The Tort of Negligent Hiring and the Use of Selection Devices: The Employee’s Right of Privacy and the Employer’s Need to Know

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INTRODUCTION

American employers have long known that they are responsible for the negligent acts of an employee acting within the scope of the employee’s duties or in furtherance of the employer’s interests.¹ Employers are now discovering that they may also be liable if they hire the wrong person. In fact, an employer may be held liable even if the employee is acting outside the scope of his or her employment.² The test applied by the courts is: When the employee was hired, did the employer conduct a

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SYMPOSIUM: SELECTION DEVICES IN HIRING

reasonable investigation into the employee's background vis a vis the job for which the employee was hired and the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee? Should the employer have reasonably foreseen the risk caused by hiring an unfit person?

Due to the extension of liability for negligent hiring, employers are now finding themselves in state courts before juries defending allegations of gross negligence arising from the act of selecting employees. Jury awards and settlements have been as high as several million dollars in such cases. As a result, employment lawyers and human resource professionals have begun to reevaluate the selection process. They are asking: What more do I have to know about an applicant, beyond his or her ability or skills to perform the job? What is reasonably foreseeable conduct?


Once these objectives have been considered, certain tests may then be used to evaluate the risk certain screening devices may create or ameliorate. What are the risks in seeking further information about applicants? Is there a line between what the employer needs to know about an applicant to avoid liability and inquiries that violate the applicant’s right to privacy? Could the inquiries expose the employer to challenges arising from federal or state anti-discrimination laws? How can an employer evaluate the risk of hiring the wrong person in light of the employer’s need to fill a position? How much does a reasonable investigation cost? How does one define what a reasonable investigation is?

These questions must be considered in the context of an employer’s personnel selection objectives which may include: 1) reduction of turnover; 2) management and reduction of employee cost; 3) improved productivity or efficiency; 4) selection of skilled and able employees; and 5) demonstration of reasonable care in hiring.

Traditionally employers have used selection criteria and devices for reasons ranging from the unsophisticated to specially designed tests to measure an applicant’s or an employee’s ability to perform or to learn to perform a specific job. The underlying reason for an employer’s use of such criteria and devices or tests is to have some certainty that those persons hired or promoted are capable, reliable, honest and loyal. Such selection criteria and devices are also used, however, to avoid making an independent judgment of the applicant’s qualifications.

The following discussion sets forth an analysis of the process that employers should use in evaluating selection devices generally and specifically polygraph tests, honesty tests, the use of outside consultants for screening, and the giving and obtaining of references. The potential liability of an employer who misuses selection devices will also be considered. This discussion is premised on the theory that employers are not willing to accept the risk of negligent hiring or retention lawsuits. Therefore, employers must choose selection criteria or devices that will reduce the risk of such liability while making sure not to interfere with the rights of applicants and employees.

I

METHODOLOGY: ASSESSMENT OF THE JOB

The first step in reducing the risk of liability for negligent hiring or retention is a careful assessment of the job that is to be filled. While all
aspects of the job should be examined, there should be a special focus on requirements such as trustworthiness, honesty and competence, as well as reasonably foreseeable circumstances that might present a special temptation for violent or criminal conduct. These factors should be placed on a sliding scale so that as the job increases in the level of sensitivity and in the opportunities for wrongdoing the more extensive will be the employer's attempts to investigate the background of the applicant. The following lists some of the job components that might be considered in a job assessment. Of course, each job assessment should be based on the realistic and reasonable components of individual jobs, and the frequency (for example: never, seldom, often, always) with which the job involves the component.

Drives company vehicle
Receives cash or checks
Receives goods from shipper/company
Enters customers' homes—customer present
Enters customers' homes—customer absent
Performs work where children are present
Works alone
Works with another person
Works with hazardous materials:
  a. explosives
  b. electrical wiring
  c. chemicals
  d. firearms
Hours of work
  a. days
  b. nights
Works with machinery
Directs work of others
Responsible for accepting and checking work of others
Must hold state license to do job (or other certification)
Must be able to operate certain equipment:
  a. computer
  b. stamp press
  c. word processor
Must have knowledge of specific product(s)
  List:
Must have ______ years experience
Must have specific or general education
  List:
Must be able to work with public

II

Methodology: Assessment of the Applicant

Once the job components have been compiled and ranked according
to importance, the employer should review its application form to see if the information requested on the form bears any relationship to the job components. Since most companies use general application forms the employer will not be able to evaluate the applicant vis a vis the job components without further screening and verification of employment history and references.

Because the risks attendant to jobs will vary, the employer may wish to establish a written policy on screening that is given to all applicants and employees. The policy should set forth the kind of information the employer may require before it makes an employment decision. Furthermore, the policy should contain a statement to the effect that applicants and employees may be required to sign waivers in order to be considered for hire, transfer or promotion. The policy may be stated on the application form and included in the employee handbook or otherwise communicated to employees.

The employer should also decide which categories of jobs will be subject to special screening. Criteria for evaluating the information received should be established and uniformly applied. For example, if the employee will have access to a company vehicle what would be an acceptable or unacceptable driving record? What will the employer do if it finds that the employment application has been falsified? How will the employer evaluate felony and misdemeanor convictions? What if the applicant was terminated from former employment for cause? What would constitute severe financial problems that would disqualify a person from holding a fiduciary position?

The policy, nature of information requested, waiver forms and criteria for evaluating the information should be reviewed by an attorney familiar with the legality of using or gathering personal information about an applicant or an employee. Such issues as state and common law privacy rights; state, federal and local laws and regulations concerning employee selection, equal employment opportunity, handicap and age discrimination, confidentiality of medical, criminal and credit records, and rights under the Fair Credit Reporting Act\(^6\) should be considered. The attorney should also evaluate and suggest how to avoid defamation actions due to the failure to limit the scope and use of the information collected. Legal counsel should advise as to whether certain selection devices such as honesty and polygraph tests should be used and what steps should be taken to assure their accuracy and proper administration.

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III
THE PUBLIC RECORD: WHAT INFORMATION IS AVAILABLE

The variety and type of personal information available to public scrutiny in today's "information age" is staggering. The only limits to how much information is available are some laws and regulations requiring a signed release from the individual who is the subject of the inquiry. Even restricted information may be included in public records, such as medical information contained in worker's compensation records.

Employers conducting investigations of applicants or employees usually telephone the references listed by the applicant and/or make written requests for information, accompanied by a release signed by the subject of the inquiry. In addition, some employers use the services of outside investigators to provide certain information. The information available to investigators includes past and current employment: schools and degrees, credit history, criminal history (including state, county and federal felony and misdemeanor charges and convictions), motor vehicle and driving records, records of residence, voting records, personal and professional references, state, county and federal civil litigation records, bankruptcy records, worker's compensation records, military records, tax records (personal and real estate), tax liens, marriage records, birth records, licensing information, probate records, real estate filings, registrations of businesses with the secretary of state or corporations divisions, Uniform Commercial Code filings, immigration records, Interstate Commerce Commission records, public utility commission records, administrative (local, state, federal) records, and personal income and background information filed with state or federal entities, including Congress, by persons covered by certain public official financial reporting laws or who seek appointment to certain offices.

Much of this information is maintained by private investigative or reporting services and is often accessible by computer in a matter of minutes or hours at a minimal cost. If a private service is used or if the investigation is conducted "in-house," safeguards should be established by the employer to assure that the reports it receives are accurate and relevant. Each request for investigation should specifically state the nature of the information requested and the employer should be able to show a correlation between the requested information and the job components. In addition, each request should specify the information sought, the dates or time frame to be investigated, the type of report sought (for example whether a written synopsis or a report containing copies of relevant documents and interview notes, including sources and other identifying information needed), and a certification of accuracy. An agreement for indemnification from liability from outside investigative services may also be desirable.
At a minimum, counsel should be asked for advice as to what information should be requested. In some cases it may be useful to prepare a list of the kinds of information the employer does not wish to receive from the investigator. Such an exclusionary list, prepared with the assistance of counsel, may include items that an employer may not legally consider in making employment decisions. In some circumstances, the employer may request that the report be presented directly to legal counsel for review and that legal counsel remove any questionable information before giving it to the employer. Legal counsel should also advise the employer as to any state or federal laws that might give the subject of the report a right to see certain sections, such as a credit report. Furthermore, counsel should also discuss with the employer the advisability of affording the subject of the report the opportunity to explain or refute any information that the employer may use in reaching a negative employment decision.

IV
TECHNIQUES THAT MAY PREVENT EMPLOYER LIABILITY
IN EMPLOYEE SELECTION

There are four basic criteria that employers should use in deciding how to obtain and use personal, private and public information about an applicant or employee in making employment decisions. First, is the information available or capable of development and by what means? Second, is it legal to use such information? Third, can the information be verified? Fourth, does the employer have an obligation to keep the information confidential?

The following example shows the process an employer, with the assistance of legal counsel, should employ in deciding what information or devices to use and how to use them.

* * * * *

Moonstone, a jewelry store that sells class rings to the Air Force Academy, has advertised for a salesperson for its Rodeo Drive store. Moonstone’s ad states that it is seeking a person with experience in selling jewelry with some knowledge of gemstones and jewelry design. Mr. Topaz Jones has filled out an application form and has stated on the form that he has seven years experience in jewelry sales with four different companies. Mr. Jones is black. Mr. Coin, the personnel manager, thinks Mr. Jones may be a heavy drinker because he saw Mr. Jones at the Heavenly Hills Alcoholism Center when Mr. Coin was there visiting his mother.

Mr. Coin has decided that he is looking for a person who is reliable, honest, hard-working and knowledgeable. He has examined the compo-
nents of the job and has determined that the following characteristics are most important.

<table>
<thead>
<tr>
<th>Components</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Receives cash or check</td>
<td>always</td>
</tr>
<tr>
<td>Receives goods from shippers</td>
<td>always</td>
</tr>
<tr>
<td>Hours of work—days</td>
<td>always</td>
</tr>
<tr>
<td>Work with minimum or no supervision</td>
<td>often</td>
</tr>
<tr>
<td>Public contact with customers</td>
<td>always</td>
</tr>
<tr>
<td>Takes customer orders and goods for repair</td>
<td>often</td>
</tr>
<tr>
<td>Has knowledge of jewelry design and repair</td>
<td>often</td>
</tr>
<tr>
<td>Experience</td>
<td>5 years</td>
</tr>
<tr>
<td>Punctual</td>
<td>always</td>
</tr>
<tr>
<td>Absenteeism</td>
<td>seldom</td>
</tr>
</tbody>
</table>

Mr. Coin wants to use a variety of methods to check Mr. Jones’ suitability for employment. He tells his lawyer, Ms. Good, that he wants to know if he may use the following investigative methods and whether there are any legal restrictions or prohibitions that he needs to consider: polygraph test, honesty testing, medical records check, credit check, criminal records check, physical (medical) examination, check of references of past employers, civil litigation check.

Ms. Good advises Mr. Coin in a letter that sets forth:

1. *Advice as to any restrictions or prohibitions on polygraph or honesty testing under state or local statutory law.*

In preparing her answer Ms. Good might wish to use the following checklist that was designed to assist employers considering using the polygraph for testing employees. Before conducting any polygraph examination, the following questions *must* be considered:

Does the polygraph violate a federal or state statute?

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Have the state courts in the state where the polygraph is to be conducted issued restrictions regarding the taking and use of polygraphs?

Does the state where the polygraph is to be conducted recognize a public policy exception to at-will employment, implied covenant of good faith and fair dealing in employment relationships, and/or an implied contract of permanent employment?

Does the state where the polygraph examination is to be taken have a statute regarding who can administer and/or the methods to be used in administering polygraphs?

Do any company brochures, pamphlets, policies (especially disciplinary policies), handbooks or other materials have any language that may in any way affect or relate to the taking of polygraphs and/or the use of polygraph results?

Are any other methods of employee questioning available which are less intrusive than a polygraph?

Does the employee have any type of medical disorder and/or mental illness history?

Have any similar disciplinary problems of the employee and/or other employees in the company ever been handled without a polygraph? Have more serious disciplinary problems ever been handled favorably without the use of polygraph?

Do you have employees in states that have restrictions or regulations on polygraphs, and other employees who work in states that have no polygraph restrictions or regulations?

Will the employee’s refusal to take the polygraph cause suspicion and/or directly result in any form of discipline and/or a different work environment?

Are polygraphs being used for the first time or used infrequently at the place where the employee works, so that the employee would not regard the use of polygraphs as a normal business routine?

2. Advice as to only federal, state or local statutes, and regulations or administrative and court decisions that may govern or limit the use of certain investigate methodologies.


A "yes" answer to any one of those questions means the employer should beware. A tough decision may loom on the horizon.

Criminal History: Many state and local civil rights commissions restrict the use of inquiries concerning an applicant's criminal history. The use of arrest records has been repeatedly prohibited by the courts. On the other hand, convictions are generally considered to be probative where an employer's action is tailored to the nature and gravity of the offense, the length of time since conviction, and the nature of the job in question.

Testing (Including Honesty Tests): The Uniform Guidelines on Employee Selection Procedures "UGESP") are designed to provide a framework for determining the proper use of tests and other selection procedures, including written tests, training programs, evaluations of desired skills and abilities, medical and physical examinations, references, and personal evaluations. If the selection procedure has an adverse impact on members of any race, sex or ethnic group it will be evidence of discrimination unless the procedure has been validated to be job related. An "Honesty Test" would be subject to validation under UGES to determine if it had an adverse impact.

3. Advice as to whether or not a written release is required from the applicant to secure certain information and whether the law requires, or practice recommends, certain provisions, such as limits as to the time the release is in effect and to whom and in what form the requested information may be released.

Medical Records: Although state labor law may be silent on the subject of confidentiality of medical records, laws and regulations related to health, medicine or hospitals may set forth specific procedures required to protect confidentiality. In addition, state medical societies may have determined that physicians may not release patient information without a release and then will release the information only to another physician. Joint medical-legal professional committees may have developed a model release.


9. For a case involving arrest, see, e.g., Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972). For cases involving convictions, see, e.g., Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972).

10. 29 C.F.R. § 1607.1(B) (1987).


12. Such a waiver or release is available from the Colorado Bar Association, and may be found
4. Advice as to constitutional,\textsuperscript{13} common law or statutory\textsuperscript{14} rights of privacy of the applicant and recommendations as to how to insure that such information is maintained in a confidential manner.

5. Practical Advice

Although Mr. Coin's jewelry store is located on Rodeo Drive it is not a "Fortune 500" company. Ms. Good's letter to Mr. Coin should not be a legal brief but rather an advisory opinion as to how Mr. Coin can investigate applicants. Mr. Coin needs a simple selection system that will show that he reasonably investigated the background of his employees. If he cannot set up a system for the security of any confidential information he may be advised to deposit it with Ms. Good and keep a record of the type of information and its sources in his files. He may need a sample release for information and a sample letter requesting specific information. It may be necessary to advise Mr. Coin about how to contract investigative services and how to limit the information he receives to specific, verifiable and lawfully obtained facts. In addition, Mr. Coin should be advised as to the kinds of conduct or actions that might result in liability attaching to him personally as well as to the store. As a matter of sound practice, Ms. Good should personally review her advice with Mr. Coin in order to answer any questions he may have and to ensure that he understands how to document his selection process.

V

DEFAMATION AND THE SELECTION PROCESS

A. Defamation

Defamation is a tort that has developed over the years from state common law. Defamation encompasses two actions: libel (written or printed defamation) and slander (spoken defamation). The elements of a claim for defamation and the defenses to such claims are basically the same in every state. Many states, however, have recognized a new claim of defamation in the employment context and it is dangerous to genera-
lize this claim without carefully reviewing the law of the state in which the claim arises.

A claim for defamation generally consists of five elements:

1. A statement, whether oral or in writing, concerning someone or something;
2. Communication of the statement to a third person (publication);
3. Falsity of the statement communicated;
4. The statement tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him; and
5. The party making the statement acted negligently in failing to determine the truth of the statement prior to making it to the third party.\(^\text{15}\)

In addition to the general tort of defamation, employers may also be charged with claims for defamation per se. Defamation per se occurs when statements are made about an employer in his trade, business or profession and result in a presumption of damages. Special damages do not have to be plead in these cases or proved to sustain such a claim.\(^\text{16}\)

Statements adversely reflecting on an employee’s abilities are defamatory, as are statements that an employee has engaged in criminal conduct or has a loathsome disease. A defamatory statement about an employee is not actionable unless it is published to another party. A communication between a supervisor and personnel director, or between a human resource assistant and a prospective employer, constitutes “publication.”

\[\text{B. Defenses to Defamation}\]

Truth, privilege, and lack of authority to publish are the three most common defenses to a defamation claim.

\[\text{1. Truth}\]

Truth is an absolute defense to claims of defamation.\(^\text{17}\) One court has stated that this defense is not available if only a partial truth is told: for example, if an employer states only one of two reasons for a dis-

\(^{15}\) Restatement (Second) of Torts §§ 558 & 559 (1977).


charge. Many states place the burden on the plaintiff to prove the falsity of the statement.

In formulating a strategy for the defense of such actions it is necessary to remember that a statement of opinion, except in certain circumstances, is not defamatory. If the communication in question is arguably an opinion, a motion for summary judgment should be made since this is initially a question of law for the court to decide. If the court, however, is unable to resolve the issue it becomes a question of fact for the jury. If this question goes to the jury it is important to carefully prepare for the examination of witnesses during the plaintiff's case because it is here that the opportunities to persuade the court that the plaintiff has not or cannot prove falsity will arise.

Although truth is an absolute defense to a claim of defamation, publication of a truthful statement can be the basis of a claim for intentional infliction of severe emotional distress, invasion of privacy and other tort actions. For example, an individual will be liable if it is determined that he or she publicized a statement with the intent to harm another individual; in other words, if the defendant acted with malice.

2. Privilege

A defense of privilege may either be an absolute or a qualified privilege, arising from the statements made in the employment setting.

Employers have a qualified privilege to publish false and defamatory statements about an employee if the employer can show that the statement was:

1. made with a good faith belief in its truth;
2. for a business interest or purpose;
3. limited to the business interest or purpose to be served;
4. made on a proper occasion; and
5. published to proper parties only.

The key issue in most defamation actions by employees is whether an employer has abused its qualified privilege.

Almost all states now recognize a qualified privilege for a communication from a past employer to a prospective employer about a job appli-
cant. This privilege includes stating the reason for termination.\(^{24}\) However, this privilege does not apply if the communication is made with actual malice (knowledge that the statement is untrue or in reckless disregard as to its truth). Actual malice exists if the defendant publishes a defamatory statement without an honest belief as to its truth based on reasonable or probable cause and after reasonably careful inquiry to determine the statement’s truth.\(^{25}\) Publication of defamatory statements due to ill will, spite, rancor, revenge or other personal animosity also constitutes actual malice.\(^{26}\) It is also possible to void the privilege by making an unnecessarily or excessively broad publication of privileged information. Such broad publication may also constitute malice.\(^{27}\)

Communications to a co-worker may be conditionally privileged depending upon the state in which the action is brought. The basis for this conditional privilege is the employer’s legitimate business interest in communicating information to employees to the extent the employees need to know that information. Examples of reasonable communications include instances when an employer has an interest in preventing rumors about the reasons for termination of employees because such rumors may themselves defame the terminated employees;\(^{28}\) where informing its employees of the reasons for a co-worker’s termination is necessary to preserve morale;\(^{29}\) and where informing its employees that others were terminated due to cash shortages is necessary to impress upon the remaining employees the importance of meticulously handling company funds.\(^{30}\) Again the availability of the qualified privilege varies from state to state.

Communications to a customer may also be privileged.\(^{31}\) The factors to be considered in evaluating this privilege are: whether the employees made the statement to protect themselves or their employer’s interest; whether the statement concerns matters of mutual concern to the employer and the customer; and whether the statement was made in


\(^{25}\) Boulet v. Beals, 177 A.2d 665 (Me. 1962).


\(^{27}\) Bratt v. IBM, 392 Mass. 508, 467 N.E.2d 126 (1984) (requiring that the overbroad communication must have been reckless to jeopardize the privilege), aff’d in part, 785 F.2d 352 (1st Cir. 1988).


response to a customer inquiry.\textsuperscript{32} The general curiosity of the public, however, will probably not provide a specific enough interest to support a conditional privilege. Communications to customers are risky and to maintain such a conditional privilege all communications should be limited to the parties that need to know, a group that is usually quite limited.

3. \textit{Lack of Authority}

The third defense to actions for defamation arises out of the basic principles of agency law.\textsuperscript{33} The liability of an employer for an employee's defamatory statement about another employee depends on the authority of that employee to make or publish the statement. As in all agency questions, authority may be actual or apparent. Actual authority exists when the person making the statement is charged with that duty; for example, when a human resource employee responds to a reference check.\textsuperscript{34} Apparent authority may exist when the company responds to a reference check, but it is not the proper employee who responds, or when the manager of a store makes a remark about an employee who is or was under the manager's authority.\textsuperscript{35} If a company has a clear policy as to who is permitted to make certain statements, that policy may prevent an apparent authority claim. Punitive damages may also be reversed in a defamation case because an employee is not authorized to make statements and the complicity of the employer was not proven.\textsuperscript{36}

\textbf{C. Practical Suggestions}

Of course employers may take other precautionary steps to lessen the chance of being sued for defamation. While these courses of actions may not be practical or possible in all circumstances or for all employers, they may provide a solution for companies that have ongoing problems in this area. For example, the employee and the employer may agree on the wording of the reference to be given out in the event of an employee's termination. Such mutually agreed upon reference would be in writing and the company's copy would be signed and approved by the employer and the employee. A second means of reducing risk for defamation claims might be to adopt a policy requiring a release from former em-

\begin{footnotesize}
\begin{itemize}
\item[33.] \textit{See} \textit{RESTATEMENT} (SECOND) OF AGENCY § 274 (1958).
\item[34.] \textit{RESTATEMENT} (SECOND) OF TORTS §§ 595-596 (1977).
\end{itemize}
\end{footnotesize}
ployees and prospective employees or applicants for the right to check references. Such releases should be as specific as possible and, in the case of references given by the employer, the employee should know in advance what kind of information would be released. A third option might be to institute procedures within the company to centralize control over all references or comments regarding the reasons for an employee's termination or any adverse employment decision. Such procedures would require designating certain employees who are trained to handle employment inquiries. The designated employees would have written instructions as to the specific information that they may release. Employees not specifically designated to handle employment inquiries should be informed that they are not authorized to give such information to third parties and should be told the procedures for referring such inquiries to the proper authorities.