Employment References in California

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In early 1997, the Supreme Court of California announced its decision in Randi W. v. Muroc Joint Unified School District. The court concluded in this case that a former employer may be held liable under a theory of negligent misrepresentation if the employer gives an unqualifiedly positive employment reference for a former employee whom the employer knows to be potentially dangerous, and that former employee later injures others in the course of new employment the employee acquires because of the positive reference. In this article, Professor Saxton argues that the Muroc decision—while correctly decided under current law—will have serious negative consequences for employment reference practices. The two most serious consequences will likely be: (1) to prompt some employers to excessively disclose negative information that may be unfairly damaging to employees in their job searches; and (2) to discourage many employers from providing employment references for their current or former employees. After exploring these likely effects of the Muroc decision, Professor Saxton proposes legislation that state legislators could enact to encourage employers and others to disseminate employment reference information both freely and responsibly.

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INTRODUCTION

On January 27, 1997, the Supreme Court of California announced its decision in Randi W. v. Muroc Joint Unified School District. The court's...
decision, which has already provoked significant public commentary, recognized the tort of negligent misrepresentation in the context of employment references. Specifically, the court held that a former employer may be held liable under theories of fraud or negligent misrepresentation when the employer gives an unqualifiedly positive reference for a former employee whom the employer knows to be potentially dangerous, if the former employee later injures third parties in the course of the employee’s new employment, acquired in part through the reference.

This article will explore Muroc’s repercussions for employment reference practices in California and other jurisdictions that may be inclined to follow the California Supreme Court’s lead on these issues. The article will argue that Muroc—although correctly decided under currently accepted tort doctrine—may have serious negative consequences for employment reference practices, and that these negative consequences will adversely affect both employers and employees. The article will thus propose legislation that should encourage employers to provide fair employment references, benefitting employees, employers, and the public at large.

To set the context in which these issues must be analyzed, Part I of this article will explain the pre-Muroc legal terrain, that is, the common law doctrines and statutes that governed employment reference practices in California before the court announced Muroc. Part II will discuss the factual allegations involved in the Muroc litigation, the issues presented to the California Supreme Court and the court’s holding. Part III of the article will analyze the post-Muroc environment for employment reference practices, including the unfortunate incentives that Muroc will engender for employers to resort either to excessive disclosures that will be unfairly damaging to employees or to “no comment” reference strategies that are also undesirable for public policy reasons. Part IV of the article contains proposals for legislation, formally presented as a model bill in the Appendix, that state legislators could enact to promote a more favorable environment for responsible employment reference practices.

A significant body of recent literature has explored the general legal framework governing employment references and employers' liability for giving them. To establish the context in which Muroc's impact must be evaluated, however, it is necessary to discuss briefly the pre-Muroc legal framework governing employment reference practices in California. The most significant legal rules governing employment references prior to Muroc were found in three areas: (1) defamation doctrine, as established by California statutes and case law; (2) the common law tort doctrine of intentional interference with prospective economic advantage; and (3) California Labor Code provisions prohibiting "blacklisting."\

A. Defamation Doctrine

When an employer has disclosed false, negative information about a current or former employee to that employee's prospective new employer, the employee may seek damages in a defamation action against the employer who disclosed the negative information. Both statutory provisions...
and case law define the parameters of California's law of defamation, which encompasses libel and slander.\(^5\)

Section 46 of the California Civil Code defines slanders, which are oral defamations. In pertinent part, it provides:

Slander is a false and unprivileged publication, orally uttered . . . which

3. Tends to injure [the person who is the subject of the communication] in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits.\(^6\)

This section of Civil Code § 46 clearly suggests slander's application in the context of an employment reference. Specifically, an employee who believes that her current or former employer has orally communicated false information about her to a prospective new employer—and that the false information suggested she is not qualified for the job she is pursuing—may seek damages in a defamation action against the former employer.\(^7\) In the pre-Muroc period, many employees pursued exactly such claims, and the California courts in the pre-Muroc period decided numerous cases in which employees sued their current or former employers contending that the employers defamed them in employment references or other work-related communications.\(^8\)

The California courts considering these types of claims have interpreted California statutory provisions to protect those providing references with a conditional, sometimes called "qualified," privilege. Since 1872, California’s Civil Code has provided protection in the form of a conditional

\(^5\) CAL. CIV. CODE § 44 (West 1982) ("Defamation is effected by either of the following: (a) Libel[. or] (b) Slander.").

\(^6\) CAL. CIV. CODE § 46 (West 1982). CAL. CIV. CODE § 45 sets forth an analogous definition for written defamations, called "libels": "LIBEL, WHAT. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." CAL. CIV. CODE § 45 (West 1982).

\(^7\) Where the former employer communicated the negative information in writing, as by a reference letter, the employee’s defamation action would be based in libel doctrine, as described in CAL. CIV. CODE § 46.

privilege for communications between individuals on a subject in which they are both interested, or in which the recipient of the communication has an interest.\textsuperscript{9} In 1994, the California legislature foreclosed any argument that this privilege would not apply in the employment reference context, when it amended California Civil Code § 47 to confirm that Section 47(c)'s privilege would protect reference communications.\textsuperscript{10} As amended in 1994, California Civil Code § 47 provides in pertinent part:

A privileged publication or broadcast is one made . . .

(c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) [by one] who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law. . . .\textsuperscript{11}

Applying the statutory privilege, California's courts have held that employees cannot recover defamation damages in this context unless the employees prove that the employers' negative reference comments were made with "malice," and were thus unprivileged.\textsuperscript{12} The California Supreme

\textsuperscript{9} As originally enacted in 1872, the pertinent statutory language provided: "A privileged communication is one made . . . (3) In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, or who was requested by him to give the information. . . ." See historical notes to CAL. CIV. CODE § 47 (West 1982).

Even before 1994, the California courts had interpreted this statutory privilege to protect employers who acted without malice from defamation liability on account of reference statements they made to others concerning their current or former employees. \textit{See}, e.g., Manguso, 200 Cal. Rptr. at 539; Agarwal, 603 P.2d at 65; Lesperance, 31 Cal. Rptr. at 875.

\textsuperscript{10} The legislative history of the 1994 amendments clarifies that their major purpose was to encourage a freer flow of reference information. \textit{See} ASSEMBLY COMMITTEE ON JUDICIARY, Bill Analysis of AB 2778 as Introduced February 10, 1994, (for committee hearing date May 11, 1994); ASSEMBLY COMMITTEE ON JUDICIARY, Bill Analysis of AB 2778 as Amended May 18, 1994, (for Assembly Third Reading, hearing date June 21, 1994).

\textsuperscript{11} CAL. CIV. CODE § 47 (West Supp. 1997).

\textsuperscript{12} Indeed, in interpreting the predecessor to the 1994 version of Civil Code § 47, the California Supreme Court emphasized that a plaintiff cannot establish that a statement — even a false and derogatory one — was defamatory under California law unless plaintiff proves that the statement was unprivileged. In this regard, the court explained that statements that are privileged under Civil Code § 47 simply are not defamatory, even if they are otherwise false and derogatory. \textit{See} Lundquist v. Reusser, 875 P.2d 1279, 1285 (Cal. 1994) (in bank) (quoting Brown v. Kelly Broadcasting Co., 771 P.2d 406, 411-412 (Cal. 1989) (in bank) ("We have held that [1] if section 47(3) applies to the occasion on which a communication is made and if it was made without malice, it is privileged and cannot constitute a defamation under California law.").
Court has also developed fairly specific standards for the "malice" that a plaintiff must demonstrate to show that the defendant's statement was unprivileged. In the court's words:

[Civil Code § 48 provides that] with respect to statements falling within section 47(c), "malice is not inferred from the communication." [note omitted] For purposes of this statutory privilege, malice has been defined as ""a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.""13

The supreme court in Lundquist similarly approved the trial court's instruction that the qualified privilege could also be lost if the person making the challenged statement "[w]as without a good-faith belief in the truth of the statement."14 This standard for "malice" presents a formidable barrier for employees seeking to recover defamation damages on account of their former employers' references, and many employees' defamation suits have failed because of the employees' inability to allege or to prove their former employers' malice.15

B. Intentional Interference with Prospective Economic Advantage

When an employer's unfavorable reference causes the employer's current or former employee to lose a prospective new job, the employee also may seek damages under the tort of "intentional interference with prospective economic advantage."16

In 1985, the California Supreme Court set forth the elements of the tort of intentional interference with prospective economic advantage as follows:

(1) an economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship;


14. Lundquist, 875 P.2d at 1291. As support for the instruction, the Lundquist court quoted Roe-mer v. Retail Credit Co., 119 Cal. Rptr. 82, 88 (Cal. Ct. App. 1975): "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights."

15. See, e.g., Manguso, 200 Cal. Rptr. at 540-41; Conkle v. Jeong, 73 F.3d 909, 917 (9th Cir. 1995); Deaile, 115 Cal. Rptr. at 585-86; Lesperance, 31 Cal. Rptr. at 876.

16. It is possible, although considerably less likely, that an employee might also be able to recover damages from an employer who has negligently interfered with the employee's prospective economic advantage, but has not acted with ill will or an intention to interfere. Cf. Restatement (Second) of Torts § 766C (1977), Negligent Interference with Prospective Contractual Relation: "One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently (a) causing a third person not to perform a contract with the other. . . ." See also Saxton, supra note 3, at 68 (collecting and discussing sources examining whether actor can be liable for negligent interference with prospective contractual relation).
(4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant.\textsuperscript{17}

An employee may attempt to claim that these elements were present when the employee’s current or former employer gave a negative job reference that prevented the employee from obtaining a new job.\textsuperscript{18} California courts applying this tort in the employment reference context have emphasized, however, that California Civil Code § 47’s conditional privilege applies to these types of claims—as it does to defamation claims—to protect employers from liability on account of their non-malicious reference disclosures.\textsuperscript{19} Accordingly, under California law an employee must prove that a former employer acted with “malice” when giving an unfavorable reference before the employee can recover damages under the theory that the employer tortiously interfered with the employee’s prospective economic advantage.\textsuperscript{20}

\textsuperscript{17} Blank v. Kirwan, 703 P.2d 58, 70 (Cal. 1985). The elements described by the California Supreme Court are essentially the same as those stated in \textit{Restatement (Second) of Torts} § 766B (1977):

\textbf{§ 766B. INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATION}

One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

\textsuperscript{18} See, e.g., O’Shea v. General Telephone Co. of California, 238 Cal. Rptr. 715 (Cal. Ct. App. 1987) (employee’s suit against former employer included count alleging former employer tortiously interfered with his prospective economic advantage when it provided negative information about his job performance to the employee’s prospective new employer); \textit{Lesperance}, 31 Cal. Rptr. at 875 (employee claimed, among other things, that his former employer maliciously interfered with his economic opportunity by furnishing misleading negative information in response to a reference inquiry from his prospective employer). \textit{Cf. Conkle}, 73 F.3d 909 (applying California law and recognizing tort of intentional interference with prospective economic advantage may apply in employment reference context, although concluding plaintiff failed to satisfy elements).

\textsuperscript{19} See \textit{Lesperance}, 31 Cal. Rptr. at 875-76 (recognizing that Civil Code § 47’s qualified privilege applies in context of plaintiff’s claim that employer tortiously interfered with his economic opportunities when employer provided unfavorable information in response to a prospective employer’s request for reference information); \textit{O’Shea}, 238 Cal. Rptr. at 720.

\textsuperscript{20} In this regard, California’s treatment of this tort is consistent with treatment of the tort in other jurisdictions. As noted above, \textit{Restatement (Second) of Torts} § 766B (1977) states as an element of the tort that defendant’s interference must be “improper.” \textit{See supra} note 17. Section 767 of the Restatement describes factors that may indicate that a defendant’s interference was improper, including the defendant’s motive and the interests the defendant sought to advance. \textit{Restatement (Second) of Torts} § 767. An employer who acts with the “malice” necessary to forfeit Civil Code § 47’s protection has likely acted “improperly” as required under \textit{Restatement (Second) of Torts} § 766B; conversely, a California employer who provides truthful information or otherwise gives honest advice, with good intentions, in a reference communication likely has not acted maliciously or improperly within the meanings of Civil Code § 47 or \textit{Restatement (Second) of Torts} § 766B respectively. \textit{Cf. Restatement (Second) of Torts} § 772 (1977), Advice as Proper or Improper Interference: “One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other’s contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice.”
C. California's Anti-Blacklisting Provisions

Since 1913, California has had in place statutory provisions prohibiting employers from "blacklisting" former employees. These provisions make it illegal for employers to make misrepresentations about former employees in circumstances where the misrepresentations could prevent the employee from obtaining new employment. Employees have occasionally invoked these provisions when former employers' negative job references caused the employees to lose job prospects.

California Labor Code § 1050 states the basic anti-blacklisting rule:

1050. Misrepresentation preventing employment of former employee; misdemeanor

Any person, or agent or officer thereof, who, after having discharged an employee from the service of such person or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is guilty of a misdemeanor.

Recognizing that the anti-blacklisting provisions could dissuade employers from providing references, the California Legislature also enacted provisions establishing that employers could not be penalized for providing truthful reference information. Thus, California Labor Code § 1053 provides:

§ 1053. Truthful statement of reasons for termination of employment

Nothing in this chapter shall prevent an employer or an agent, employee, superintendent or manager thereof from furnishing, upon special request therefor, a truthful statement concerning the reason for the discharge of an employee or why an employee voluntarily left the service of the employer. If such statement furnishes any mark, sign, or other means conveying infor-

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21. The term "blacklisting" comes from the practice some employers used in the early part of the twentieth century to attempt to discourage union organizing. See William J. Holloway & Michael J. Leech, Employment Termination: Rights and Remedies 246-47 (1985) ("(B)lacklisting was originally associated with employer opposition to labor unions, and was a means of preventing possible union adherents from getting into the work place.").


23. CAL. LAB. CODE § 1050 (West 1989). In addition, CAL. LAB. CODE § 1052 establishes that a violation of CAL. LAB. CODE § 1050 may result in criminal penalties for others who are in an employment relationship with the direct violator. "Any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his employ to commit a violation of sections 1050 and 1051, or who fails to take all reasonable steps within his power to prevent such violation is guilty of a misdemeanor." CAL. LAB. CODE § 1052 (West 1989).

CAL. LAB. CODE § 1054 (West 1989) establishes that employers who violate the anti-blacklisting provisions may also be subject to civil penalties including treble damages:

§ 1054. Violation; civil penalty

In addition to and apart from the criminal penalty provided any person or agent or officer thereof, who violates any provision of sections 1050 to 1052, inclusive, is liable to the party aggrieved, in a civil action, for treble damages. Such civil action may be brought by such aggrieved person or his assigns, or successors in interest, without first establishing any criminal liability under this article.
mation different from that expressed by words therein, such fact, or the fact that such statement or other means of furnishing information was given without a special request therefor is prima facie evidence of a violation of sections 1050 to 1053. 24

Although the California courts have only infrequently applied and interpreted Labor Code § 1050, at least one court has recognized that California Civil Code § 47's conditional privilege may protect employers from liability under Labor Code § 1050. 25 Accordingly, an employee seeking treble damages under Labor Code § 1054 on account of his former employer's harmful reference will likely be required to establish not only that the employer's comments constituted misrepresentations, but also that the employer acted with malice and thus forfeited the conditional privilege.

II  
Muroc: Factual Allegations, Issues Presented, and the California Court's Decision

A. Factual Allegations

The California Supreme Court decided Muroc in the procedural context of plaintiff's appeal from the superior court's order sustaining certain defendants' demurrers to plaintiff's First Amended Complaint. 26 Because the issues were presented in this context, the supreme court based its analysis on the factual allegations set forth in plaintiff's First Amended Complaint (the "complaint"). Those allegations are summarized below. 27

Robert Gadams worked as a teacher and education administrator in three different school districts between 1985 and 1991. The three districts were the Mendota Unified School District ("Mendota"), where Gadams worked as a teacher from 1985 until about 1988; the Golden Plains Unified School District ("Golden Plains"), where Gadams worked as a teacher and administrator from about 1986 until 1990; and the Muroc Joint Unified School District ("Muroc"), where Gadams worked as an administrator in or around 1990.

While Gadams was employed by Mendota, he engaged in improper contacts with female students. These contacts included "hugging some female junior high school students, giving them back massages, making 'sex-

25. See O'Shea, 238 Cal. Rptr. at 720.  
27. The discussion here reports the factual allegations and the proceedings below as they were described in the reported decision of the California Supreme Court in Muroc, 929 P.2d at 585-87 (Chin, Associate Justice). The author emphasizes that the discussion in this section reports the facts as alleged by plaintiff in her complaint; defendants have contested certain of these facts and the veracity of the allegations has not yet been determined at the trial court level.
ual remarks’ to them, and being involved in ‘sexual situations’ with
them.” Gilbert Rossette, a Mendota official, was aware that Gadams had
been accused of and may have committed these improprieties. Nonetheless,
in 1990 Rossette sent an unqualifiedly positive recommendation letter about
Gadams to the placement office at Fresno Pacific College, where Gadams
had received his teaching credentials. Rossette’s letter discussed, in a posi-
tive light, aspects of Gadams’s job performance at Mendota, including
Gadams’s “genuine concern” for students. The letter concluded: “I
wouldn’t hesitate to recommend Mr. Gadams for any position.” Ros-
sette’s letter did not, however, mention Gadams’s alleged inappropriate
conduct with students, even though Rossette knew that the letter would be
transmitted to Gadams’s prospective employers.

While Gadams was employed by Golden Plains, he again engaged in
improper conduct with students, including leading a “panty raid” and mak-
ing sexual overtures and sexual remarks to students. Concerns about
these episodes resulted in Gadams “resigning under pressure from Golden
Plains due to sexual misconduct charges . . . .” Richard Cole, a Golden
Plains official, knew that Gadams had been accused of these improprieties.
Nonetheless, in 1990 Cole prepared and transmitted to Fresno Pacific Col-
lege’s placement office an unqualifiedly positive recommendation letter
concerning Gadams. Cole’s letter, like Rossette’s, discussed Gadams’s
positive qualities without revealing any concerns about Gadams’s improper
conduct. Cole’s letter stated that Cole “would recommend him for almost
any administrative position he wishes to pursue.” Again, like Rossette,
Cole made this recommendation on a form that clearly indicated that the
information he provided would be passed on to Gadams’s prospective
employers.

Similarly, officials from the Muroc Joint Unified School District,
where Gadams worked in 1990 or 1991, gave Gadams an unqualifiedly pos-
itive recommendation for later employment, despite their knowledge that
Gadams had been disciplined as a result of charges that he acted improperly
while employed by them. Specifically, while with Muroc, Gadams was ac-
cused of sexual harassment; allegations included claims that he had en-
gaged in “sexual touching” of female students. Concerns about these
episodes led Muroc to push for his resignation. Nonetheless, Muroc school
officials gave Fresno Pacific College a recommendation letter for Gadams.

29. Id.
30. Id. Fresno Pacific College supplied the form on which Rossette made the recommendation.
The form informed the recommenders that the information they provided “will be sent to prospective
employers.” Id.
31. Id.
32. Id.
33. Id.
34. Id.
in 1991. The letter did not mention Gadams’s alleged improper conduct. Instead, the letter recommended Gadams “for an assistant principalship or equivalent position without reservation,” describing Gadams as “an upbeat, enthusiastic administrator who relates well to the students.”35 The Muroc official who signed this letter, David J. Malcolm, made the recommendation on a form that clearly indicated that the information he provided would be passed on to Gadams’s prospective employers.

Relying on the positive reference letters that Gadams’s former employers had provided, the Livingston Union School District hired Gadams as a vice-principal at Livingston Middle School. According to the complaint, Gadams thereafter (on February 1, 1992) “negligently and offensively touched, molested, and engaged in sexual touching of [the 13-year old plaintiff, Randi W.], proximately causing injury to her.”36 Randi W. (by and through her guardian ad litem) subsequently sued Livingston Union School District, Muroc Joint Unified School District, Golden Plains Unified School District, Tranquility Elementary School, Mendota Unified School District, the State of California, Robert Gadams, Gilbert Rossette, Gary Rice, Richard Cole, Henry Escobar, Kathy Berkeley, and David Malcolm.37

B. Proceedings Below

Plaintiff’s First Amended Complaint included six counts directed at the defendants for whom Gadams worked before he commenced work with the Livingston Union School District. The six counts were based on theories of negligence (Count 1), negligent hiring (Count 2), negligent misrepresentation (Count 3), fraud (Count 4), negligence per se38 (Count 5), and violation of federal law39 (Count 6).

The Superior Court of Fresno County sustained defendants’ demurrers to plaintiff’s First Amended Complaint. The superior court’s written order sustaining the demurrers stated in part that “the First Amended Complaint does not state facts sufficient to constitute a cause of action against the demurring defendants, on the basis that no duty exists to this plaintiff, from these demurring defendants.”41

35. Id.
36. Id.
37. Muroc, 929 P.2d at 584. Defendants Livingston Union School District, Robert Gadams, Henry Escobar, and Kathy Berkeley were not parties to the appeal the Supreme Court considered in Muroc. Id. Accordingly, in this article the term “defendants” refers to the remaining defendants, who did participate in the appeal.
38. The negligence per se theory was based on defendants’ alleged non-compliance with statutes requiring that charges of sexual misconduct be reported to appropriate authorities. See Child Abuse and Neglect Reporting Act, Pen. Code § 11164 et seq.
40. See Muroc, 929 P.2d at 585-86.
41. Id. at 586 (quoting the superior court’s written order sustaining defendants’ demurrers).
Plaintiff appealed the superior court’s order sustaining the demurrers. On appeal, the California Court of Appeal, Fifth District, affirmed the trial court’s ruling on Count 1 (negligence), Count 2 (negligent hiring), and Count 6 (title IX violation). The appellate court reversed the trial court’s ruling on Count 3 (negligent misrepresentation), Count 4 (fraud), and Count 5 (negligence per se). The California Supreme Court summarized the reasoning of the court of appeal on Counts 3 and 4 as follows:

the Court of Appeal . . . ruled that plaintiff’s complaint adequately stated a cause of action for fraud and negligent misrepresentation. The majority relied primarily on sections 310 and 311 of the Restatement Second of Torts, imposing liability on one who intentionally or negligently gives false information to another person that results in physical injury to the recipient or a third person. The majority believed that defendants’ letters contained misleading misrepresentations or “half truths” regarding Gadams’s qualifications.

On March 21, 1996, the California Supreme Court granted review of the decision of the court of appeal.

C. Issues Presented and the Court’s Holding

The California Supreme Court described the general issue presented in Muroc as follows: “In this case, we must decide under what circumstances courts may impose tort liability on employers who fail to use reasonable care in recommending former employees for employment without disclosing material information bearing on their fitness.”

The court resolved this question by deciding that an employer may be held liable under theories of fraud or negligent misrepresentation when the employer gives an unquali-
fiedly positive reference for a former employee whom the employer knows to be potentially dangerous, if the former employee later injures third parties in the course of the employee’s new employment. This section reviews the reasoning the supreme court used in reaching that result.

1. The Fraud and Negligent Misrepresentation Claims (Counts 3, 4)

The supreme court initially framed the issue involved in Counts 3 and 4 by asking whether the two Restatement provisions on which the court of appeal relied should be applied in the circumstances of this case. These provisions were Restatement (Second) of Torts §§ 310 and 311, which address liability for intentional and negligent misrepresentations.47 The supreme court explained that in deciding whether to apply these Restatement provisions in the circumstances of this case, the court would consider “whether plaintiff has sufficiently pleaded that defendants owed her a duty of care, that they breached that duty by making misrepresentations or giving false information, and that Livingston’s reasonable reliance on their statements proximately caused plaintiff’s injury.”48 The court then analyzed each of these elements in turn.

a. Duty to Plaintiff

With regard to whether defendants owed plaintiff a duty of care, the court noted that no California case had previously held that “one who intentionally or negligently provides false information to another owes a duty of care to a third person who did not receive the information and who has no special relationship with the provider.”49 The court resolved this issue of

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47. Section 310 addresses intentional misrepresentations. It provides:
Section 310. Conscious Misrepresentation Involving Risk of Physical Harm
An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.

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

Section 311 addresses negligent misrepresentations. It provides:
Section 311. Negligent Misrepresentation Involving Risk of Physical Harm
(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated.

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

48. Muroc, 929 P.2d at 587-88 (original emphasis).

49. Id. at 588 (original emphasis). Plaintiff in Muroc did not attempt to argue that a special relationship provided the basis for defendants’ duty to her. Id. Circumstances in which a special relationship may cause a potential defendant to assume a duty to protect a potential plaintiff from harm caused by a third person are addressed in RESTATEMENT (SECOND) OF TORTS § 315:

Section 315. General Principle
first impression by applying several of the factors set forth in Rowland v. Christian, including: (1) the foreseeability that plaintiff (or others similarly situated) might suffer harm from defendant’s conduct; (2) the moral blameworthiness of defendant’s conduct; (3) the availability of insurance for the risk involved; and (4) public policy considerations.

In considering the foreseeability of harm, the court found that defendants should reasonably have foreseen that their unqualifiedly positive references could result in the kind of injuries that plaintiff suffered. Specifically, the court concluded that defendants could reasonably have foreseen that their unqualifiedly positive references could induce another employer to hire Gadams, and that, once in that position, Gadams might molest a student like plaintiff.

In addressing the second factor—the moral blameworthiness of defendants’ conduct—the court again concluded that the analysis favored plaintiff’s claim that defendants should have disclosed their knowledge of Gadams’s improper conduct. The court acknowledged that the veracity of plaintiff’s allegations had not yet been tested at trial but stated that “it is certainly arguable that [defendants’] unreserved recommendations of Gadams, together with their failure to disclose facts reasonably necessary to avoid or minimize the risk of further child molestations or abuse, could be characterized as morally blameworthy.”

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965). The California Supreme Court has previously used this Restatement provision in exploring circumstances when one actor may have a duty to warn a potential victim or others that a third person intends to harm the victim. See Tarasoff v. Regents of University of California, 551 P.2d 334, 340 (Cal. 1976) (psychotherapist may have duty to warn a potential victim that the therapist’s patient expressed intention to harm victim).

50. 443 P.2d 561 (Cal. 1968).

51. The court used Rowland to describe more fully these and other factors typically used by the California courts in analyzing duty issues:

In this state, the general rule is that all persons have a duty to use ordinary care to prevent others from being injured as the result of their conduct. [citation omitted] As we have observed, “Rowland enumerates a number of considerations . . . that have been taken into account by courts in various contexts to determine whether a departure from the general rule is appropriate: the major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.”

Muroc, 929 P.2d at 588 (quoting Rowland, 443 P.2d at 564).

52. Muroc, 929 P.2d at 589. Again, in doing this analysis the court assumed that plaintiff’s allegations were true, as the court was required to do in analyzing whether the Superior Court properly sustained defendants’ demurrers to plaintiff’s First Amended Complaint. Id. at 589.

53. Id.

54. Id. at 589.
In discussing the third factor—the "availability of insurance or alternative courses of conduct"—the court stated conclusions that will be especially important to analysis of employers' likely reactions to Muroc.55 The court first assumed that standard business liability insurance might cover employers' liability for their negligent misrepresentations in references, even if not for their intentional misrepresentations or fraud. However, the court then stated:

[Perhaps more significantly, [the Muroc] defendants had alternative courses of conduct to avoid tort liability, namely, (1) writing a "full disclosure" letter revealing all relevant facts regarding Gadams's background, or (2) writing a "no comment" letter omitting any affirmative representations regarding Gadams's qualifications, or merely verifying basic employment dates and details. The parties cite no case or Restatement provision suggesting that a former employer has an affirmative duty of disclosure that would preclude such a no comment letter. As we have previously indicated, liability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship not alleged here.56

The court then devoted its most careful attention to the fourth factor, the "public policy considerations" implicated by its decision on whether to impose a duty of disclosure on employers in this context. The court first emphasized the strong policy of preventing the type of harm allegedly suffered by plaintiff here: "One of society's highest priorities is to protect children from sexual or physical abuse."57 After highlighting this policy, the court acknowledged, as defendants and two amicus curiae had argued, that the imposition of liability on the defendants in this case might discourage other employers from providing references freely,58 and that the resulting restriction of reference information could disserve both employers and employees.59 The court then turned to plaintiff's arguments in response to these concerns. In particular, the court focussed on how employers provid-

55. See infra at Section III.
56. Id. at 589.
57. Id.
58. Id. at 589-90. The court explained defendants' argument as follows:
In defendants' view, rather than prepare a recommendation letter stating all "material" facts, positive and negative, an employer would be better advised to decline to write a reference letter or, at most, merely to confirm the former employee's position, salary, and dates of employment. According to defendants, apart from the former employer's difficulty in deciding how much "negative" information to divulge, an employer who disclosed more than minimal employment data would risk a defamation, breach of privacy, or wrongful interference suit from a rejected job seeker. Id. at 590.
59. Id. at 589-90. In this regard, the court noted:
Defendants contend that the threat of potential tort liability will inhibit employers from freely providing reference information, restricting the flow of information prospective employers need and impeding job applicants in finding new employment. One writer recently explained that "[m]any employers have adopted policies, sometimes referred to as 'no comment' policies, under which they refuse to provide job references for former or departing employees...[T]hese policies work to the detriment of both prospective employers and prospective employees."
Id. at 590 (quoting Saxton, supra note 3, at 45).
ing references would be protected from liability, in at least some situations, by the conditional privilege codified in California Civil Code § 47, which would protect employers from defamation liability based on nonmalicious communications regarding an applicant's suitability for employment. \(^60\)

Two aspects of the court's discussion of California Civil Code § 47 are particularly important for analysis of employers' reactions to Muroc. \(^61\) First, the court expressed reservations about whether section 47's conditional privilege would protect employers from suits by injured third parties like the plaintiff in Muroc; the court noted that “[l]egislative materials submitted by [an amicus curiae] . . . indicate that Civil Code section 47, subdivision (c), was primarily intended to provide employers with a defense to actions by former employees, rather than to insulate them from all tort liability arising from employment disclosures.” \(^62\) Second, the court noted that Section 47's privilege would be inapplicable to the defendants in Muroc—even if the privilege might generally be available to defendants in suits brought by injured third parties who were not former employees—because the statutory privilege by its terms applies to communications made “upon request” by prospective employers; the letters written by the Muroc former employers had not been solicited by the Livingston Union School District. \(^63\)

While the court did not clearly indicate how much protection Civil Code § 47 would generally give to employers in suits initiated by injured third parties, the court was apparently persuaded that the balancing of conflicting policies favored plaintiff. Hence, the court stated its conclusion and holding on the duty question as follows:

In light of these factors and policy considerations, we hold, consistent with Restatement Second of Torts sections 310 and 311, that the writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees. In those cases, the policy favoring free and open communication with prospective employers should prevail. \(^64\)

\(b. \) Misrepresentation

Having resolved the question of duty, the court proceeded to examine whether plaintiff had sufficiently pled that defendants breached the duty

\(60. \) Id. at 590-91. See discussion of Cal. Civ. Code § 47, supra note 13.

\(61. \) See infra at Section III.

\(62. \) Muroc, 929 P.2d at 591.

\(63. \) Id.

\(64. \) Id.
they owed to her by making misrepresentations or giving false information. The court concluded that plaintiff had done so. In reaching this conclusion, the supreme court discussed, then rejected, defendants' argument that the letters contained no affirmative misrepresentations.

The court characterized defendants' argument as follows: "[Defendants suggest that] a letter noting only a candidate's favorable qualities cannot reasonably be deemed misleading as to any unfavorable ones, and the recipient of such a letter cannot reasonably rely on any implication that the candidate lacks unfavorable qualities." The court disagreed with defendants' arguments that the letters did not contain misrepresentations. Instead, the court sided with the majority opinion of the court of appeal that the letters contained "misleading half-truths" amounting to misrepresentations. The supreme court believed that the negative information that defendants omitted materially qualified the positive information that defendants did include in their letters. Thus, the court concluded:

We conclude that these letters, essentially recommending Gadams for any position without reservation or qualification, constituted affirmative representations that strongly implied Gadams was fit to interact appropriately and safely with female students. These representations were false and misleading in light of defendants' alleged knowledge of charges of Gadams's repeated sexual improprieties. We also conclude that plaintiff's complaint adequately alleged misleading half-truths that could invoke an exception to the general rule excluding liability for mere nondisclosure or other failure to act.

c. Reliance

Regarding the reliance element, the supreme court again rejected defendants' arguments that plaintiff's allegations were insufficient to permit her case to go forward. Defendants argued, using language from Restatement §§ 310 and 311 and from case law, that plaintiff could not proceed against them on a misrepresentation theory unless she alleged that she herself had relied on defendants' representations to her detriment. Where plaintiff's allegations established only that others (here the Livingston Union School District) relied on defendants' letters, defendants argued, plaintiff's pleadings were insufficient. The court found defendants' argument unconvincing and concurred with the opinion of the court of appeal that the Restatement provisions should be construed to permit injured third parties...
parties—as well as those who themselves relied on the misrepresentations—to recover. The court stated its conclusion on the reliance issue as follows: “We agree with the Court of Appeal’s reliance analysis. Under the Restatement provisions, plaintiff need only allege that her injury resulted from action that the recipient of defendants’ misrepresentations took in reliance on them.”

d. Proximate Cause

The supreme court similarly found that plaintiff’s complaint contained allegations sufficient to establish proximate causation. In the court’s view, the facts plaintiff alleged would tend to establish that “plaintiff’s injury foreseeably and proximately resulted from Livingston’s decision to hire Gadams in reliance on defendants’ unqualified recommendation of him.”

Thus, with the duty, misrepresentation, reliance and proximate cause questions all resolved in plaintiff’s favor, the supreme court concluded that the superior court had erred in sustaining defendants’ demurrers to plaintiff’s Count 3 (negligent misrepresentation) and Count 4 (fraud). Accordingly, the court remanded the case for further proceedings.

2. Negligence Per Se (Count 5)

Plaintiff’s theory of negligence per se was based on defendants’ alleged non-compliance with statutes requiring entities like defendants to report child abuse to appropriate authorities. The court of appeal had concluded that plaintiff’s allegations in Count 5 were sufficient to withstand defendants’ demurrers, and reversed the superior court’s ruling on this issue. The California Supreme Court disagreed with the court of appeal and reinstated the superior court’s order sustaining defendants’ demurrers to Count 5. In so holding, the court stated:

We need not decide whether the complaint’s allegations are sufficient to allege defendants knew or suspected reportable “child abuse,” because it is clear plaintiff was not a member of the class for whose protection the Re-

73. Id. at 594. The court was influenced by comment (c) to RESTATEMENT § 310: “A misrepresentation may be negligent not only toward a person whose conduct it is intended to influence but also toward all others whom the maker should recognize as likely to be imperiled by action taken in reliance upon his misrepresentation.” The court also relied upon RESTATEMENT (SECOND) OF TORTS § 311, comment d, illus. 8. See 929 P.2d at 593-94.

74. Muroc, 29 P.2d at 594. The court also noted that “[i]n a case involving false or fraudulent letters of recommendation sent to prospective employers regarding a potentially dangerous employee, it would be unusual for the person ultimately injured by the employee actually to ‘rely’ on such letters, much less even be aware of them.” Id.

75. Id.

76. Id.

77. Id. at 595.

78. Id. at 594.

79. Id. at 586-87, 594.

80. Id. at 595.
porting Act was enacted. Defendant school districts were never the "custo-
dians" of plaintiff, a Livingston student and, accordingly, owed her no
obligations under the Act.81

III
THE POST-MUROC EMPLOYMENT REFERENCE ENVIRONMENT:
THE DANGERS OF EXCESSIVE DISCLOSURES AND
INCENTIVES TOWARD "NO-COMMENT"
REFERENCE STRATEGIES

Even before the California Supreme Court announced Muroc, concern
over the repercussions of the current legal environment for employment ref-
ERENCE practices had prompted significant commentary in both the popular
press and scholarly journals.82 The Muroc decision, however, will likely
exacerbate existing tensions in law and public policy. As explained below,
Muroc's most serious detrimental effects may be: (1) to encourage employ-
ERS to "over-disclose" negative information in a way that may unfairly dam-
age employees' employment prospects; and (2) to encourage employers
who have previously given employment references freely to join the swell-
ing ranks of employers who have adopted "no comment" reference strate-
gies because of concern about legal exposure.

A. The Danger of Excessive Disclosures: The Unfair Prejudice to the
Eccentric Employee and Other Disclosure Issues

From the perspective of California employers and employees, the most
significant aspect of Muroc is the California Supreme Court's holding that
employers have a duty when giving references to disclose any negative in-
formation suggesting a substantial risk that a former employee might be
dangerous to others. The facts alleged in Muroc presented a comparatively

81. The court also observed:
To adopt plaintiff's contrary argument would impose a broader reporting obligation than the
Legislature intended. Under plaintiff's interpretation of the Reporting Act, a child care custo-
dian that fails to report suspected child abuse affecting one child in its care or custody could be
held liable, perhaps years later, to any other children abused by the same person, whether or
not those children were within its custodial protection. Neither legislative intent nor public
policy would support such a broad extension of liability.
Id. This article does not attempt to analyze the supreme court's treatment of plaintiff's negligence per se
claim.

82. See e.g., sources cited supra at note 3. See also Ross H. Fishman, When Silence is Golden;
Providing Employment References, 79 NATION'S BUS. 48 (1991) ("It is widely believed that the safest
and most conservative position is to refuse to provide references."); Lawrence S. Kleiman & Charles S.
White, Reference Checking Dilemma: How to Solve It?, 52 SUPERVISION 6 (Apr. 1991) ("Currently
many firms are unwilling to provide information. Until the legal environment is perceived as being
safer, organizations will continue to feel pressure to provide minimal information about previous em-
ployees to reduce their liability."); Alan L. Rolnick, When Silence is Golden: Information on Dismissal
of Employees, 35 BOAAN 87 (December 1993) ("With an ever increasing risk of being subject to liabil-
ity for defamation, however, fewer and fewer employers are willing to offer more than position held and
dates of employment.").
clear-cut case in which the employers' disclosure obligation seemed justified. Indeed, if the plaintiff's allegations are accurate, the Muroc defendants acted unconscionably when they recommended Robert Gadams, while failing to disclose their knowledge or suspicion of Robert Gadams's propensities to molest children. Muroc's reach, however, will not be limited to the Muroc parties; thus California employers after Muroc will be required to make difficult judgments about how much—and what types of—negative information they must disclose when giving references for current or former employees. Perhaps in many situations, employers who know of Muroc's holding may feel compelled to disclose information that may be unfairly damaging to the employees involved.

To illustrate the potential dangers of "excessive disclosures," consider three hypothetical scenarios:

Case 1

John T. is employed as a clerk by Employer A, a large hardware store. He stocks shelves and works the register, assisting customers with their orders. John has always worked well with the customers, although he has occasionally expressed his frustration to his co-workers (although never to customers) about how "dumb" some customers' questions are.

John's co-workers and supervisors know him to be fiercely competitive in the many sports activities in which he participates in his off-duty hours. At the company picnic last year, John got into a heated argument with a co-worker's husband about whether he'd been tagged out when he slid home during a softball game. John also plays ice hockey, and friends from work who have seen him play have remarked that he seems to get more penalties than other players for unnecessary roughness and fighting during games. Co-workers who have played golf with John have also seen him break clubs over his knee (or, occasionally, over a golf cart) in frustration after a bad shot.

John's manager has now learned that John is applying for new jobs with other employers, seeking a position in which he could sell sporting goods equipment on a retail basis. John's manager expects that he will soon be getting calls from prospective employers seeking to evaluate John for employment.

Case 2

Bill J. has worked as a supervisor for Employer B for six years. He has always been an excellent supervisor; he is diligent, responsible and fair. Occasionally, Bill is required to travel on company business.

83. Obviously, even before Muroc, employers had to make judgments about the types of negative information they would disclose when providing references about current or former employees. And even before Muroc, employers may have felt pressure on occasion to disclose negative information that arguably had little or no nexus to an employee's workplace performance. But after Muroc, well-informed employers who continue to provide references will likely feel considerably more pressure to disclose information about employees—whether job-related or not—if the information suggests that the employee might conceivably be dangerous to others in connection with future work.
these trips, Bill usually drives his own car. Bill has never been known to drink on the job, but he gets pretty “tipsy” at company parties, and co-workers who have dined socially with Bill have reported back to others at the office that Bill drinks heavily at home. Six months ago, the newspaper reported that Bill had been arrested on a Saturday night for driving while intoxicated. Bill pled guilty and paid a fine. His driving privileges have since been restored.

Today, Bill advised his boss that he is under consideration for a new job as a supervisor with a company in another town. Bill’s responsibilities at the new job would be very similar to his responsibilities with Employer B. Bill would like Employer B to provide him with a reference letter that Bill could give to the prospective new employer.

Case 3

Robin S. has worked for several years as an editor for Employer C, a trade magazine. She has always been punctual and careful with her work, and her supervisors think she is a talented editor. Robin’s co-workers and supervisors do think, however, that Robin is “odd.” Co-workers who commute with Robin on the subway have frequently observed her talking to herself. In addition, co-workers who have visited Robin at her home have heard her burst into song while sitting alone in the latrine. Robin also seems inordinately fond of movies like Rambo and has boasted to co-workers that she has an excellent collection of old Soldier of Fortune magazines in a closet in her home. Robin’s supervisors and co-workers have frequently discussed, among themselves, their (half-serious) concern that Robin might “go off the deep end” some day and bring a weapon to work and hurt someone. To date, however, Robin has never acted in a dangerous or confrontational manner at work.

Today, Robin advised her manager that she is applying for a new job as a copy editor for another trade journal; Robin told her manager that he could expect to get a reference call from the prospective employer, as the job posting noted that the prospective employer would check applicant’s references.

What kind of references should Employers A, B, and C give for John, Bill, and Robin in these circumstances? When fashioning their references, all three employers should recall Muroc’s admonition: “[A reference provider] owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons.”

Bearing Muroc in mind, all three employers may have concerns about how much negative information they should disclose while attempting to give otherwise positive references for their respective employees. Employer A might well think to herself, “John’s never had any problems at work, but I know from what I’ve heard and seen that John has a pretty bad

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84. 929 P.2d at 591.
temper and sometimes expresses his anger physically—what if he got in an argument with a customer at a new employer's shop and the dispute got physical?" Employer B might have similar thoughts: "Bill's never had a problem at work, but I know that he had that DWI and drinks a lot—what if he got drunk and got in a drunk-driving accident while on company business for a new employer?" Employer C might think: "Robin's always been a good employee and we've never had problems with her—but what if she did go off the deep end and hurt someone at a new employer's workplace, and I hadn't warned the employer that we'd sometimes expressed concern among ourselves about Robin's stability?"

In all three situations, and others like them, employers may feel that their safest course is to disclose their concerns, fearing liability for negligent misrepresentation if they do not disclose their concerns and the employee later injures someone in the course of the employee's new employment. In an effort to be fair, the employers might appropriately qualify their expression of concern by emphasizing that the employees involved had never (yet) acted inappropriately or dangerously at the workplace.

Unfortunately, even if the employers providing references appropriately qualify or limit their disclosures of concern the expressions of concern could still cause the prospective new employer to reject the applicant about whom the concerns were expressed. Prospective employers understandably will often prefer to hire applicants about whom no reservations or concerns have surfaced. Even if most prospective employers were not already predisposed to favor "low-risk" applicants, the widespread recognition of the tort of "negligent hiring" provides a powerful incentive for prospective employers to avoid hiring any applicants about whom safety concerns arose during the reference-checking process, even if those safety concerns were largely speculative.85

Reasonable persons may differ about whether Employers A, B, and C should reveal their concerns to prospective employers when giving references for John, Bill, and Robin. Some might feel that John, Bill, and Robin should expect to suffer the consequences of their choices about their out-of-work lives, and that Employers A, B, and C should not feel constrained to avoid expressing their honestly felt concerns, even if those concerns are somewhat speculative. Others might feel that Employers A, B, and C should not, in fairness, reveal their concerns about the out-of-work conduct

85. California, like most jurisdictions, has recognized that employers may be liable under a negligent hiring theory if they hire employees without reasonably attempting to gather—or without reasonably weighing—background information that would have revealed the employees' dangerous tendencies, and the employees subsequently injure others in the course of their employment. See, e.g. Evan F. v. Hughson United Methodist Church, 10 Cal. Rptr. 2d 748, 753 (Cal. Ct. App. 1992). For a good discussion of the emergence and development of the tort of negligent hiring, see Ronald M. Green & Richard J. Reibstein, Employer's Guide to Workplace Torts 3-26 (1992).
of John, Bill, and Robin, when the concerns are arguably speculative and when none of them have ever exhibited any of the tendencies prompting the concerns when at work. 86

Whether or not disclosures in these conditions are generally fair or generally warranted, employers who continue to provide references freely after Muroc will often feel compelled to express concerns about the possible dangerousness of an employee in circumstances analogous to the hypothetical situations discussed above. Similarly, it seems almost certain that on at least some—perhaps many—occasions, these disclosures may unfairly damage the employment prospects of employees who are very unlikely ever to engage in inappropriate or dangerous conduct at the workplace. 87 While reasonable people may disagree about whether Em-

86. Even if employers are not concerned about the fairness of revealing information about employees' out-of-work conduct, they should be aware of the possibility that employees offended by such disclosures might seek to recover damages under a theory that the employers making the disclosures violated the employees' privacy rights. California's Constitution, Art. 1, § 1, guarantees individuals' rights to privacy, and California courts have held that the Constitutional privacy right may provide individuals with a cause of action against both public and private entities that unjustifiably intrude on individuals' private lives. For example, in Urbaniak v. Newton, 277 Cal. Rptr. 354, 355 (Cal. Ct. App. 1991), the court recognized that a medical patient might have a cause of action, for invasion of his state constitutional privacy rights, against a physician who examined him in connection with a workers compensation case and subsequently disclosed to the workers compensation insurer and others that the patient was HIV-positive. The court explained that the patient's cause of action would be for the physician's "improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party." 227 Cal. Rptr. at 359. Cf. Roman Catholic Bishop of San Diego v. Superior Court, 50 Cal. Rptr.2d 399, 405-406 (Cal. Ct. App. 1996) (No compelling state interest requires employer to investigate sexual practices of its employee, and employer who queries employees on sexual behavior may be subject to claims for invasion of privacy and sexual harassment).

Federal regulations implementing the Americans with Disabilities Act may also prohibit employers from disclosing to others certain types of information about their former employees, if the disclosures would reveal the employees' confidential medical information. See 29 C.F.R. § 1630.14 (1996) (describing permissible medical examinations and inquiries and requiring that medical information gathered by employers be treated as confidential medical records). State laws may also restrict the ability of employers either to disclose or use certain types of information that may arguably have some bearing on an employee's possible dangerousness to others in some circumstances. See, e.g. CAL. CIV. CODE § 56.13 (West 1982) (prohibiting recipients of confidential medical information, who received the information pursuant to authorization, from further disclosing that information except in accordance with a new authorization meeting requirements of the Confidentiality of Medical Information Act); CAL. PEN. CODE § 11105.3 (West Supp. 1997) (requiring certain employers to treat as confidential certain information they obtain of records of individuals' convictions involving sex crimes, drug crimes or crimes of violence); CAL. LAB. CODE § 432.7 (West Supp. 1997) (restricting employers' ability to request or use certain information pertaining to job applicants' arrest or detention records); CAL. LAB. CODE § 1026 (West 1989) (requiring employer to make reasonable efforts to safeguard the privacy of any employee who is enrolled in alcohol or drug rehabilitation program); CAL. CIV. CODE § 1798.53 (West Supp. 1997) (provision of Information Practices Act establishing a cause of action for invasion of privacy against persons who intentionally disclose information, not otherwise public, that was obtained from personal information maintained by a state agency or from records within a system of records maintained by a federal government agency).

87. Psychologists, who by training and experience are arguably much better equipped than lay persons to predict whether particular individuals will likely be dangerous in the future, have emphasized that predicting dangerousness accurately is an extremely difficult task. See Christopher Slobogin, Dan-
Employers A, B, and C should disclose their concerns about John, Bill, and Robin, most would likely agree that it will be unfortunate if Muroc encourages employers to disclose negative information excessively, resulting in employees who are not truly dangerous losing job prospects they might otherwise have secured.

B. The Incentives for "No Comment" Reference Strategies

Even before Muroc, the legal framework governing employment references had caused many employers to resort to "no comment" reference strategies, in which they would refuse to comment on current or former employees' past job performance and suitability for new employment. But the Muroc decision now provides a powerful incentive for even more employers to adopt a "no comment" approach. As explained below, Muroc will likely induce many employers who have previously given references freely to switch to "no comment" reference practices, to the detriment of other employers, employees, and the public.

The Muroc court stated precisely the legal reasons encouraging employers to adopt "no comment" reference strategies:

[the Muroc] defendants had alternative courses of conduct to avoid tort liability, namely, (1) writing a "full disclosure" letter revealing all relevant facts regarding Gadsam's background, or (2) writing a "no comment" letter omitting any affirmative representations regarding Gadsam's qualifications, or merely verifying basic employment dates and details. The parties cite no case or Restatement provision suggesting that a former employer has an affirmative duty of disclosure that would preclude such a no comment letter. As we have previously indicated, liability may not be imposed for mere nondisclosure or other failure to act, at least in the absence of some special relationship not alleged here.

88. See, Saxton, supra note 3, at 46-49 (discussing empirical evidence of the increasing use of "no comment" reference strategies). As the Muroc court recognized, many employers following "no comment" reference strategies will confirm former employees' job titles, salaries, and dates of employment, but will not provide any other information about the employee's past job performance or suitability for new employment. 929 P.2d at 590.

89. Both amicus curiae briefs submitted to the California Supreme Court in Muroc argued vigorously that a decision for plaintiff would cause employers in the future to resort to "no comment" reference strategies. See Brief of California Employment Law Council as Amicus Curiae at 6-12, Muroc (No. S051441); Brief of Amicus Curiae The Employers Group at 3-6, Muroc (S051441). Many post-Muroc commentators have similarly suggested that the decision will likely discourage employers from continuing to provide references freely. See, e.g., Chris DiEdoardo, Employers Face Tough Dilemma, SAN DIEGO DAILY TRANSCRIPT, January 30, 1997. ("In the wake of [Muroc], the safest course of action for employers when calls come in for reference checks might be summed up in four words: don't ask, don't tell.").

90. Muroc, 929 P.2d at 589 (emphasis added).
The court's statement of the legal rules should prompt many employers who are planning their reference policies to reason as follows: "I can avoid liability completely if I simply refuse to give references, and I have no legal duty to give references; on the other hand, if I give reference information I can be sued by a former employee (if I say negative things), or I can be sued by as-yet unknown third parties if I omit negative information from the reference and my former employee ends up hurting someone in the course of new employment as a result of some character flaw that I have observed." This reasoning, which is quite sound under current doctrine, should persuade many cautious employers to resort to "no-comment" reference strategies.

Additional incentives for employers to move toward "no-comment" reference policies arise from the concerns presented above in Section IIIA. As discussed there in detail, employers will likely find it difficult to judge how much and what types of negative information to disclose about certain employees, particularly those employees who have never acted inappropriately at work but have elsewhere exhibited unusual or potentially unsafe tendencies. Employers in these circumstances may well decide to retreat to "no comment" reference strategies, rather than to make disclosures that Muroc might seem to require but that might unfairly damage the involved employee's prospects for a new job.

An additional aspect of Muroc will likely compound these other factors pushing employers toward "no comment" reference strategies. Specifically, the court's equivocation about how Civil Code § 47's conditional privilege applies in Muroc-type circumstances should contribute to the other factors dissuading employers from continuing to give references freely. The Muroc court noted that Civil Code § 47's conditional privilege clearly protects employers when they are sued under a defamation theory by a former employee who is disgruntled by a poor reference.\(^91\) However, the court left unresolved the issue of whether the conditional privilege would protect employers from Muroc-type claims by third parties after the employers have made good-faith decisions about what negative information they should reasonably disclose when giving references.\(^92\) Employers who are already concerned about how to make fair disclosure decisions should be reluctant to give references that may require those decisions, if their good-faith disclosure decisions may not be at least conditionally privileged. Like the incentives discussed above, the incentive created by the court's equivocation on Section 47 will likely push employers strongly towards "no comment" strategies.

While Muroc may exacerbate pre-existing tensions causing employers to choose "no comment" reference approaches, that result should be troub-
ling only if widespread use of "no comment" reference strategies is undesirable. I have elsewhere argued in detail that "no comment" policies are undesirable. 93 For purposes of this article, I will simply note three of the most important reasons that "no comment" policies are socially undesirable. First, widespread use of "no comment" policies is damaging to employers, as they find themselves increasingly hampered in obtaining reference information that will help them to make good, well-informed hiring decisions. 94 Second, "no comment" policies are damaging to many employees, as employers who follow "no comment" strategies will generally refuse to give detailed references for employees who would find those references advantageous in their quest for new employment. 95 Third, the public is poorly served if former employers hide behind "no comment" reference policies to avoid disclosing information that would alert a prospective new employer that a job applicant is dangerous, or even merely incompetent or unpleasant. Indeed, the facts alleged in Muroc suggest a prototypical example of how public policy is badly served when employers try to avoid liability by using "no comment" policies. When our legal rules encourage employers to use "no comment" reference policies to avoid liability—as the Muroc court acknowledged they could—prospective employers may be unable to obtain information that, if available, would discourage them from hiring employees with demonstrated propensities to hurt or abuse others, including children.

IV
RECOMMENDATIONS FOR REFORM: POTENTIAL LEGISLATION

Dramatic changes in the current legal framework may be necessary before many employers will feel strong incentives to provide reference in-

93. See Saxton, supra note 3, at 49-51.
94. For a more detailed discussion of this concern, see Saxton, supra note 3, at 49-50; see also Brief of California Employment Law Council as Amicus Curiae, supra note 90, at 14; Brief of Amicus Curiae The Employers Group, supra note 90, at 3-6. In this regard, it is significant that human resource experts have stressed that an employee's past job performance is one of the best predictors of that employee's future job success. See 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, 224-25 (1987) (collecting sources and concluding "[m]anagement experts consider contacting former employers to be one of the best methods for evaluating prospective employers."); see also James W. Fenton & Kay W. Larimore, Employment Reference Checking, Firm Size and Defamation Liability, 30 J. SMALL BUS. MGMT. 88 (1992) ("[R]esearch has shown that the more frequently an employer checks references, the less likely the employer [is] to experience employee related problems including absenteeism, tardiness, attitude and work quality and quantity.").
95. For a more detailed discussion of this concern, see Saxton, supra note 3, at 50; see also Brief of California Employment Law Council as Amicus Curiae, supra note 90, at 12-13. This concern is heightened by the fact that many prospective employers apparently interpret a "no comment" reference response to their reference request as an implicitly negative comment about the employment suitability of the applicant involved. See Saxton, supra note 3, at notes 17-18 and accompanying text (collecting sources discussing how many employers interpret no comment references as negative references).
formation freely.\textsuperscript{96} Even without undertaking such dramatic changes, however, state legislators may wish to consider enacting provisions to address in a more limited way the adverse incentives that \textit{Muroc} will likely engender.

State legislators should do at least the following things to encourage employers to provide responsible employment references in the post-\textit{Muroc} environment: (1) clarify that a conditional privilege protects employers from liability on account of references they have provided, not only when they are sued by their former employees, but also when they are sued by third parties in \textit{Muroc}-type claims;\textsuperscript{97} (2) clarify that the conditional privilege protects employers who volunteer reference information without having received a request from a prospective employer, as well as employers who provide references upon request; (3) clarify with more specificity the factors that employers should consider when determining the types of negative information they should disclose if giving references for current or former employees; and (4) clarify the circumstances in which, in different types of claims arising from employment references, employers will be deemed to have abused the conditional privilege and forfeited its protection.

This discussion will discuss each of these recommendations in turn. The Appendix includes proposed legislation by which the recommendations could be implemented.

A. The Legislature Should Provide that a Conditional Privilege Applies in the Context of Muroc-type Claims

As discussed in sections II and III of this article, the \textit{Muroc} court expressed skepticism about whether California Civil Code § 47's privilege would protect employers in the context of \textit{Muroc}-type claims, as opposed to claims made by former employees.\textsuperscript{98} The court's skepticism may unnec-

\textsuperscript{96} It has been argued elsewhere, for example, that many employers will not likely provide references freely unless legislatures (or courts) impose a limited affirmative duty on employers to respond to reference inquiries, following principles set forth in Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976). Specifically, employers under such a duty could not retreat to a "no comment" response and would be required, after receiving a reference request about their current or former employees, to warn prospective new employers if the current or former employees had exhibited dangerous tendencies. See Saxton, supra note 3, at 91-99; see also Lewis \textit{et al}., supra note 3, at 834-35 & n. 253; Ann M. Barry, \textit{Note, Defamation in the Workplace: The Impact of Increasing Employer Liability, 72 MARQ. L. REV.} 264, 301 (1989); Swerdlow, supra note 3, at 1667-71.

It has also been argued that many employers will likely decline to provide references freely unless legislatures enact attorney-fee shifting rules that would allow employers to recoup from their opponents the litigation expenses the employers incur in successfully defending responsible employment references. See Saxton, supra note 3, at 99-107. See also Brief of California Employment Law Council as Amicus Curiae, supra note 90, at 9.

\textsuperscript{97} By \textit{Muroc}-type claims, I mean third-party claims based on theories of fraud or negligent or intentional misrepresentation, in which the third party asserts that an employer's positive reference was responsible for injuries the referenced employee later inflicted on the third party.

\textsuperscript{98} The court noted that "[l]egislative materials submitted by [an amicus curiae] . . . indicate that Civil Code section 47, subdivision (c), was primarily intended to provide employers with a defense to
sarily discourage employers from providing reference information. Therefore, the legislature should clarify that a conditional privilege does protect employers in the context of *Muroc*-type claims.

The California Supreme Court has described the general purpose of California Civil Code § 47's privilege as follows: "[The privilege] protect[s] communications made in good faith on a subject in which the speaker and hearer share[ ] an interest or duty." In discussing the conditional privilege, the court has frequently relied on Professor Laurence Eldredge's treatise on defamation law, in which he has described the specific policies underlying conditional privileges:

The conditional privileges which have been created by the courts provide a protection against liability for defamation which is "based upon a public policy that recognizes that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. In order that the information may be freely given, it is necessary to afford protection against liability for misinformation given in an appropriate effort to protect or advance the interest in question. If the protection were not given, true information that should be given or received would not be communicated because of fear of the persons capable of giving it that they would be held liable in an action of defamation if their statements were untrue."  

The policies Professor Eldredge's remarks address apply with great force in the context of employment references, where employers contemplating hiring a job applicant—and arguably the public whom they will serve—have a strong interest in obtaining information about that applicant's suitability for the contemplated employment. Employees who are seeking new employment also have a strong interest in having their former employers transmit reference information about their character and abilities to the employees' prospective new employers. Because former employers generally will have helpful, specific information about their former employee's suitability for new employment, encouraging former employers to disclose that information by protecting those disclosures with a conditional privilege makes a great deal of sense.

The California courts have recognized that the factors discussed above justify giving employers conditional protection from liability for providing reference information. Indeed, California courts have routinely held that California Civil Code § 47's privilege conditionally protects employers who have been sued by former employees on account of unfavorable references. For example, in a 1973 decision the court of appeal described the

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actions by former employees, rather than to insulate them from all tort liability arising from employment disclosures." 929 P.2d at 591 (emphasis by court).
99. See discussion supra at Section IIIB.
EMPLOYMENT REFERENCES IN CALIFORNIA

reasons underlying the application of the privilege in the employment reference context, in a case in which a college professor was the plaintiff:

As to the publication of the allegedly false statements to the representatives of other schools as alleged in the first cause of action, we hold such acts to be within the framework of respondents’ implied authority to answer questions from persons legitimately interested in appellant’s qualifications and past performance as a teacher. Questions of reliability in the performance of teaching duties and compatibility with one’s fellow employees are of critical importance to a prospective employer and must be considered relevant to an applicant’s qualifications for a teaching position. It is well established that a former employer may properly respond to an inquiry from a potential employer concerning an individual’s fitness for employment, and if it is not done maliciously such response is privileged.102

The same policies that justify applying the privilege for employers who are sued by their current or former employees would seem to apply with equal force to justify applying the privilege for employers who are sued by a Muroc-type claimant.103 Specifically, employers who are concerned that they might later be sued by Muroc-type claimants—like employers who are concerned that they might later be sued by their former employees—have strong incentives to avoid prospective claims by simply refusing to provide reference information to others. And employers who are worried about Muroc-type claims—like employers who are worried about suits by their former employees—may feel encouraged to provide reference information if their good faith efforts to do so will be at least conditionally privileged.104


103. In this regard, the legislative history of the 1994 amendments to Civil Code § 47 does suggest, as the Muroc court recognized, that one of their primary purposes was to provide employers with a defense to actions by their former employees. But the broader purpose of the amendments was to attempt to provide legal protection that would encourage employers to be more willing to provide reference information. See generally, ASSEMBLY COMMITTEE ON JUDICIARY, Bill Analysis of AB2778 as amended May 18, 1994, supra note 10. This broader purpose will be best served if the conditional privilege is applied in the context of Muroc-type claims, as well as in the context of suits by former employees.

104. There would not seem to be any doctrinal problem in applying the conditional privilege to suits, like the one in Muroc, based on non-defamation theories such as negligent or intentional misrepresentation. The California courts have already recognized that California Civil Code § 47’s conditional privilege protects defendants from claims under other theories, as well as from defamation claims, even if the privilege is most frequently applied in the context of defamation claims. See, e.g. Deaile v. General Telephone Co. of California, 115 Cal. Rptr. 582, 587-88 (Cal. Ct. App. 1974) (applying privilege to claims of intentional infliction of emotional distress); Lesperance, 31 Cal. Rptr. at 875-76 (applying privilege to tort of tortious interference with economic opportunity); Vackar v. Package Machinery Co., 841 F. Supp. 310, 315 (N.D. Cal. 1993) (applying privilege to general negligence claims).
For these reasons, the California legislature could address at least one of Muroc's unfortunate results by clarifying that a conditional privilege protects employers in the context of Muroc-type claims, as well as in the context of suits by former employees. The proposed legislation in the Appendix to the article suggests language by which the legislature could implement this recommendation.

B. The Legislature Should Clarify that the Conditional Privilege Protects Both Requested and Unrequested References

The Muroc court concluded that Civil Code § 47's privilege would have been inapplicable to the Muroc defendants, even if the privilege might generally protect employers from Muroc-type claims, because the statutory privilege by its current terms applies only to communications made "upon request" by prospective employers. Again, this aspect of the court's holding may deter employers from engaging in desirable reference practices. Thus, the legislature should respond by clarifying that a conditional privilege protects both requested and unrequested references.

While many employers do provide references upon request, many employers also prepare and make available reference information that has not been specifically requested by a particular prospective employer. Muroc's facts involved this type of situation. The former employers prepared general reference letters for the placement office at the college where Robert Gadams received his teaching credentials. Many other employers similarly give employees general "To Whom It May Concern" letters, with the understanding that the employees may provide those letters to prospective new employers. Employers in these circumstances have not provided references "upon request" of the prospective employers. Nonetheless, employers who in good faith release reference information in this manner would seem to be doing so for purposes consistent with those underlying the conditional privilege. Consequently, they would seem to be entitled to its protection.

105. Muroc, 929 P.2d at 591. The reader will recall that the Muroc defendants provided reference letters without having been requested to do so by Livingston Union School District, for whom Gadams worked at the time of the incidents giving rise to the litigation. Id.

106. The original bill that lead to the 1994 amendments to Cal. Civ. Code § 47 had not restricted the protection of the conditional privilege to solicited references. The bill was amended in the Assembly Judiciary Committee, however, to include the "upon request" language that restricted the privilege's application to solicited references. While the reasons for that change are not entirely clear, some language from the committee analysis of the bill suggests that the change may have resulted from the committee's perception that the pre-1994 version of Civil Code § 47 restricted the conditional privilege's protection to solicited references. See Assembly Committee on Judiciary, Bill Analysis of AB 2778 as Introduced February 10, 1994 at 3 (for committee hearing date May 11, 1994); Assembly Committee on Judiciary, Bill Analysis of AB 2778 as Amended May 18, 1994 at 3, (for Assembly Third Reading, hearing date June 21, 1994). As explained later in this section, that perception, if the committee members held it, was mistaken. See discussion infra at notes 107-109 and accompanying text.
The pre-1994 version of California Civil Code § 47 was worded in a manner that did not preclude application of its privilege to volunteered references. This version, which the California courts had consistently applied to employment references, provided that a privileged publication is one made

[i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) [by one] who is requested by the person interested to give the information.¹⁰⁷

The use of the disjunctive for the three clauses indicates that the fact that a communication was not requested by the person interested in receiving the information is pertinent to, but not dispositive of, the question of whether or not that communication was privileged.

Professor Eldredge has summarized the courts’ general treatment of volunteered statements and rendered the following conclusion:

There is no general rule that, in the absence of a legal duty to speak, there is no privilege to volunteer false defamatory information concerning the plaintiff. On the contrary, there are numerous cases holding that the defendant’s volunteered statement was published on a conditionally privileged occasion. The real test is whether, considering all the circumstances of the particular case, the court concludes that it was the moral or social duty of the defendant to volunteer the information . . . .¹⁰⁸

In this respect, Professor Eldredge’s synthesis of the case law is consistent with Restatement (Second) of Torts § 595, which states that in determining whether a publication is conditionally privileged, “it is an important factor . . . that the publication is made in response to a request rather than volunteered by the publisher.”¹⁰⁹

¹⁰⁷. CAL. CIV. CODE § 47(c) (West 1982) (emphasis added), quoted in Lundquist v. Reusser, 875 P.2d 1279, 1285 (1994). I have inserted here in clause 3 the bracketed language “by one,” which appears to have been omitted inadvertently from the statute during an earlier recodification. That language should have been included in the statute both to make the provision grammatical and to make clear that each of the three clauses provides an independent basis for application of the privilege. The original version of the statute made this intent clearer; as originally enacted in 1872, the pertinent statutory language provided: “A privileged communication is one made . . . (3) In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, or who was requested by him to give the information . . . .” See historical notes to CAL. CIV. CODE § 47 (West 1982).

¹⁰⁸. ELDRIDGE, supra note 102, at 474 (emphasis in original). See also id. at 474-77 (collecting and discussing cases, including cases involving employment reference communications, in which courts found the privilege to apply to volunteered, unrequested statements).

¹⁰⁹. The quotation here is from RESTATEMENT (SECOND) OF TORTS § 595 (1977), which states in full:

§ 595. Protection of Interest of Recipient or Third Person

(1) An occasion makes a publication conditionally privileged if the circumstances induce a reasonable or correct 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 person is
In short, while the *Muroc* court was correct in noting that California Civil Code § 47's current wording appears to restrict the protection of the conditional privilege to requested references, the policies underlying the privilege and pre-1994 authorities strongly suggest that the privilege's protection should not be so limited. The California legislature could thus address another of *Muroc*'s unfortunate results by clarifying that the conditional privilege protects both requested and unrequested references. Again, the proposed legislation included in the Appendix suggests language by which the legislature could implement this recommendation.

**C. The Legislature Should Clarify the Factors Employers Should Consider When Determining What Types of Negative Information They Should Include In Employment References**

The *Muroc* court did not give employers much specific guidance about the factors they should consider when deciding what types of negative information they should include in employment references. While it is very difficult to articulate helpful, specific criteria for such disclosures, the legislature might be able to establish some general guidelines that will assist employers who attempt in good faith to comply with *Muroc*'s disclosure obligations.

The court's holding in *Muroc* imposed a disclosure obligation on employers while giving little specific guidance about the factors they should consider when weighing disclosures in particular circumstances. The court held:

>[The writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to the third persons. In the absence, however, of resulting physical injury, or some special relationship between the parties, the writer of a letter of recommendation should have no duty of care extending to third persons for misrepresentations made concerning former employees. In those cases, the policy favoring free and open communication with prospective employers should prevail.](110)

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

Comment j to § 595 clarifies that while the presence of a request for the information is important, it is not necessarily dispositive: "Thus, while it is not always necessary that the defamatory matter be published in response to a request by the person whose interest is concerned, the fact that the request has been made is an important one." *[Id.]* at 269 (emphasis added).

In some respects, a "bright-line" test, in which an employer's disclosure obligation would follow automatically when particular objective criteria were satisfied, would be more helpful than the rather unspecific test the court announced in *Muroc*, as set forth in the italicized language above. For example, one amicus in the *Muroc* litigation offered just such a bright-line test for the disclosure obligation; the amicus proposed that "at worst, an employer should be liable for omissions made in a letter of reference only when such omissions pertain to (i) known criminal conduct, (ii) that endangered the health and welfare of others, and (iii) that is known to be relevant to the position being sought." This bright-line test would have the virtue of clearly demarcating a limited category of cases in which the employer's disclosure of negative information would automatically be required. The bright-line test would thus make it easier for employers to determine when they would and when they would not be required to disclose negative information about an employee to the employee's prospective new employer. Moreover, such a bright-line test would ease the burden of administering *Muroc*-type claims in the future; judges, juries, and parties attempting to settle claims should find it comparatively easy under such a bright-line test to determine when an employer has violated her *Muroc* disclosure obligations.

Unfortunately, any bright-line test in this context will likely be both over-inclusive and under-inclusive: a bright-line test would almost certainly require employers to disclose negative information in contexts where disclosure is not warranted, and it would almost certainly convince some employers not to disclose information in circumstances where disclosure would be desirable. The test proposed by the amicus, for example, would arguably require Employer A to disclose to prospective Employer B that Employee C was convicted eight years ago of criminal assault because of his participation in a bar-room brawl with a patron who had insulted him earlier that day at the workplace, even though Employee C has never acted dangerously or violently in the course of his duties with Employer A, and has seemed genuinely to regret his conduct in the eight-year old incident. On the other hand, the test proposed by the amicus would seem to permit Employer D to avoid disclosing to Employer E that Employee F, who is seeking a job as an orderly at Employer E's mental health institution, has frequently talked openly with his co-employees at Employer D's clinic about how he'd "love to get a job in a mental institution, because they have sexually mature women there who wouldn't be believed if they were to accuse him of molesting them."

111. Brief of California Employment Law Council as Amicus Curiae, *supra* note 90, at 27.

112. In considering the hypothetical involving Employer A and Employee C, reasonable persons might reach different conclusions regarding whether Employer A, to be fair and moral, should or should not disclose to Employer B the information about Employee C's assault conviction. In considering the hypothetical involving Employer D and Employee F, a reasonable person would likely conclude that
If a bright-line test is too rigid effectively to address the full range of circumstances employers may confront, then the best that we can likely hope for is that employers will act responsibly when considering Muroc-type disclosure issues. That is, we can only hope that employers will attempt in good faith responsibly to balance the interests of the reference recipient (and the public) in learning information about an applicant's potential dangerousness with the interests of the applicant in not having speculative concerns expressed in a manner that would unfairly damage the applicant's employment prospects.

The legislature might assist employers in these endeavors by describing in more detail than the Muroc court did the factors that employers should weigh when making disclosure decisions. Factors that would seem pertinent include: (1) the extent to which employees have actually committed acts that have harmed others or could have potentially harmed others; (2) the extent to which employees have behaved dangerously at work, as opposed to behaving dangerously when not at work; (3) the extent to which employees' dangerousness has been documented or proved, as opposed to merely alleged or rumored; and (4) the degree of relation between the employees' potentially dangerous tendencies and the employees' likely responsibilities in new employment, and the likelihood that the employees' dangerous tendencies would have occasion to manifest themselves in injury to others at the new workplace.113

Once again, the proposed legislation in the Appendix suggests language by which the legislature could implement this recommendation and give employers more guidance for their inevitable Muroc-type disclosure decisions.

D. The Legislature Should Clarify How Employers May Abuse and Forfeit the Conditional Privilege

The legislature should also enact provisions to clarify the standards for employers' abuse and forfeiture of the conditional privilege's protection. In the context of employees' claims that their former employers' references were defamatory or otherwise tortious, the "malice" required for the employers' forfeiture of the privilege is well established. However, that mal-

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113. These factors are relevant, as a matter of common sense, in a lay person's attempt to predict whether an individual poses a substantial risk of injuring others in the course of future employment. The factors are also consistent with the general types of factors mental health professionals would likely weigh when evaluating whether a given individual presents a substantial risk of harm to others in particularized future circumstances. Cf. John Monahan, Clinical and Actuarial Predictions of Violence, in Modern Scientific Evidence: The Law and Science of Expert Testimony 300 (David Faigman et al. eds., 1997) (summarizing and discussing the scientific status of research on clinical and actuarial predictions of violence, and discussing factors that a number of mental health researchers have considered and evaluated as predictors of violent behavior).
ice standard will not generally make sense in the context of Muroc-type claims. The legislature should, therefore, clarify the standards for employers' forfeiture of the privilege in this context.

The California Supreme Court has articulated the malice standard that applies when employees sue their current or former employees on account of a negative reference; malice in this context means "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person."114 The court also recognized that a person making a statement that would otherwise be privileged acts with malice and loses the privilege if the person "[w]as without a good faith belief in the truth of the statement" or "lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights."115

Because this standard is well established in the decisions of the California courts, it should likely be preserved in any legislation addressing employment references.116

In the context of Muroc-type claims, however, the malice standard generally seems inapposite. Granted, in some situations employers giving references for current or former employees might intentionally omit information from the reference with "ill will" toward the recipient of the reference information, and with a conscious desire to "vex, annoy or injure" the reference recipient by causing her to hire an incompetent or dangerous employee. Occasionally employers might also lack a good faith belief that the references they are providing fairly state the "truth" about the referenced employees. More typically, however, employers probably fail to make Muroc-type disclosures not because of any malice toward the reference recipient; they likely fail to make such disclosures because of their concerns and uncertainty about how or whether to disclose negative information about their current or former employees.

As noted in the previous section, the best that we can likely hope for in the above circumstances is that the employer has undertaken, in good faith, to weigh in a responsible manner the factors both in favor of and against disclosure of particular negative information. Where the employer has in good faith undertaken that weighing—and attempted to balance responsibly the interests of the referenced employee and the interests of the reference recipient and the general public—the employer should not forfeit the conditional privilege's protection from liability. On the other hand, where the employer has not, in good faith, balanced the pertinent concerns, or has

115. Lundquist, 875 P.2d at 1290.
116. I have argued elsewhere that "malice," at least as typically defined in lay parlance, should not be used as the standard for forfeiture of the conditional privilege when employees sue their former employers on account of unfavorable references, and that a standard requiring knowledge or reckless disregard of falsity might better serve the purposes of the privilege in this context. See Saxton, supra note 3, at 77-90.
otherwise acted recklessly with respect to the employer’s disclosure obligations, the employer should not receive the protection of the privilege.

For these reasons, the legislature should enact provisions establishing a specific standard for abuse and forfeiture of the conditional privilege in the context of Muroc-type claims. Consistent with the discussion above, the standard proposed in the legislation included in the Appendix focuses not on the employer’s “ill will,” but rather exclusively on the employer’s knowing or reckless omission from a reference of admonitory information about a referenced employee’s dangerous tendencies. The proposed standard would require Muroc-type plaintiffs to establish that employer-defendants, in formulating the references giving rise to plaintiffs’ claims, either did not in good faith weigh the factors described above in Section IV.C or performed that weighing process recklessly.

Once again, the proposed legislation included in the Appendix suggests language by which the legislature could implement these recommendations.

V
CONCLUSION

Even before the California Supreme Court announced Muroc, the legal framework created powerful incentives for employers to follow “no comment” reference practices. I have argued here that Muroc will exacerbate

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117. This proposed “knowing or reckless disregard” standard draws upon the standard applied as a matter of constitutional law when public figures seek to recover from media defendants for defamations they have published. See New York Times v. Sullivan, 376 U.S. 254 (1964); see also Eldredge, supra note 102, at 254-88 (discussing development of constitutional rules governing recovery for defamation of public officials and public figures). The analogy seems apt; the constitutional standard evolved from a recognition of the strong public interest in encouraging media to report on matters of public interest without being unduly chilled by fear of liability arising from their publications.

118. This proposed standard deliberately establishes recklessness, as opposed to negligence, as the threshold for employers’ liability under Muroc-type theories in this context. The Muroc court’s reliance on Restatement § 311 as the basis for liability already implicitly requires Muroc-type plaintiffs to prove at least negligence on the part of Muroc-type defendants before they may recover damages from them. Accordingly, the conditional privilege would give employers no added protection from liability if it established the employer’s negligence as a sufficient condition for forfeiture of the privilege.

A recklessness standard also seems fairest because employers considering Muroc-type disclosures will often be forced to make very difficult decisions, where legitimate concerns will counsel both for and against disclosure of admonitory information. See discussion supra at Section III.A. When an employer in good faith weighs these factors and determines that disclosure would be unwarranted, and the employee involved subsequently does injure someone in new employment, there would seem to be considerable risk that a fact-finder—with the benefit of 20-20 hindsight—would view the employer’s disclosure decision as negligent. A recklessness standard would seem to give employers better and fairer protection against unfairly critical after-the-fact assessments of their before-the-fact disclosure determinations.

I note, however, that in my view the Muroc defendants might have abused and lost the privilege even if the privilege is defined by this more protective recklessness standard—the facts alleged by the Muroc plaintiffs, if proved, strongly suggest that defendants were at least reckless in failing to include in their references some admonitory information about Robert Gadam’s past conduct.
the pre-existing tensions in the law, and that *Muroc* will likely encourage employers who have previously given references freely either: (1) to excessively disclose negative reference information that may be unfairly damaging to employees; or (2) to retreat to “no comment” reference strategies that are undesirable for policy reasons. The limited legislative reforms proposed in this article should help address the unfortunate incentives *Muroc* will engender. These reforms should at least encourage employers who have been willing to provide responsible references in the past to continue to do so in the future.\(^\text{119}\)

VI
APPENDIX

*An Act*\(^\text{120}\)

To encourage employers and other persons to use open, responsible employment reference practices and to assure to the extent possible that employment reference information is available to permit prospective employers to evaluate applicants for employment; by clarifying certain legal rules governing a person’s potential liability arising from that person’s provision of employment references.

Section 1: Be it enacted that this Act may be cited as “The Employment References Act of __________.”

*Findings and Purpose*

Section 2:

(a) The legislature finds that recent legal developments, including the decision of the California Supreme Court in Randi W. v. Muroc Joint Unified School District, 929 P.2d 582 (Cal. 1997), have encouraged many employers to adopt what have been called “no comment” or otherwise restricted employment reference practices under which the employers refuse to comment on their current or former employees’ suitability for prospective new employment. The legislature further finds that the increasing use by employers of these “no comment” reference policies has undesirable, detrimental effects on the ability of prospective employers to evaluate applicants for employment and on the ability of many employees to compete for potential new employment.

(b) The legislature declares it to be its purpose and policy, through the exercise of its powers to regulate commerce within this state, to ensure to the extent possible a free flow of employment reference information and to

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\(^{119}\) As argued earlier in the article, reforms that are more dramatic than the ones proposed here may be necessary to encourage employers who have already adopted “no comment” policies to move toward more open reference practices in the future. See supra note 96 and accompanying text.

\(^{120}\) Certain language in this proposed statute is borrowed from other legislation I have proposed elsewhere relating to employment reference practices. See Saxton, supra note 3, at 107-112.
encourage employers and other persons to act responsibly with respect to the dissemination of employment references.

Definitions

Section 3: For the purposes of this Act:

(a) The term "employment reference" means a written or oral communication containing information concerning a person's education, training, experience, qualifications, character and/or job performance, where the information is provided by the communicator to assist the immediate or ultimate recipient of the information in evaluating that person for employment or other service.

(b) The term "person" means one or more individuals, employers, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons.

Applicability of this Act

Section 4: This Act shall apply with respect to employment references requested by or provided to persons within this State.

Required Disclosures

Section 5: A person who provides an employment reference concerning an applicant's suitability for employment or other service has a duty not to misrepresent the facts in describing that applicant's qualifications and character, if making those misrepresentations would present a substantial risk of physical injury to third persons. However, a person who provides an employment reference should not generally disclose concerns suggesting that an applicant may be dangerous to others if those concerns are based solely upon rumor, speculation or conjecture, as disclosures in these circumstances may unfairly damage the applicant's prospects for employment. Accordingly, a person shall consider at least the following factors when determining when the person's disclosure of concerns may be justified and necessary to protect against possible harms the referenced applicant might cause in future employment or service.

(a) The extent to which the applicant has actually committed acts that have caused harm to others or could have potentially caused harm to others, as opposed to merely threatening or otherwise suggesting an inclination to commit such acts.

(b) The extent to which the applicant has engaged in dangerous conduct or displayed dangerous tendencies when at work, as opposed to engaging in such conduct when not at work.

(c) The extent to which the applicant's dangerous conduct or tendencies have been documented or proved, as opposed to merely alleged or rumored.
(d) The degree of relation between the applicant’s potentially dangerous tendencies and the applicant’s likely responsibilities in new employment, and the likelihood that the applicant’s dangerous tendencies would proximately cause injury to others at the new workplace.

**Conditional Privilege to Provide Employment Reference Information and Conduct Causing Forfeiture of the Conditional Privilege**

Section 6:

(a) Any person who provides an employment reference concerning an applicant’s suitability for future employment shall be protected by a “conditional privilege” from liability on account of that reference. Except as otherwise set forth herein, this conditional privilege applies both in circumstances in which the person is responding to a request for an employment reference and in circumstances where the person voluntarily prepares and releases an employment reference without a request but with the understanding that the information may be provided to the referenced applicant’s prospective new employer.

(b) Except as otherwise provided herein, the “conditional privilege” described in this section shall protect a person from liability, on account of an employment reference the person has provided, under any theories, including but not limited to negligence, defamation, tortious interference with prospective contractual relation, tortious interference with prospective economic advantage, invasion of privacy, intentional or negligent infliction of emotional distress, negligent or intentional misrepresentation, fraud, or violation of California Labor Code § 1050.

(c) Except as otherwise provided herein, the conditional privilege shall protect a person who has provided an employment reference from liability both to applicants who were the subject of the person’s employment reference and to third parties seeking damages from the person under the theory that the person’s employment reference constituted a negligent or intentional misrepresentation or fraud that proximately caused the third party to be injured by the referenced applicant.

(d) The conditional privilege shall not apply to employment reference information concerning the speech or activities of an applicant for employment if the speech or activities were constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.\(^{121}\)

(e) A person who provides an employment reference shall be deemed to have abused the conditional privilege established by this section and forfeited its protection from liability as set forth below.

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\(^{121}\) This clause is borrowed from the language of current Cal. Civ. Code § 47(c) as amended in 1994.
(1) In the context of an applicant's claim that the person provided a false, damaging employment reference concerning the applicant, the person shall be deemed to have forfeited the conditional privilege if the person in disseminating the false, damaging employment reference acted with "malice." In this context, "malice" means either:

(i) a state of mind arising from hatred or ill will, evidencing a willingness and desire to vex, annoy or injure the applicant to whom the employment reference relates; or

(ii) without a good faith belief in the truth of the employment reference.

The fact that a person volunteered the damaging employment reference, without having received a request for it, is not dispositive but may be probative of whether or not the person acted with "malice" as here defined.

(2) In the context of a third person's claim that an employment reference intentionally or negligently misrepresented or omitted facts in a manner that proximately caused the third person to be injured by the referenced applicant, the person who gave the employment reference shall be deemed to have forfeited the privilege if:

(i) the person knowingly or recklessly misrepresented facts or omitted material information from the employment reference in such a manner that the employment reference failed to warn the prospective new employer of the referenced applicant's dangerous tendencies; and

(ii) the person in formulating the reference either did not in good faith consider and balance the factors set forth in Section 5, or the person did that balancing in a reckless fashion.

(f) A party seeking to recover damages on account of an employment reference shall bear the burden of establishing that the person who gave the employment reference abused and forfeited the conditional privilege established by this section.

Respondeat Superior Liability

Section 7: Nothing in this Act shall be deemed to preclude an employer, in appropriate circumstances, from being held liable under the doctrine of respondeat superior on account of an employment reference provided to another person by the employer's employee.

Interaction with State Anti-Blacklisting and Service-Letter Statutes and Other Law

Section 8:

(a) To the extent that any provisions in the state anti-blacklisting statute or the state service-letter statute would appear to preclude a person from disseminating employment references as defined in this Act, those provisions are superseded by this Act. In other respects, the state anti-blacklisting statute and service-letter statute are preserved.
(b) Nothing in this Act shall be interpreted to permit employers to engage in conduct prohibited by federal or state statutes governing labor-management relations, or to require employers to disclose information about their current or former employees where such disclosure would be prohibited by law.

Effective Date

Section 9: This Act shall take effect ____________.