cafeteria and shot five former supervisors, killing three and seriously wounding two others. Two years later, the survivors and relatives of those killed settled a lawsuit against Allstate based in part on the company's failure to advise Calden's subsequent employer of Calden's history of violent conduct in the workplace. However, Calden's case is not typical. There was evidence that Allstate had not merely failed to disclose but had affirmatively misrepresented the reasons for his termination. In a more typical case, Paul Calden's employer would have provided no reference, or simply "name rank, and serial number" in response to a reference request. In that more common situation, the victims' families would have no recourse under the common law or existing reference shield statutes. Had it provided a "no comment" or "name, rank, and serial number" reference without misrepresentation, Allstate would have been free to remain silent about Calden's known violent behavior.

In today's world of increasing workplace violence, prospective employers need to know if job applicants have engaged in violent conduct in the workplace. The best source of such information is the reference process, where current and former employers can exchange information about violent employees. The time has come for legislatures to recognize a limited affirmative duty of disclosure, reflecting society's unwillingness to continue condoning an employer's silence in response to a reference inquiry regarding a violent employee. For an employer to remain silent when asked for a reference regarding a violent employee is wrong and dangerous. With the adoption of disclosure-shield statutes, such silence not only will be morally unacceptable, it will be legally unacceptable as well.

## APPENDIX A

### State Reference Shield Laws In Effect as of February 1998

| State | Code Section | Enacted | Standard of Proof to Rebut Presumption of Good Faith[225] |
|---|---|---|---|
| Alaska | Alaska Stat. § 09.65.160 | 1993 | Preponderance |
| Arizona | Ariz. Rev. Stat. § 23-1361 | 1996 | |
| California | Cal. Civ. Code § 47c[226] | 1994 | |
| Colorado | Colo. Rev. Stat. § 8-2-114 | 1989 | Preponderance |
| Delaware | Del. Code Ann. Tit. 19, § 708 | 1996 | |
| Florida | Fla. Stat. § 768.095 | 1991 | Clear and Convincing Evidence |
| Georgia | Ga. Code Ann. § 34-1-4 | 1993 | Preponderance |
| Idaho | Idaho Code § 44-201 | 1996 | Clear and Convincing Evidence |
| Illinois | 745 Ill. Comp. Stat. 46/10 | 1996 | Preponderance |
| Indiana | Ind. Code Ann. § 22-5-3-1 | 1995 | Preponderance |
| Iowa | Iowa Code § 91B.2 | 1997 | |
| Kansas | Kan. Stat. Ann. § 44-119a | 1995 | |
| Louisiana | La. Rev. Stat. Ann. § 23:291 | 1995 | Preponderance |
| Maine | Me. Rev. Stat. Ann. tit. 26, § 598 | 1995 | Clear and Convincing Evidence |
| Maryland | Md. Code Ann., Cts. & Jud. Proc. § 5-423 | 1996 | Clear and Convincing Evidence |
| Michigan | Mich. Comp. Laws Ann. § 423.452 | 1996 | Preponderance |

[225] This column indicates the standard of proof for rebutting the presumption where statutes expressly state the standard of proof. Although the majority of the statutes are silent on the issue, one can safely assume that these states apply the preponderance of evidence standard—the generally applicable burden of proof in civil litigation. McCormick on Evidence, § 339 (4th ed. 1992).

[226] Amendment specifically relating to employment references.

| State | Code Section | Enacted | Standard of Proof to Rebut Presumption of Good Faith |
|---|---|---|---|
| New Mexico | N.M. Stat. Ann. § 50-12-1 | 1995 | |
| North Carolina | N.C. Gen. Stat § 1-539.12 | 1997 | Preponderance |
| North Dakota | N.D. Cent. Code § 34-02 | 1997 | Preponderance |
| Ohio | Ohio Rev. Code Ann. § 413.71 | 1996 | Preponderance |
| Oklahoma | Okla. Stat. Ann. tit. 40, § 61 | 1995 | Preponderance |
| Oregon | Or. Rev. Stat. § 30.178 | 1995 | Preponderance |
| Rhode Island | R.I. Gen. Laws § 28-6/4-1 | 1996 | Preponderance |
| South Carolina | S.C. Code Ann. § 41-1-65 | 1996 | |
| South Dakota | S.D. Codified Laws § 60-4-12 | 1996 | Clear and Convincing Evidence |
| Tennessee | Tenn. Code Ann. § 50-1-105 | 1995 | Preponderance |
| Utah | Utah Code Ann. § 34-42-1 | 1995 | Clear and Convincing Evidence |
| Wisconsin | Wis. Stat. Ann. § 895.487 | 1996 | Clear and Convincing Evidence |
| Wyoming | Wyo. Stat. § 27-1-113 | 1996 | Preponderance |

## APPENDIX B

### Proposed Reference Shield Statute

A. *Definitions*

1-5. For definition paragraphs 1 through 5, legislatures could adopt definitions of the terms "employer,"[227] "employee,"[228] "prospective employer,"[229] "prospective employee,"[230] and "former employee"[231] used in existing reference shield statutes.

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[227] Ga. Code Ann. § 34-1-4(a)(2) (Supp. 1997) (defining employer as: "any individual engaged in a business, corporation, S-corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, association, or government entity"); La. Rev. Stat. Ann. § 291.C(1) (West Supp. 1998) (defining employer as: "any person, firm, or corporation, including the state and its political subdivisions, and their agents, that has one or more employees, or individuals performing services under any contract of hire or service, expressed or implied, oral or written"); Mich. Comp. Laws Ann. § 423.452(2) (West Supp. 1997) (defining employer as: "a person who employs an individual for compensation or who supervises an individual providing labor as a volunteer"); Ohio Rev. Code Ann. § 4113.71(A)(2) (Anderson Supp. 1996) (defining employer as: "the state, any political subdivision of the state, any person employing one or more individuals in this state, and any person directly or indirectly acting in the interest of the state, political subdivision, or such person"); S.C. Code Ann. § 41-1-65(A)(1) (Law Co-op. Supp. 1997) (defining employer as: "any person, partnership, for profit or nonprofit corporation, limited liability corporation, the State and its political subdivisions and their agents [or any former supervisor or the employer's designee] that employ one or more employees"); Wis. Stat. Ann. § 895.487(1)(b) (West 1997) (defining employer as: "any person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any agent, manager, representative or other person having control or custody of any employment, place of employment or of any employe [sic]").

[228] La. Rev. Stat. Ann. § 291.C(2) (West Supp. 1998) (defining employee as: "any person, paid or unpaid, in the service of an employer"); Mich. Comp. Laws Ann. § 423.452(2) (West Supp. 1997) (defining employee as: "an individual who is a volunteer or for compensation provides an employer with his or her labor"); Oh. Rev. Code Ann. § 4113.71(A)(1) (Anderson Supp. 1996) (defining employee as: "an individual currently or formerly employed by an employer") (Anderson 1997); S.C. Code Ann. § 41-1-65(A)(2) (Law Co-op. Supp. 1997) (defining employee as: "any person employed by an employer"); Wis. Stat. Ann. § 895.487(1)(a) (West 1997) (defining employee as: "any person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment").

[229] La. Rev. Stat. Ann. § 291.C(3) (West Supp. 1998) (defining prospective employer as: "any 'employer' as defined herein, to which a prospective employee has made application, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment"); Mich. Comp. Laws Ann. § 423.452(2) (West Supp. 1997) (defining prospective employer as: "a person to whom an employee or former employee has submitted an application for employment"); S.C. Code Ann. § 41-1-65(A)(6) (Law Co-op. Supp. 1997) (defining prospective employer as: "any employer to which a prospective employee has made application, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment").

[230] La. Rev. Stat. Ann. § 291.C(4) (West Supp. 1998) (defining prospective employee as: "any person who has made an application, either oral or written, or has sent a resume or other correspondence indicating an interest in employment"); S.C. Code Ann. § 41-1-65(A)(7) (Law Co-op. Supp. 1997) (defining prospective employee as: "any person who has made an application either

6. The term "employment reference" means a communication between a prospective employer and employer regarding an employee's job performance or qualifications for employment with the prospective employer.

7. The term "violent conduct" means battery, assault, threats of violence, physical fighting, possession of weapons, physical harassment, physical intimidation, sexual harassment involving physical intimidation, assault, or battery, and other violent conduct posing a threat of physical injury to persons.

8. The term "in the workplace" means at the employer's place of business or at the site of customers or clients during a time in which an employee is performing the business of his or her employer.

B. *Duty to Disclose Reference Information Regarding Employee's Violent Conduct in the Workplace*

An employer who receives a request for an employment reference from a prospective employer regarding a current or former employee shall disclose in writing all facts relating to any incident or incidents of violent conduct in the workplace by such current or former employee. The employer shall send a copy of the written disclosure to the employee or former employee at his or her last known address.

C. *Qualified Immunity for Disclosure of Information Regarding Employee's Violent Conduct in the Workplace*

1. An employer or former employer who provides information pursuant to subsection B shall be immune from civil liability to the employee or any other person for the disclosure or any consequences proximately caused by the disclosure.

2. This protection and immunity shall not apply if it can be shown by a preponderance of the evidence that the employer:

a. provided the disclosure knowing that the information contained in the disclosure or the information upon which the disclosure was based was false or deliberately misleading;

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oral or written or has sent a resume or other correspondence to a prospective employer indicating an interest in employment").

[231] S.C. Code Ann. § 41-1-65(A)(4) (Law Co-op. Supp. 1997) (defining former employee as: "an individual who was previously employed by an employer").

b) provided the disclosure with reckless disregard for the truth or falsity of the information contained in the disclosure or the information upon which the disclosure was based; or

c) provided the disclosure in violation of any state or federal civil rights laws.

D. *Protection for Prospective Employer*

A prospective employer who hires an employee after receiving such a disclosure and who takes reasonable precautions to monitor and supervise such employee, shall be immune from civil liability including liability for negligent hiring, negligent retention, and other causes of action related to the hiring and retention of such employee.