Self-Publication Defamation and the Employment Relationship

Deanna J. Mouser

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Self-Publication Defamation and the Employment Relationship

Deanna J. Mouser†

Ms. Mouser examines the tort of defamation within the employment context. She discusses the history of employer-employee relations, examines the basic elements of defamation, and then analyzes the defamation doctrine within the employment context. In recent years, courts have recognized and allowed an employee to recover for defamation when he/she is the person who publishes the defamatory statement made by the employer. Ms. Mouser analyzes the circumstances in which courts permit such recovery and discusses the impact of the self-publication theory on the employment relationship. Ms. Mouser then reviews an employer’s affirmative defenses, and concludes that a qualified privilege must exist in order to protect open communication between an employer and employee. Finally, Ms. Mouser discusses the practical aspects of litigating self-publication claims and concludes with suggestions for employers seeking to avoid liability in self-publication situations.

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† B.S. 1985, Central Michigan University; J.D. 1988, University of Michigan Law School; LL.M. 1989, University of Illinois College of Law.


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I

INTRODUCTION TO EMPLOYEE PROTECTION FROM
EMPLOYERS' UNFAIR ACTS

The American legal system currently provides greater protection of employees' rights than it has in the past. Historically, an employee had little protection from an employer's capricious acts. Early American law provided no statutory protection, and case law allowed employees hired for an indefinite time period to be discharged by employers for any or no reason.¹ Contract law offered little protection as individual employees

¹ In the nineteenth century, the employment of an employee hired for an indefinite term could be terminated by either the employer or employee: "When the continuance of the term of service by the contract of hiring is in any manner left discretionary with either party, either may put an end thereto at any time . . . ." HORACE G. WOOD, TREATISE ON THE LAW OF MASTER AND SERVANT § 133, at 272-73 (2d ed. 1886). Only employees hired for a definite time period had protection from unjust termination:

When a servant is discharged without sufficient legal excuse, before the expiration of his term, he has his choice of two remedies. He may elect to treat the contract as rescinded, and at once bring an action for the value of the services rendered, or he may sue for a breach of the contract, and recover his probable damages from the breach, or he may wait until the term is ended, and sue for the actual damage he has sustained, which can in no case exceed the wages provided for in the contract, for the entire term.

Id. § 127, at 242-43. However, eighteenth-century colonial America did protect employees. The employer was required to provide care and could not discharge the employee without cause. Matthew W. Finkin, The Limits of Majority Rule in Collective Bargaining, 64 MINN. L. REV. 184, 185 (1980).
lacked bargaining strength to influence employers. In the twentieth century, federal and state legislatures have enacted statutes protecting employees' rights, state courts have created numerous exceptions to the doctrine of at-will employment, and employee unions have provided employees with additional protection.

With this evolution of increasing employee protection came new applications of tort doctrines to the employment relationship. Theories such as intentional or negligent infliction of emotional distress, false imprisonment, assault, battery, tortious invasion of privacy, and defamation were applied to employment disputes. Fear of tort liability, with the

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2. The individual employee's lack of bargaining power is summarized by John Mitchell, former President of the United Mine Workers, in testimony before the United States Senate in 1914:

   The individual workman theoretically bargains with his employer as to the wages to be paid by his employer; but practically there is no bargaining. The individual workman must accept the wages and conditions of employment that are offered to him by his employer. It is a matter of no concern at all to an employer if one workingman refuses employment. He thinks nothing about it, because there is another workingman ready to take the job. 

MARK A. ROTSTEIN ET. AL., CASES AND MATERIALS ON EMPLOYMENT LAW 35 (1987). Employers viewed employees as interchangeable production commodities. Matthew W. Finkin, The Bureaucratization of Work: Employer Policies and Contract Law, 1986 Wis. L. REV. 733, 751 (1986). Even when the employee succeeded in obtaining a contract, courts found the contract unenforceable unless the employee gave consideration in addition to the services performed. Id. at 739.


4. Exceptions to the at-will doctrine include the implied contract based on oral promises or employee handbooks, public policy, and the implied covenant of good faith and fair dealing. Sami M. Abbasi et al., Employment at Will: An Eroding Concept in Employment Relationships, 38 LAB. L.J. 21, 24-28 (1987).


6. E.g., Kelley v. Schlumberger Technology Corp., 849 F.2d 41 (1st Cir. 1988) (finding tortious invasion of privacy and negligent infliction of emotional distress for the discharge of an employee after the employee failed a drug test); Keehr v. Consolidated Freightways, Inc., 825 F.2d 133 (7th Cir. 1987) (finding invasion of privacy and intentional infliction of emotional distress, but denying defamation claim, for statement to plaintiff that plaintiff's wife was unfaithful); Tumbarella v. Kroger Co., 271 N.W.2d 284 (Mich. Ct. App. 1978) (reversing trial court's grant of motion for
accompanying possibility of punitive damages, encouraged employers to become more careful in dealing with their employees.

This article discusses the tort of defamation as it affects the employment relationship. The primary method of avoiding liability for traditional defamation was for the employer to refrain from communicating the reason for the employee's discharge to anyone other than the employee, thereby negating the required element of "publication." Recent developments in some states have allowed recovery for defamation without the defendant employer publishing the defamatory statement to a third party. This result was achieved when courts held that an employee's compelled or foreseeable repetition of the defamatory statement constitutes publication by the employer, making the defendant employer liable for defamation.

This paper will focus on this theory of compelled self-publication and the theory's effect on the law of employment torts. Chapter I has briefly discussed the history of employee protection, while Chapter II introduces the basic elements of defamation and discusses the early cases which provide the rationale for the self-publication theory. Chapter III describes the modern cases that have applied the self-publication doctrine to employment situations, and Chapter IV analyzes the impact the self-publication theory will have on the employment relationship and on the objectives of tort law. Chapter V discusses the theory's effect on the employer's affirmative defenses of consent and qualified privilege and emphasizes that a qualified privilege must be recognized to promote the public interest served by open and honest communications about employees. Chapter VI analyzes some practical concerns in litigating self-publication claims, such as statutes of limitations, recoverable damages, and the effect of the self-publication doctrine on wrongful discharge claims. Chapter VII summarizes the analysis, suggests rules that courts should apply if they adopt the self-publication theory, and suggests alternatives that employers should follow to minimize potential liability.

II
INTRODUCTION TO SELF-PUBLICATION THEORY OF DEFAMATION

A. Elements of Traditional Defamation

The elements required to establish the defamation cause of action are:


summary judgment on claims of false imprisonment, slander, and libel where the employee cashier was investigated for theft of five dollars).


8. Lewis, 389 N.W.2d at 888.
(1) publication of a statement,
(2) which is defamatory,
(3) which is false,
(4) which is made by defendant with negligence, reckless disregard, or knowledge regarding the truth or falsity and the defamatory character of the statement,
(5) which is the cause of injury, and
(6) which is not privileged. 9

The plaintiff has the burden of proving that the defendant published the statement, that the statement was defamatory, that the defendant was negligent, reckless, or knowing, and that the statement injured the plaintiff. 10 The defendant has the burden of proving that the statement was privileged. 11 If the defendant establishes a qualified privilege, the plaintiff then has the burden of proving that the defendant abused that qualified privilege. 12 Under common law, the defendant had the burden of proving the statement’s truth or falsity, but the Restatement notes that burden may have shifted since the plaintiff now must prove the defendant was negligent, reckless, or knew of the truth or falsity of the statement. 13

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9. The Restatement (Second) of Torts summarizes the elements for the defamation cause of action as follows:
   To create liability for defamation there must be:
   (a) a false and defamatory statement concerning another;
   (b) an unprivileged publication to a third party;
   (c) fault amounting at least to negligence on the part of the publisher; and
   (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1977). See id. §§ 580A and 58B for explanation of reckless disregard or knowledge. But see infra note 25; fault may no longer be required in private plaintiff cases where the speech is not on a matter of public concern.

10. The Restatement (Second) of Torts § 613 (1977) explains the burden of proof as follows:
   (1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised,
   (a) the defamatory character of the communication,
   (b) its publication by the defendant,
   (c) its application to the plaintiff,
   (d) the recipient’s understanding of its defamatory meaning,
   (e) the recipient’s understanding of it as intended to be applied to the plaintiff,
   (f) special harm resulting to the plaintiff from its publication,
   (g) the defendant’s negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication, and
   (h) the abuse of a conditionally privileged occasion.
   (2) In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication.

11. Id.
12. Id.
13. The Restatement provides a caveat to § 613 on the burden of proving truth:
   The Institute expresses no opinion on the extent to which the common law rule placing the burden of proof to show the truth of the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant’s negligence or greater fault regarding the falsity of the communication.
1. **Publication**

Publication is the intentional or negligent communication of the defamatory matter to a person other than the person defamed.\(^\text{14}\) Publication requires that the recipient of the defamatory comment understands the comment’s defamatory nature.\(^\text{15}\) Normally, the defendant must be the person who communicates the statement to the third party.\(^\text{16}\) The compelled self-publication theory changes these general rules and allows recovery when the only communication of the defamatory material to a third party is made by the defamed person.\(^\text{17}\)

2. **Defamatory**

A communication is defamatory if it tends to deter others from associating with the defamed person or if it tends to lower the defamed person’s reputation in the community.\(^\text{18}\) A communication does not necessarily have to lower the plaintiff’s personal or financial reputation; a communication is defamatory if it deters third parties from associating

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\(^\text{Id.}\) The burden of proving fault regarding falsity does not necessarily include the burden of proving falsity:

[T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation. There is, in other words, nothing inconsistent about requiring the defendant to prove truth if absolute protection is to be provided for a defamatory imputation while at the same time requiring the plaintiff to prove that the defendant acted negligently or recklessly in publishing the statement on the basis of the information that was available to him. The situation is very much the same as that which has existed historically under the common law when the defendant publishes a defamatory statement about the plaintiff on a privileged occasion. If he wished to escape altogether, he could prove truth. He could also plead a privilege, and if he established circumstances giving rise to a privilege, then the plaintiff would find it necessary to show some kind of fault as a prerequisite to recovery. So, if the defendant publishes a defamatory statement on a constitutionally privileged occasion, he can either prove truth or require the plaintiff to prove fault. The mere fact that it may be difficult to establish recklessness or negligence without some evidence of falsity does not mean that fault in reporting something to be true cannot be found in the absence of an affirmative finding that the statement was true.


A plaintiff who is a “public figure” has the burden of proving the statement’s falsity, as does a private plaintiff when the statement is of public concern. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-76 (1986). The Supreme Court has not yet ruled on whether the plaintiff has the burden of proving falsity where the plaintiff is a private person and the statement concerns a private matter.

One court ruling on the self-publication theory stated that truth is an affirmative defense, thus placing the burden of proving truth on the defendant. Churchey v. Adolph Coors Co., 759 P.2d 1336, 1341 (Colo. 1988). A second state court also treated truth as a defense. Lewis v. Equitable Life Assur. Soc’y, 389 N.W.2d 876, 889 (Minn. 1986) (truth is determined by whether the underlying implication of the defamatory statement is true, not whether the statement accurately reflects the reason the employer gave the employee for the employee’s termination).

\(^\text{14. Restatement (Second) of Torts § 577(1) (1977).}\)

\(^\text{15. Id. cmt. c.}\)

\(^\text{16. The Restatement requires “publication by the defendant.” Id. § 613(1)(b).}\)

\(^\text{17. See infra Chapters II.B and III.}\)

\(^\text{18. Restatement (Second) of Torts § 559 (1977).}\)
with the plaintiff, such as by imputations of physical disease or mental impairment.\textsuperscript{19}

3. \textit{Falsity}

The defendant is not liable if the defamatory statement is true. Even if the defamatory statement is made for no good reason and is inspired by ill will, truth is an absolute bar to liability.\textsuperscript{20} The defendant need only show that the statement was substantially true since the resulting harm is otherwise the same whether a minor misstatement was included or not.\textsuperscript{21}

4. \textit{Fault Regarding Falsity and Defamatory Character}

The defendant must be at least negligent in failing to ascertain that the statement is false and defamatory. This requirement of fault arises from the United States Supreme Court's interpretation of the First Amendment in \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{22} and is contrary to the common law rule of strict liability for defamation.\textsuperscript{23} The \textit{Gertz} facts involved a media defendant, so the express holding was limited to plaintiffs who were suing a publisher or broadcaster: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."\textsuperscript{24} Later cases have stated that the requirement of proving fault applies in actions against nonmedia defendants, noting that the critical distinction is whether the defamatory statement concerns public or private matters.\textsuperscript{25}

\textsuperscript{19} \textit{Id.} cmt. c.

\textsuperscript{20} \textit{Id.} § 581A cmt. a.

\textsuperscript{21} "It is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true . . . ." \textit{Prosser \& Keeton, supra} note 13, § 116, at 842. See also, \textit{Avianca, Inc. v. Corriea}, 705 F. Supp. 666, 683 (D.D.C. 1989) (statements regarding attorney's breach of ethical obligations and breach of fiduciary duty to client were substantially true).

\textsuperscript{22} 418 U.S. 323 (1974); \textit{Restatement (Second) of Torts} § 580B cmt. c (referring to \textit{Gertz}). \textit{Gertz} involved an attorney who was representing plaintiffs in civil litigation against a policeman. 418 U.S. at 325. A magazine article had falsely labeled the attorney a Communist, partially because of his involvement in this litigation against the policeman. \textit{Id.} at 326. As the plaintiff was not a "public figure" or "public official," the "actual malice" standard of New York Times v. Sullivan, 376 U.S. 254 (1964), did not apply, so the plaintiff could recover without having to prove the defendant knew of or recklessly disregarded the falsity of the defamatory statement. \textit{Gertz}, 418 U.S. at 342-43.

\textsuperscript{23} \textit{Restatement (Second) of Torts} § 580B cmts. b-c (1977).

\textsuperscript{24} \textit{Gertz}, 418 U.S. at 347.

\textsuperscript{25} The Supreme Court did not rely on the defendant being a publisher or broadcaster to justify the requirement of "actual malice." \textit{Dun \& Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749, 753, 773 n.4 (1985). "[A]ll the Justices in \textit{Dun \& Bradstreet} either explicitly or implicitly rejected the media/nonmedia distinction." \textit{Rodney A. Smolla, Law of Defamation} § 3.02[2], at 3-9 (1986). The Court instead focused on whether the speech was of a public or private concern since "speech on matters of purely private concern is of less First Amendment concern." 472 U.S. at 759. When the defamation involves a private concern and a private plaintiff, the plaintiff can recover...
5. Cause of Injury

The causation element requires that the injury follow from the publication of the defamatory statement. The extent of injury that must be shown depends on whether the defamation is oral (slander) or written (libel). Some slander, such as a statement affecting the employee's busi-

presumed and punitive damages without proof of actual malice: "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."" Id. at 761.

An example of a public concern is a clerical deputy's statement that she hoped President Reagan would be assassinated. Rankin v. McPherson, 483 U.S. 378 (1987). An example of a private concern is a public employee's complaints concerning the District Attorney's office, circulated to other District Attorneys in the form of a questionnaire. Connick v. Myers, 461 U.S. 138 (1983). Unless an employee was terminated for comments concerning public matters or the employee's termination arose out of circumstances of interest to the general public, this distinction will not affect the self-publication doctrine.

The California Court of Appeal, however, has substantially changed the definitions of a public plaintiff and a public concern by holding that a publicly employed social worker had to plead a knowing or reckless falsehood in order to state a claim for defamation. Kahn v. Bower, 284 Cal. Rptr. 244 (Ct. App. 1991). The court noted that the quality and efficiency of a public employee's work performance is a matter of public concern; the public is paying the employee and does not have the option of seeking services from a private competitor because the public entity is the only entity providing the service. Id. at 254. The major factor in determining whether an individual is a public official is the extent to which the individual's position is likely to attract or warrant scrutiny by the public. Id. at 251. This scrutiny may be based on the prominence of the position or based on the duties of the position tending to have a dramatic impact on the public. As the public employee in the case was a child welfare worker who possessed considerable power over the lives of individuals, the court concluded that she was a public official. Id. at 253.

Where the plaintiff is a public official, the defamatory statement must be published with knowledge that it was false or with reckless disregard for the veracity of the statement. Mere negligence is not sufficient. Masson v. New Yorker Magazine, Inc., — U.S. —, 111 S. Ct. 2419, 2429 (1991).

Dun & Bradstreet only decided the issue of presumed and punitive damages, so it is unclear whether a private plaintiff is still required to prove negligence. However, Justice White's concurrence notes that the plurality's reasoning supports the argument that fault is not required in a defamation claim brought by a private plaintiff based on a statement of a private concern. Dun & Bradstreet, 472 U.S. at 773-74. White's analysis refers to the plurality's emphasis that speech on private matters receives reduced First Amendment protection. Therefore, White concludes that private plaintiffs should not have to prove fault since the defendant's right to free speech is not as heavily implicated for private speech. Chief Justice Burger's concurrence advocated overruling Gertz so that states could return to the common law strict liability standard. Id. at 764. Professor Smolla concludes that because the plurality cited state cases that applied strict liability in private figure nonmedia situations, the plurality indicated an endorsement of a return to strict liability for private plaintiffs where the statement is on a private concern. SMOLLA, supra, § 3.02[3], at 3-11 to 3-12.

Professor Smolla believes that states which chose strict liability in nonmedia cases based on the now obsolete media/nonmedia distinction will adopt strict liability for private plaintiffs when the speech is not a matter of public concern. Id. § 3.09[2], at 3-22. "The vast majority of states have chosen the 'low option' under Gertz, opting for some form of negligence standard in defamation actions brought by private figure plaintiffs." Id. § 3.10, at 3-22. Professor Smolla has constructed an excellent chart summarizing the minimum level of fault required based on the plaintiff's status (public official, public figure, or private figure) and the subject matter (public concern or non-public concern). Id. § 3.05, at 3-18 to 3-19.
ness reputation, is actionable per se.²⁶ Slander per se is actionable without proof that the statement caused special harm,²⁷ while other claims of slander require special harm.²⁸ Special harm is defined as economic or pecuniary losses.²⁹ Most libel claims are actionable without proof of special harm.³⁰ However, the United States Supreme Court requires proof of actual injury to the plaintiff even for defamation actionable per se if the defendant did not know the statement was false or did not act in reckless disregard as to its truth.³¹

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²⁶ The categories of slander per se, actionable without proof of special damages, are those statements that impute to the other a criminal offense, a loathsome disease, a matter incompatible with the other's business or office, or serious sexual misconduct. RESTATEMENT (SECOND) OF TORTS §§ 570-574 (1977).

²⁷ The general rule is that all libel is actionable per se:

Oral defamation is slander; written defamation is libel. Libel is a crime and a tort which subjects the defamer to liability without proof of special damages. Slander is not a common law crime and, with certain exceptions, does not subject the defamer to liability unless there is proof of special damages.


²⁹ The only type of libel that requires proof of special damages is libel per quod:

Originally all libels were actionable without proof of special harm, but gradually the rule developed that libels in which the defamatory meaning was clear from the face of the words were actionable "per se" without proof of special damages, while libels requiring proof of extrinsic facts to support their defamatory meaning were considered "per quod," and did require proof of special damages.

³⁰ See supra note 25, § 1.04[5], at 1-11 to 1-12 (1986). See also ELDRIDGE, supra § 17, at 93-94.

³¹ RESTATEMENT (SECOND) OF TORTS §§ 570-574 (1977) (regarding what is actionable without proof of special harm).

³² Id. § 575.

³³ Id. cmt. b. The trend is to broaden the scope of pecuniary loss to include deprivation of benefits with an indirect financial value, such as loss of companionship, if such an association could be found to have economic value. Id. A finding of special damages requires specific evidence of the damage because no damages will be presumed. PROSSER & KEETON, supra note 13, § 112, at 793.

³⁴ See supra note 26.

³⁵ RESTATEMENT (SECOND) OF TORTS § 569 cmt. c and § 621 (1977). The Supreme Court stated that the state interest in compensating individuals for injury to reputation "extends no further than compensation for actual injury." Gertz, 418 U.S. at 348-49. "[T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Id. at 349. The rationale for not allowing presumed damages is to prevent windfall recoveries and to prevent the chilling of free speech:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

³⁶ Id. The Court was trying to reconcile the state interest in compensating victims for their loss of reputation with the constitutional protection of free speech; the Court therefore limited state remedies to only those necessary to vindicate the reputational interest—the actual injury. Id.
6. Not Privileged

Privileges fall into two categories—absolute and qualified. Absolute privileges prevent liability even if the defamatory statement was made maliciously, whereas qualified privileges are lost if the statement was made for an improper purpose or with knowledge or reckless disregard as to its falsity. Absolute privileges include consent by the defamed person to the publication and statements made in judicial and legislative proceedings. Qualified or conditional privileges include protection of a common interest or an interest of a third party. The topic of privilege as it relates to the employment context will be developed more fully in Chapter V.

B. Self-Publication Theory

The general rule is that defamers are not liable for the defamed per-

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32. RESTATEMENT (SECOND) OF TORTS § 585, Introductory Note to Title B at 242-43 (1977).
33. Id.
34. Id. at 243-44. See infra Chapter V.B.3.b notes 389-93 and accompanying text for a discussion of improper purpose. Negligence alone is not sufficient to defeat a qualified privilege since negligence as to falsity is required for all defamation actions under Gertz: "One consequence of this holding is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of a conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose." RESTATEMENT (SECOND) OF TORTS § 593 cmt. c (1977). But see supra note 25, discussing that fault may not be required.
36. See id. §§ 594-598A.
son's repetition of the defamatory statement to others. However, this rule has exceptions, including self-publication:

Ordinarily the defendant is not liable for any publication made to others by the plaintiff himself, even though it was to be expected that he might publish it. There are, however, a few cases in which, because of the plaintiff's blindness or immaturity, or because of some necessity he was under to communicate the matter to others, it was reasonably to be anticipated that he would do so, and the writer has been held to be responsible.

The theory has been expanded in some jurisdictions to allow a defamation claim to be stated for any defamatory statement the defamed person is compelled to repeat.

1. Origins of the Theory

Although the basic elements of defamation law are not of recent origin, the self-publication theory is a fairly recent development. The foundation of the theory began to be developed in the late nineteenth century and early twentieth century.

The early cases on the exception of compelled self-publication were not set exclusively in an employment context. One early case held that fear can supply the compulsion for self-publication, not just physical conditions like blindness. This case involved a fourteen-year-old boy who received a letter threatening him with prosecution and imprisonment for a theft. The frightened boy then showed the letter to his family. The defendant storekeeper argued that he could not be liable for defamation because he did not publish the defamatory statement to anyone except the plaintiff; plaintiff alone revealed the letter's contents to others. The court found defendant liable because he had reason to know the matter would reach third persons as a natural and probable result of his sending the letter. The court emphasized that a causal relation must be shown between the defendant's act and the damage, but held that the nexus was met since the defendant knew the boy was young and would probably react with fear and seek his family's advice. Although earlier cases al-

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37. Prosser & Keeton, supra note 13, § 113, at 802.
38. Id.
40. Hedgpeth v. Coleman, 111 S.E. 517 (N.C. 1922). See also Davis v. Askin's Retail Stores, 191 S.E. 33 (N.C. 1937) (holding that the facts alleged in plaintiff's complaint were sufficient to find publication by the defendant when the defendant's letter threatened the 17-year-old plaintiff with criminal prosecution and the frightened plaintiff showed the letter to others.)
41. 111 S.E. at 518.
42. Id. at 519.
43. Id. at 519-20.
44. Id. The court explained the rationale for requiring the causal relationship as follows: The ultimate concern is the relation that existed between the writing of the paper and the disclosure of its contents by the plaintiff. For running through the entire law of tort is the
lowed for recovery when the necessity of self-publication arose from the
defamed person's blindness or illiteracy, the Hedgpeth court expanded
the theory so that it was no longer limited to publication necessitated by
physical conditions: "Necessity may be superinduced by a fear which is
akin to duress." 

An even earlier case emphasized that the self-publication must be at
least foreseeable to the defamer for him to be held liable. The defamed
person received a sealed letter and opened it, allowing her husband to
read the letter at the same time she was reading it. The court held that
the publication was by the plaintiff, not the defendant, because no evi-
dence showed that the defendant knew that the plaintiff’s husband was
in the habit of reading the plaintiff’s mail. Liability is imposed only
when the defendant knows the letter may be read by a third person, such
as when the defendant knows that the plaintiff is illiterate or knows the
plaintiff’s mail is often opened by a business clerk or another person.
The court focused on whether the defendant should have foreseen that
the communication would reach people other than the plaintiff. This
analysis distinguishes between cases where the communication will
foreseeably reach a third party from cases where the plaintiff will
foreseeably republish the communication by self-publication.

2. History of Application of the Self-Publication Theory in the
Employment Context

Later cases applied the self-publication theory to the employment
relationship. Stevens v. Haering's Grocetorium applied the rule that the
employee's self-publication cannot be voluntary. The employer's accu-
sation that a store employee had stolen money was stated in the presence
of others, and the employee became hysterical and repeated the accusa-

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principle that a causal relation must exist between the damage complained of and the act
which occasions the damage. Unless such relation exists, the damage is held to be remote,
and cannot be recovered; but if such relation does exist, the wrongful act is held to be the
cause of the damage.

Id.

45. Allen v. Wortham, 13 S.W. 73 (Ky. 1890) (defamed person was illiterate).
46. 111 S.E. at 520.
47. Wilcox v. Moon, 24 A. 244, 245 (Vt. 1892).
48. Id.
49. Id.
50. Id. See also Rumney v. Worthley, 71 N.E. 316 (Mass. 1904) (reversing trial court's di-
rected verdict for defendant on the evidence that defendant watched plaintiff’s daughter open busi-
ness mail and show contents to plaintiff, which was sufficient evidence for the jury to find defendant
had good reason to believe his letter was likely to be opened and read by a third person and, there-
fore, was sufficient evidence to go to the jury on whether defendant published the defamatory
statement).
51. Wilcox, 24 A. at 245.
52. 216 P. 870 (Wash. 1923).
53. Id. at 871.
tion. Because of the accusation's nature and the time, place, and harsh manner in which the charge was made, the court found that the evidence was sufficient for the jury to find that "Mrs. Stevens, as a natural and to be anticipated result, became hysterical and said and did things which were the pure product of appellants' action rather than the result of her own volition." The plaintiff could recover for slander, but only because her repetition was not voluntary.

An employer's letter that provides the reasons an employee was terminated constitutes a publication where the employer has reason to know others will read the letter. In *Colonial Stores, Inc. v. Barrett*, a World War II agency regulation required employers to certify that discharged employees were available for work. The court allowed a libel claim based on the certificate's false statement because the defamer intended or had reason to believe a third person would read the certificate. The employee applied for several jobs, but the prospective employers refused to employ him after reading the certificate. These employers would have hired him if the certificate had not stated he was discharged for improper conduct toward fellow employees. The employer knew the employee would have to present the certificate to third persons because the War Manpower Commission regulation required the employee to present the certificate to prospective employers. The court stated that the self-publication rule requires a causal link between the defamation and the self-publication:

The rule, that there is no publication when words are communicated only to the person defamed, is subject to exception or qualification. Thus, in the case of libel, whether the general rule extends to a disclosure by the person libeled is to be determined by the causal relation existing between the libel and the publication. There may be a publication where the sender intends or has reason to suppose that the communication will reach third persons, which happens, or which result naturally flows from the sending. This rule is particularly applied in cases where the act of disclosure arises from necessity.

54. *Id.*
55. *Id.*
57. *Id.* at 307.
58. *Id.*
59. *Id.* at 308. The improper conduct was the employee's intervention and attempted peace-making in a fight between two other employees; one of the fighting employees turned on the plaintiff who then hit this fighting employee in self-defense. *Id.*
60. *Id.*
61. *Id.* at 307 (quoting 36 *Corpus Juris, Libel & Slander* § 172, at 1225 (1924)). The Georgia Court of Appeals has subsequently held that the employee's repetition of the statement did not constitute publication where the causal link was not sufficiently established. Green v. Sun Trust Banks, Inc., 6 Indiv. Empl. Rts. Cas. (BNA) 118, 123 (Ga. Ct. App. 1990) (employee's voluntary publication of reason for termination to prospective employers failed to create compelled self-publication claim); Sigmon v. Womack, 279 S.E.2d 254 (Ga. Ct. App. 1981) (employee's repetition in an
The employer's knowledge that the discharged employee would have to submit the certificate to prospective employers was a sufficient link for the employer to be liable for the self-publication.  

C. Conclusion

The traditional theory of defamation requires that the defendant publish the statement to a person other than the person defamed. The defamation theory has been expanded to allow recovery when the defendant can foresee that the plaintiff will be compelled to repeat the defamatory statement which the defendant made to the plaintiff. Although older cases relied primarily on a physical defect or immaturity to justify holding the defendant liable for the plaintiff's self-publication, modern cases have expanded the cause of action to include repetitions by adults that are not the result of physical handicaps.

III
MODERN APPLICATION OF SELF-PUBLICATION TO THE EMPLOYMENT CONTEXT

More recently, courts have allowed recovery for self-publication in the employment context under two different approaches:

(1) The employer knew or could have foreseen the employee would be likely to repeat the defamatory statement, or
(2) The employer knew or could have foreseen the employee would be compelled to repeat the defamatory statement.

Courts adopt the compulsion approach more often. This is perhaps due to the efforts of the courts to limit the liability of employers who are not guilty of traditional defamation because they have not repeated the defamatory statement to others. An employer is less likely to be found liable under the compulsion standard than under the likelihood standard because the employee's burden in proving foreseeable compulsion is tougher than proving mere foreseeable likelihood. Compulsion requires that the defamed person have "no reasonable means of avoiding publication of the statement or avoiding the resulting damages." The

62. 38 S.E.2d at 308.
64. Eg, Churchey v. Adolph Coors Co., 759 P.2d 1336, 1345 (Colo. 1988).
65. Id.
66. Lewis v. Equitable Life Assur. Soc'y, 389 N.W.2d 876, 888 (Minn. 1986). In a case that did not arise out of an employment relationship, the California Court of Appeal has recently defined the compulsion required as compulsion "so strong that it [the newspaper company] could not reasonably have refused" to publish the letter in the newspaper, and an allegation that defendant "demanded" that the letter be published was inadequate to establish compulsion as a matter of law. Live Oak Publishing Co. v. Cohagan, 286 Cal. Rptr. 198, 202 (Ct. App. 1991).
likelihood approach is more liberal, requiring only that a "reasonably prudent person would have expected the plaintiff to republish the communication."^67

A. The Likelihood Approach

Some courts have required that the foreseeability of the republication merely be likely. A Michigan court has held that the defendant was liable if the defendant had reason to suppose the defamatory statement would come to the knowledge of a third person.^68 The court did not mention compulsion. The employee was discharged after eighteen years of continuous service with the defendant. The employee alleged that the defendant corporation and the defendant's employees slandered her by making false assessments of her work, which caused her discharge and prevented her from obtaining other employment.^70 Although the defamatory statements were made only to the employee, the appellate court reasoned that publication is established when the defendant has reason to suppose the statement will be repeated to a third person.^71

Relying on the Restatement (Second) of Torts, a Texas court also applied the likelihood standard in First State Bank v. Ake. Publication has occurred when circumstances indicate repetition to a third person is likely or when a reasonable person would recognize that an act creates an unreasonable risk that the statement will be repeated to a third person.^73 In Ake, former bank president Ake filed a defamation claim against the bank and bank chairman for the bank's unjustified filing of a fidelity bond claim. This fidelity bond claim alleged losses of more than $40,000 resulting from Ake's dishonesty. The chairman knew that he had no basis for claiming Ake was dishonest. Fidelity bonds only cover losses through an employee's dishonest or fraudulent acts, so there was no mistaking the defamatory nature of the bond claim. Ake discovered the filing of the fidelity bond claim only after being refused employment at several banks; the bank did not inform him of its action against him until

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^70. Id. at 361.
^71. Grist, 168 N.W.2d at 405-06.
^73. Id. (citing Restatement (Second) of Torts § 577 cmts. m and k (1977)).
^74. Id. at 698.
^75. Id.
^76. Id. at 700.
^77. Id.
he made an inquiry. If he had not volunteered that information, banks would have inquired whether he had ever had a bond claim filed against him because he had formerly held a bondable position: the filing of this fidelity bond claim "was surely to be brought out during the application and interviewing process..." The probability of Ake repeating the statement meant the defendant was liable for the damages caused by Ake's self-publication.

A subsequent Texas case followed the Ake standard in holding that a prima facie case for damages was established when the jury found that a reasonably prudent person should have expected that the defamed subcontractor would repeat the statement to others. Michael Hope, vice president of the general contractor, Chasewood Construction Company, told a subcontractor, David Rico, to return the materials that Chasewood believed Rico had stolen or to "get off the job right now." Rico ordered his employees to remove themselves and all machinery from the work site. More than one hundred employees were "literally 'in the street,'" demanding to know the reason. Rico explained that he had been accused of theft and had been ordered to remove his employees from the site. The court found that the general contractor's vice president should have foreseen Rico would feel obligated to explain the abrupt departure from the job site:

It was reasonable for Rico to explain the departure from the job site. We are of the opinion that Michael Hope, in the exercise of ordinary care, should have known that Rico would feel an obligation to give an explanation to his personnel and would actually tell them what had occurred. The jury found that a reasonably prudent person in the circumstances would have known that Hope's statement would be communicated to others by Rico.

The Missouri Court of Appeals has adopted the likelihood standard

78. Id. at 699.
79. Id. at 701.
80. Id. at 702.
81. Id. at 701-02.
83. Id. at 444.
84. Id.
85. Id.
86. Id. The language the court used, "feel an obligation," may indicate a standard requiring more than a reasonable expectation of republication, but other courts discuss this case as requiring mere likelihood, not compulsion. See Churchey v. Adolph Coors Co., 759 P.2d 1336, 1345 (Colo. 1988). Moreover, the dissent in Chasewood clarified that "likelihood" was the majority's standard when the dissenting judge argued that the case should be remanded for retrial because Rico failed to show the repetition was necessary. Chasewood, 696 S.W.2d at 449-50. Thus, the dissent was arguing in favor of the compulsion standard. By holding that Rico established a prima facie defamation action when he established that a reasonably prudent person should have expected the accusation to be repeated, the majority was applying the likelihood standard. Id. at 445.
by determining that a plaintiff has stated a claim upon which relief may be granted by alleging that the defendant intended or had reason to suppose the defamatory statement to the employee would reach a third person. In Neighbors, the employee alleged the following facts: (1) the employer gave the employee a "service letter" to serve as a reference for the employee to use in finding a job; (2) prospective employers read the letter which directly and proximately damaged her reputation; (3) the letter's statement that the employee clinic manager breached the confidentiality of a clinic patient was false; and (4) the falsehood was actuated by defendant's express malice. The defendant claimed that the pleadings failed to state a cause of action because the plaintiff did not allege that the defendant published the letter to anyone but the plaintiff. The court held that the allegations that the letter was given to plaintiff for use as a reference and that prospective employers read the letter were sufficient to bring the facts within the self-publication rule. Where the defendant intends or has reason to suppose the matter will come to some third person's knowledge, the defendant can be liable even though it directly published the statement only to the plaintiff. Although directly published only to the plaintiff, the defendant had reason to know third parties would read the letter because the letter would only serve its purpose if plaintiff used the letter as a reference.

The likelihood approach does not adequately protect employers' interests. As most job applications ask the reason for leaving prior employment and as most employers ask job applicants if they have ever been accused of dishonesty, the likelihood of an employee repeating a defamatory statement is virtually a certainty. Therefore, under the likelihood standard, any employer who gives an employee a reason for discharge may be subjected to a self-publication defamation claim. As the standard may easily be met, it would provide employees with an incentive to repeat the statement at every interview to increase damages.

Public policy considerations dictate that there be open communication between employers and employees. The likelihood standard thwarts this public policy and fails to adequately protect employers' interests by inhibiting open and honest communication between employer and employee. Open communication is necessary because employees who are terminated without being told the reason are more likely to sue the employer for wrongful discharge. If an employer only has to foresee the

88. Id. at 824.
89. Id.
90. Id. at 824-25.
91. Id.
92. Id. at 825.
likelihood of the employee repeating the statement to be liable, an employer will be discouraged from telling the employee the reason for her discharge. Some limitations do restrict the scope of defamation liability—for example, the statement must still be false when made and the defendant may have to be at least negligent in failing to ascertain that the statement is false and defamatory. However, most courts believe these limits do not sufficiently protect the employer and, therefore, require that the plaintiff be compelled to repeat the statement.

B. The Compulsion Approach

The highest courts in Minnesota and Colorado have recently recognized a claim for compelled self-publication. Both courts have cited to section 577 of the Restatement (Second) of Torts as supporting this theory.

1. Restatement Section 577

The Restatement (Second) of Torts defines publication of a defamatory matter as "communication intentionally or by a negligent act to one other than the person defamed." To constitute publication, the defamatory matter must be communicated to someone other than the defamed person. Comments k and m further delineate the requirements for compelled self-publication. Comment m deals directly with self-publication and allows recovery for self-publication when the defamed person repeats the statement without an awareness of the defamatory nature and when the circumstances indicate repetition is likely:

One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances. If the defamed person's transmission of the communication to the third person was made, however, without an awareness of the defamatory nature of the matter and if the circumstances indicated that communication to a third party would be likely, a publication may properly be held to have occurred.

The language of comment m indicates that self-publication does not cre-

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93. See supra notes 22-25 and accompanying text.
96. Churchey, 759 P.2d at 1343-44; Lewis, 389 N.W.2d at 886 (citing RESTATEMENT (SECOND) OF TORTS § 577 cmt. m (1977)).
98. Id. cmt. b. Communication to a third person is required because the defamation cause of action primarily protects reputations and no loss of reputation occurs until a third party hears the disparaging comment and correspondingly lowers his estimation of the defamed person. Id.
99. Id. cmt. m.
ate grounds for recovery except under one set of circumstances—when
the defamed person is unaware of the defamatory nature and when the
repetition is likely. The illustrations to comment m clarify that the de-
famed person must have no idea of the defamatory character.100

Despite the clear implication of comment m that this is the only way
to recover for self-publication, judges have relied on comment k to justify
the compelled self-publication theory.101 Comment k distinguishes inten-
tional from negligent publication:

There is an intent to publish defamatory matter when the actor does an
act for the purpose of communicating it to a third person or with knowl-
edge that it is substantially certain to be so communicated. It is not nec-
necessary, however, that the communication to a third person be intentional.
If a reasonable person would recognize that an act creates an unreason-
able risk that the defamatory matter will be communicated to a third per-
son, the conduct becomes a negligent communication. A negligent
communication amounts to a publication just as effectively as an inten-
tional communication.102

None of the illustrations to comment k deal with the defamed person’s
compelled repetition of the statement.103

2. Case Analysis

The most frequently cited case that has adopted the rule that an
employee may state a defamation claim for self-publication that is com-
pelled is *Lewis v. Equitable Life Assurance Society*.104 In *Lewis*, the
Supreme Court of Minnesota began by stating the general rule that a
statement cannot be defamatory unless it is communicated to a person

100. Illustration 10 involves a blind person giving a defamatory letter to a third party to read.
Illustration 11 deals with a defamatory letter written in Latin when the writer knows the defamed
person cannot read Latin and will have to take the letter to an interpreter. *Id.*
101. *Churchey,* 759 P.2d at 1343-44. *See also Chasewood Constr. Co.,* 696 S.W.2d at 448-49
(Reeves, J., dissenting). After quoting comment k, the dissenting judge concluded that the defend-
ant’s statement did not support negligent publication because necessity was not shown. *Id.* at 449.
The dissent pointed out that the jury findings did not support a conclusion of compelled self-publica-
tion since the jury only found that the defendant should have reasonably expected the plaintiff’s
repetition. “Expecting a statement would be repeated goes only to foreseeability; expecting the state-
ment would *have* to be repeated would support necessity.” *Id.* (emphasis in original). Since neces-
sity was not established, the plaintiff should not be able to recover. *Id.* at 449-50. The dissent never
explained how comment k required a showing of necessity, and instead relied on Prosser’s descrip-
tion of necessity. This reasoning is extremely unclear because comment k does not require necessity.
(See *supra* note 38 and accompanying text for Prosser’s quote on which the dissent relied.)
102. RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977) (citations omitted).
103. The closest illustration merely deals with foreseeability. In Illustration 6, the defendant
mailed the plaintiff a defamatory letter, knowing that the plaintiff’s secretary would open the letter
in the plaintiff’s absence. When the secretary reads the letter, the defendant has published the de-
famatory statement to a third person. RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977).
The illustration does not deal with the plaintiff opening the letter himself and feeling compelled to
repeat the contents to a third person.
104. 389 N.W.2d 876 (Minn. 1986).
other than the plaintiff. The court cited to comment m of Restatement section 577 as support for the rule that the defendant’s direct communication to the plaintiff, who then repeats the statement to a third person, normally does not constitute publication. However, the Lewis court reasoned that courts recognize a narrow exception and hold the defendant liable for the plaintiff’s self-publication if: (1) the defamed person was compelled to repeat the defamatory statement to a third person; and (2) this compulsion was foreseeable to the defendant. The Supreme Court of Minnesota found that these two conditions were present, thereby allowing recovery for the plaintiffs’ own repetition of the defamatory statement.

In Lewis, the four plaintiffs were discharged for “gross insubordination” because the employees refused to alter their expense reports for a company trip as the company had requested. The company never disputed that the employees’ expenses had been honestly incurred and acknowledged that the employees should have been given “more thorough” instructions before leaving on the trip.

The company never directly communicated the reason for the employees’ terminations to prospective employers. The employer’s policy was to provide only the job title and dates of employment unless the employee authorized in writing the release of additional information. Prospective employers asked the plaintiffs their reasons for leaving, and each plaintiff responded that she had been terminated. When the prospective employers asked the plaintiffs to explain their terminations, each attempted to explain the situation behind the “gross insubordination” label. Each plaintiff had difficulty obtaining subsequent employment and suffered emotional and financial hardship because of being

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105. Id. at 886.
106. Id.
107. Id.
108. Id. at 888.
109. The employees had not been told that they would be required to complete expense reports until after they returned from a company trip. 389 N.W.2d at 880. They attempted to reconstruct their expenses in filling out the report, but the employer then asked the employees to alter their reports because the initial instructions were erroneous. They changed their reports to reflect this request. The employer then asked the employees to change their reports again to reflect lower total expenses. The employees refused to do this. As they refused to alter their expense reports further, the employer accused them of gross insubordination and warned them that they might be terminated. Id. at 881. The company decided to terminate all four employees, but told the office manager to collect the money that two of the employees had agreed to repay to the company before firing any of the four. Id.
110. Id. at 881.
111. Id. at 882.
112. Id.
113. Id.
114. Id.
115. One plaintiff found a job after explaining forthrightly to the interviewer the circumstances
discharged.116

The Supreme Court of Minnesota based its adoption of compelled self-publication on the close causal link between the defendant's actions and the resulting damages from the foreseeable republication.117 The defendant knew or should have known that the plaintiffs had no reasonable means to avoid the publication, so "the damages are fairly viewed as the direct result of the originator's actions."118 The court noted that "[t]he trend of modern authority persuades us that Minnesota law should recognize the doctrine of compelled self-publication."119

The Supreme Court of Colorado has also recognized the compelled self-publication theory of defamation in Churchey v. Adolph Coors Co.120 The court held that material factual disputes precluded summary judgment for defendant Coors on the defamation claim.121 One factual dispute in the defamation claim was whether the employer could have reasonably foreseen the employee would be compelled to repeat the reason she was terminated to subsequent prospective employers.122

Coors discharged Diana Churchey for "dishonesty" because she
"failed and refused to report her medical clearances to return to work." Immediately prior to her discharge, she was absent from work for five consecutive days because of illness. During these five days, she was being examined by her personal doctors and the Coors' medical staff, and she was trying to inform her supervisor of her condition and ability to work. The charge of "dishonesty" was based on the Coors' medical staff directing Churchey to return to work on a specified day, which she failed to do based on her personal doctors directing her not to return to work and based on her supervisor directing her to report again to the Coors' medical staff, who subsequently authorized her being absent the next day.

The trial court applied the likelihood standard. The self-publication is sufficient "if Coors had known that there was a substantial certainty that communication to a third person by Churchey was likely, or if a reasonable person would have foreseen this likelihood." The trial court granted Coors' summary judgment motion because nothing indicated that the defendant should have foreseen the likelihood of plaintiff's

123. Id. at 1338.
124. Churchey's condition was first diagnosed on Sunday as an eye infection and she called her supervisor to inform him that she could not work on Monday, January 17, 1983. Id. On Monday, a specialist diagnosed her condition as conjunctivitis and maxillary sinusitis. Conjunctivitis is an inflammation of the tissue lining the back of the eyelid. Maxillary sinusitis is an inflammation of the air spaces located on each side of the nose, which causes pain in that area, toothache, and headache. Id. at 1338 n.1.
125. Id. at 1338-39.
126. Churchey called her supervisor on Monday after she received the diagnosis from the specialist and requested a leave of absence. He told her to report to the Coors' medical center, which she did on Tuesday. The Coors' personnel confirmed her condition as being conjunctivitis and ordered her to return to work on Wednesday. Id. at 1338. Her condition worsened overnight, and she saw two specialists the next day who told her not to return to work until the following Monday. Id. at 1338-39.

On Wednesday, Churchey called one of her supervisors to ask for time off. As this supervisor was unfamiliar with the company's leave policy, he said that he would call her back later that day. He called her that afternoon and told her to report to Coors' medical center. The record does not specify whether the supervisor told her to report to the center that same day. Id. at 1339.

On Thursday morning, Churchey gave her supervisor the form that the medical center had filled out on Tuesday, directing Churchey to return to work on Wednesday. The supervisor did not read the form at that time. Churchey reported to the medical center, and the nurse practitioner excused her from work until the next day, when Churchey was scheduled to see a company doctor. On Thursday afternoon, the supervisor read the form that ordered Churchey to return to work Wednesday and decided to suspend her pay as of the previous day, but he did not notify her of this decision. Id.

On Friday, Churchey saw the Coors' doctor, who signed the medical treatment request form which the supervisor had dated January 24, the following Monday. Churchey believed that the form authorized her absence and returned home. The doctor told Churchey's supervisor that Churchey had said she was not scheduled to work until Tuesday, January 25. The doctor told the supervisor that Churchey could have worked that Friday. The supervisor and a company personnel specialist decided to suspend Churchey if she did not report to work that day, but no one told Churchey this. Churchey returned to work the following Tuesday when her supervisors told her she was suspended. The next day they discharged her for "dishonesty." Id.

127. Id. at 1343.
repetition at the time the defendant communicated the reason to the plaintiff. The appellate court affirmed on the different ground that all of the employer's communications were privileged. The Supreme Court of Colorado reversed and remanded the defamation claim to the appellate court with instructions to return the case to the trial court for further proceedings.

The Supreme Court of Colorado adopted the compulsion standard based on its analysis of the Restatement (Second) of Torts. The court also relied on the recent trend of other jurisdictions adopting the compelled approach.

3. Analysis of Restatement Section 577

Although comment k does not apply expressly to self-publication situations, the Supreme Court of Colorado expended a great deal of effort to use the definition of negligent communication in comment k of section

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128. Id.
129. Id. The appellate court rejected the foreseeability standard and concluded that there had not been an unprivileged communication of the reasons for the employee's termination to anyone except her.
130. Id. at 1338.
131. Id. at 1343-44. The court relied on comment k of the Restatement (Second) of Torts § 577 (1977). See supra notes 101-03 and accompanying text.

The Colorado court also cited Bretz v. Mayer, 203 N.E.2d 665 (Ohio Ct. Common Pless 1963). Bretz allowed recovery for a libelous letter when the libeler had reason to believe that the victim would be under a strong compulsion to show the letter to others. In Bretz, a disgruntled former congregation member, Mayer, sent a letter to a minister, Bretz, who had been preaching at the church for the 10-year period since the minister had left Hungary. The letter pointed out that the minister had been expelled from this church for his divorce and early remarriage. The letter also threatened to obtain a restraining order to prevent the minister from organizing a new church and to prevent the minister from using the title of "Reverend." Id. at 667. The court largely based recovery on the minister's duty to the church:

[D]efendant had reason to suppose that the letter would reach third persons, such result following naturally from the sending. The letter from Mayer to Bretz contains not only a personal libel, but also a very real threat to the existence of the new church. It was Bretz's duty as pastor to reveal the imminent danger to the church's officials. Bretz was a man, transplanted in a strange land in middle life, having difficulty with the language, at low physical and emotional ebb because of church disputes and his marital difficulties, and feeling painfully responsible to the church he was forming. It was patently inevitable that he would reveal the letter to such persons as he did.
Id. at 670-71. Despite this focus on the minister's unique duties to the church members, the Bretz case is cited as general support for the compelled self-publication theory.

Another frequently cited case adopting compelled self-publication is Belcher v. Little, 315 N.W.2d 734 (Iowa 1982). Belcher involved a suit for slander of title to real estate arising out of a property division during a divorce. Id. at 735-36. The damaged person, the rightful property owner, repeated the slander to a third person, a bank. Id. at 737. The Supreme Court of Iowa discussed the likelihood standard of "knew or should have known," but adopted the compulsion standard which requires "some urgent or pressing reason for disclosure." Id. at 738. The determination of strong compulsion is a question of fact which must be decided on each case's circumstances. Id. The court reversed and remanded for a new trial since the jury could have found compulsion, but had not expressly determined the compulsion question. Id.
577 to support its conclusion that an unreasonable risk that the defamatory matter would be published to another person supports recovery for self-publication. If the plaintiff's repetition of the defamatory statement was foreseeable, then the defendant's statement to the plaintiff created an unreasonable risk of publication to another person. The court in Churchey held that the facts of the case did not fit within the special criteria of comment m since Churchey was aware of the statement's defamatory nature, and thus comment m did not control the case's resolution. The facts of the case fell within the criteria of comment k since the defendant's conduct created an unreasonable risk that the defamation would be published to a third party.

Comment m explicitly explains when self-publication can support recovery for defamation. Given comment m's explicit enumeration of circumstances that allow for recovery in self-publication cases, the courts are expanding the intended coverage of comment k by forcing the adoption of compelled self-publication under its auspices. Since courts are not required to follow the Restatement, courts can extend the coverage of the Restatement sections and develop new theories not included in the Restatement. Courts would be more persuasive if they explained their rationale for recognizing the self-publication theory instead of trying to force that theory into the language of comment k.

C. Rejection of the Self-Publication Theory

I. State Courts

A few state courts have expressly rejected the self-publication theory. For example, in Layne v. Builders Plumbing Supply Co., the appellate court of Illinois recently refused to recognize the compelled self-publication theory. The court reasoned that the theory had not achieved widespread acceptance and that recognizing the claim would be disadvantageous for several reasons: (1) recognizing the claim would discourage plaintiffs from mitigating damages because employees could increase damages by repeating the statement when the repetition was not necessary or when the employee could have tried to explain the true nature of the defamatory situation to the prospective employer; (2) recognizing the claim would deter employers from communicating to the employee the reason for the employee's termination; and (3) recognizing the cause of action would thwart the public interest in providing information regarding the reason an employee was discharged to prospective employers.

133. Churchey, 759 P.2d at 1344.
134. Id.
135. Id.
137. Id. at 1110-11.
The appellate court in Pennsylvania has also recently rejected the self-publication doctrine in *Yetter v. Ward Trucking Corp.* The court, however, carefully limited its rejection of the theory to the particular facts before the court. The court based its decision on case law that recognizes that employers have an absolute privilege to publish defamatory matter in notices of employee terminations. The absolute privilege is designed to encourage an employer to communicate to the employee the reasons for discharge. This absolute privilege protects only communications to the employee, not to others; thus, the self-publication claim would defeat the absolute privilege. The court noted that other jurisdictions recognizing the compelled self-publication theory merely allow a qualified or conditional privilege, not the absolute privilege the Pennsylvania courts recognize. The court concluded that where the defamation claim is based on the publication of an employee termination letter by the employer to the employee only, the requirement that the defendant publish the defamatory matter is not met through proof of compelled self-publication.

In *Hoover v. Livingston Bank*, the Louisiana Court of Appeal held that a bank's investigation of an employee for missing money did not constitute publication since the bank never used any defamatory language against the employee. The employee admitted that no one at the bank had accused her of theft and that she did not know of the bank making such a statement to anyone else. The court held that the employer's conduct did not constitute publication of a defamatory statement. The bank's act of suspending the employee without giving her a chance to prove herself innocent did not support a defamation claim.

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139. *Id.* at 1024.
140. *Id.*
141. *Id.*
142. *Id.* at 1024-25.
143. *Id.* at 1025.
146. *Id.* at 5.
147. *Id.*
148. *Id.*
149. *Id.* Other courts agree that employers' actions do not constitute defamation. The Indiana Court of Appeals has held that an employer's conduct of searching an employee's car did not constitute defamation. Kolczynski v. Maxton Motors, Inc., 538 N.E.2d 275, 276 (Ind. Ct. App. 1989). In *Gowin v. Hazen Memorial Hosp. Ass'n*, 349 N.W.2d 4 (N.D. 1984), the Supreme Court of North Dakota held that the employer's act of demoting a hospital employee was not slander. *Id.* at 10. The court also stated that the inferences that could be drawn from the demotion did not make the demotion itself slanderous. *Id.* This indicates that unless the employer verbalizes the reason for the employee's demotion, the employer cannot be held liable for defamation. In *Little v. Spaeth*, 394 N.W.2d 700 (N.D. 1986), the same court held that the dismissal of two assistant Attorneys General was not defamatory. *Id.* at 705. The two assistant attorneys' jobs were not protected by contract, so
The employee was the only person to publish the statement, which was insufficient as a matter of law to support recovery for defamation.150

In *Lunz v. Neuman*,151 an employee voluntarily quit after his employer accused him of taking groceries without paying for them.152 The plaintiff claimed he was required to disclose the false accusation that forced him to quit when applying for other jobs.153 The court held that the defendant's communication to the plaintiff alone is not sufficient to establish publication.154 If the plaintiff's employment applications contained defamatory information, the publication of the defamation was by the plaintiff.155 Therefore, the employer was not liable for defamation.156

2. Federal Courts

Federal courts are less willing to adopt the compelled self-publication theory than state courts. For instance, the Fourth Circuit refused to apply the self-publication theory in an action brought by a surgeon against a hospital in *De Leon v. St. Joseph Hospital, Inc.*157 The Fourth Circuit noted that "the theory of self-publication has not gained widespread acceptance," that the *Restatement (Second) of Torts* had rejected the theory and that no Maryland authority had been provided to the court.158 The court noted that recognizing the self-publication theory might impose liability for defamation on every employer each time a job applicant was rejected.159

150. *Hoover*, 451 So. 2d at 5-6. The court also concluded that the employer had not violated its qualified privilege since the investigation was undertaken in good faith. *Id.* at 5.

151. 290 P.2d 697 (Wash. 1955).

152. *Id.* at 699.

153. *Id.* at 701.

154. *Id.*

155. *Id.* at 701-02.

156. *Id.* at 702.


158. *Id.* The court cited to Restatement § 577 at 206, which is comment m, as rejecting the self-publication theory.

159. 871 F.2d at 1237.
One reason for the rejection of the theory by federal courts is that federal courts defer to state courts on questions of state law. In Burger v. Health Insurance Plan, a federal district court in New York declined to exercise jurisdiction over the pendent compelled self-publication claim because the state courts of New York had not yet ruled on the self-publication question. "A federal court should not decide, in the first instance, this important matter of state public policy." A federal district court in Indiana also refused to predict whether the Supreme Court of Indiana would adopt the self-publication theory and dismissed the claim.

However, other federal district courts in New York have allowed claims for self-publication defamation, holding that New York courts were apt to join the trend in recognizing the cause of action for compelled self-publication. In Weldy v. Piedmont Airlines, the United States District Court for the Western District of New York allowed an employee's suit for self-publication where the employee was terminated for assault and unprofessional conduct. When plaintiff subsequently sought employment, he alleged that he was "required to repeat the . . . defamatory statements to prospective employers during the course of giving an honest account of the reason for his termination, as stated by defendant."

Although the court acknowledged that the self-publication theory is recognized only in a minority of jurisdictions and is contrary to the general rule that the originator of a defamatory statement is not liable for the defamed person's repetition of the statement to others, the court recognized the action based on the trend in other jurisdictions to accept the

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161. Id. at 52. The court also based its declination of jurisdiction on the possibility of jury confusion on damages since the defendant's malice was irrelevant to the federal Age Discrimination in Employment Act claim, but was relevant to the plaintiff's tort claims of defamation and intentional infliction of emotional distress. 684 F. Supp. at 50.
162. Id. The federal court dismissed the defamation claim without prejudice so that the plaintiff could sue in state court.

The same federal court in New York refused to decide whether the Lewis standard of compulsion or the Restatement § 577 comment m standard of unawareness of the defamatory nature should be applied to a self-publication claim since the evidence did not support recovery under either standard. Mandelblatt v. Perelman, 683 F. Supp. 379, 386 (S.D.N.Y. 1988). See also McBride v. Chesebrough-Ponds, Inc., No. B-86-329, 1988 U.S. Dist. LEXIS 12384, at *1, 22 (D. Conn. Nov. 1, 1988) (the record did not indicate any necessity or compulsion, so the court did not have to determine whether Connecticut would adopt the compelled self-publication rule).
165. The employee was terminated for assault after warning a coworker verbally to stop harassing his wife, who also worked for the airline. The plaintiff did not physically threaten or touch the coworker. Eleven days after the verbal confrontation, the plaintiff was terminated for aggravated assault and unprofessional conduct. 4 Indiv. Empl. Rts. Cas. at 1846-47.
166. Id. at 1847.
The key elements to the cause of action are the plaintiff being compelled to repeat the defamatory statement and the defendant being able to foresee that the plaintiff would be so compelled. The facts supporting the self-publication claim usually arise from a job applicant feeling compelled to explain to a prospective employer the reason that she was terminated from her prior job. The court, in effect, held that foreseeability is easily established since "an employee who has been fired generally must explain to prospective employers the proffered basis of his former employer as to why he was fired."

The court rejected dictum from a prior decision by another federal district court that had noted that the employee must not realize that the statement was defamatory at the time the employee repeated the statement. The court reasoned that requiring a plaintiff not to realize the defamatory nature would effectively eviscerate the claim since the plaintiff is in the best position to know whether the allegations are false.

In *Elmore v. Shell Oil Co.*, the United States District Court for the Eastern District of New York allowed a claim for compelled self-publication where a manager was terminated for accepting monetary gifts from dealers. After recognizing that a defendant generally is not held responsible for a voluntary republication by the plaintiff, the court noted that an exception to this rule was increasingly being recognized in other jurisdictions where the originator of the defamatory statement had reason to believe the plaintiff would be compelled to repeat the statement to a third person. The court recognized the compelled self-publication theory for employees who are provided a defamatory reason for their termination since plaintiffs should not have to fabricate reasons for their sudden departures from prior employment. As the plaintiff had been employed by the same oil company for thirteen years, the court found that the plaintiff had stated a claim that he was compelled to repeat the defamatory statement to explain his sudden departure.

The United States District Court for the District of Minnesota also denied an employer’s motion for summary judgment on a self-publication claim in *Steinbach v. Northwestern National Life Insurance Co.* The court held the plaintiff had stated a claim for compelled self-publication

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167. *Id.* at 1849. In fact, the court noted that “every court which has considered the question on its merits has adopted the doctrine.” *Id.* at 1850.

168. *Id.* at 1849.

169. *Id.*

170. *Id.* at 1850 (citing Mandelblatt v. Perelman, 683 F. Supp. 379 (S.D.N.Y. 1988)).


173. *Id.* at 546 (citations omitted).

174. *Id.*

175. *Id.*

based on defamatory statements that were repeated in subsequent inter-
views.177 As the Minnesota courts had already recognized the compelled
self-publication action, the plaintiff's allegation that he was compelled in
subsequent interviews to repeat the defamatory explanation for his termi-
nation stated a cause of action.178

Other federal district courts refuse to allow recovery when the em-
ployer does not publish the defamatory statement to others. In Mathis v.
Boeing Co.,179 the court held that the employer's policy of not publishing
the reason for an employee's discharge precluded a defamation cause of
action since the employee did not offer any evidence to deny this policy
and, therefore, no genuine issue of material fact was presented.180 In
Carson v. Southern Railway Co.,181 the employee was the only one to
repeat the defamatory statement.182 The court granted the defendant's
motion for summary judgment on the employee's self-publication claim
because even if the employer expected that the employee might repeat the
defamatory statement, that expectation did not change the result.183

Although the federal courts are largely unwilling to recognize the
compelled self-publication theory unless state law has already accepted
the theory, few state courts which have addressed the issue have rejected
the theory. However, the recent rejection of the theory in Illinois and
Pennsylvania may signal an increasing recognition of the disadvanta-
geous effects of the theory. Nevertheless, assuming state courts continue
to allow self-publication claims, more federal courts may be willing to
adopt the theory even though the state court has not expressly ruled on
the issue.

177. Plaintiff was employed as an electronic data processing manager in an insurance company's
internal audit department. Id. at 1390. After six years of favorable evaluations from one supervisor,
problems developed between the plaintiff and his new supervisor. For the next three years, plaintiff
received mostly favorable ratings in the evaluation categories. During the next year, the supervisor
issued a written warning that criticized the plaintiff for failure to provide target dates for some tasks
but did not reprimand him for missing deadlines. 728 F. Supp. at 1391. Over the next six weeks, the
plaintiff completed all the projects discussed in the warning. Within a week, the plaintiff was termi-
nated without written explanation. The supervisor told the plaintiff's coworkers that the plaintiff
had been on probation and was terminated because of performance problems. Plaintiff alleged that
he has been compelled to disclose this statement while attempting to find subsequent employment.
Id.

178. Id. at 1396. The federal court also endorsed the Minnesota court's ruling that the falsity
issue is determined by the falsity of the underlying statement—that is, whether the plaintiff per-
formed his job poorly. Plaintiff's allegations that the termination was motivated by age discrimina-
tion and not by poor performance created a triable issue.

180. Id. at 645.
182. Id. at 1113. See also Martino v. Amoco Chemicals Co., 7 Indiv. Empl. Rts. Cas. (BNA)
331, 335 (S.C. Ct. Common Pleas 1991) (citing Carson and other cases to support rejection of the
self-publication theory).
183. Id. at 1114.
D. Conclusion

Although only a few states have formally adopted the self-publication theory, the theory has substantial ramifications on the employment relationship. Only nine states have recognized self-publication in the employment context, and only five of those states require the plaintiff to prove compulsion. Two other states have adopted the compulsion standard for republications in contexts other than employment relationships. Although few jurisdictions have recognized the compelled self-publication doctrine, the number of defamation suits arising out of the employment relationship has increased substantially. The implications of the compelled self-publication doctrine on the employment relationship are analyzed in the following chapter.

IV

Effect of Self-Publication on the Employment Relationship


California, Colorado, Georgia, Minnesota, and Ohio require compulsion. The other states listed in note 184 have adopted the likelihood standard. See Belcher v. Little, 315 N.W.2d 734 (Iowa 1982); Hedgpeith v. Coleman, 111 S.E. 517 (N.C. 1922).

Libel suits filed by former employees now account for one-third of all defamation suits, with successful litigants collecting an average of $112,000 . . . .” Ronald Turner, Compelled Self-Publication: How Discharge Begs Defamation, 14 EMPLOYEE REL. L.J. 19, 19 (1988). Around five thousand claims involving employment references are filed each year. Id. at 20. Considering that average verdicts in California wrongful discharge suits have tripled in the last three years, the average verdict in employee defamation suits has probably increased as well. Lauren Blau, Jury Awards Above Average in Work Cases, S.F. DAILY J., July 7, 1992, at 3 (average jury verdict from 115 employment cases from 1989-91 was $1.417 million).

"Anxious to avoid the high costs and aggravation of libel suits, many companies are sharply restricting information they will provide about former employees. Some refuse to offer anything more than a former employee's name, rank and dates of employment." Gregory Stricharchuk, Fired Employees Turn the Reason for Dismissal Into a Legal Weapon, WALL ST. J., Oct. 2, 1986, at 33. To avoid defamation suits, 75% of surveyed employers would not supply other employers with more than the former employee’s name, dates worked, and jobs performed. Turner, supra note 187, at 19-20.
However, even this policy of nondisclosure to prospective employers proves futile in states recognizing the self-publication theory. Under the self-publication theory, if the employer tells only the employee the reasons for the discharge, the employer is subject to liability for defamation if the employer could have foreseen that the employee's repetition would be likely or compelled.\(^{189}\)

### A. Self-Publication Theory Increases Risk of Litigation

#### 1. Risk of Litigation When Employer Fails To Provide Reason for Termination

When an employer discharges an employee, the employer can communicate the reason for discharge and risk self-publication liability or withhold the reason and increase the risk of other suits such as wrongful discharge, retaliatory discharge, discrimination, or intentional or negligent infliction of emotional distress. Before the self-publication theory was adopted, the employer could reveal to the employee the justification for the discharge, thereby minimizing wrongful discharge litigation, but still avoid defamation liability by telling only the employee.\(^{190}\) Now, under the self-publication theory, the employer can be found liable even though the employer diligently avoided disclosing the reasons for the employee's discharge to third persons.\(^{191}\)

Withholding the reasons for discharge from the employee prevents employer liability for defamation, but may increase the probability that the employee will sue the employer under several other theories. The most likely claim is wrongful discharge because a termination without explanation creates an inference of discharge for an impermissible reason. The increasing number of states recognizing exceptions to the at-will employment doctrine\(^{192}\) may lead an employee to believe she can win a wrongful discharge suit.

Retaliatory discharge is a second theory under which the employee can sue an employer who withholds the reasons for the employee's discharge. In a retaliatory discharge suit, the employee claims that she was discharged in retaliation for exercising legally protected rights.\(^{193}\)

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\(^{189}\) See supra Chapter III.A-B.

\(^{190}\) Courts rejecting the self-publication theory have held that the employer's policy of not revealing the reason for the discharge to third parties precludes defamation liability when the employee repeats the statement himself. Mathis v. Boeing Co., 684 F. Supp. 641, 645 (W.D. Wash. 1987).

\(^{191}\) E.g., Lewis v. Equitable Life Assur. Soc'y, 389 N.W.2d 876, 882 (Minn. 1986).

\(^{192}\) A majority of states recognize the public policy exception that prohibits a discharge in violation of public rights protected by a constitution, a statute, or case law. David S. Hames, The Current Status of the Doctrine of Employment-At-Will, 39 Lab. L.J. 19, 31 (1988). A majority also recognize implied contracts based on handbooks or oral assurances to the employees. Id.

\(^{193}\) The Supreme Court of Illinois specified three elements necessary to state a cause of action for retaliatory discharge: (1) the employee was discharged; (2) the discharge was in retaliation for the
public policy exception to at-will employment is one type of retaliatory discharge, while a second type involves whistleblowing claims which are based on state and federal laws. Such statutes usually provide that an employee cannot be discharged for reporting the employer for an act which the employee in good faith believed to be a violation of law.

An employee may also believe her discharge is for discriminatory reasons if the employer is unwilling to disclose the reason for discharge. The employee could claim that age, sex, race, religious, or other discrimination motivated the discharge. The employee might also file a claim with the National Labor Relations Board alleging the employer committed an unfair labor practice by discriminating against the employee for employee's activities; and (3) the discharge violates a clear mandate of public policy. Hinthorn v. Roland's, Inc., 519 N.E.2d 909, 911 (Ill. 1988) (trial court's granting dismissal for failure to state a claim was error when the employee alleged that she was discharged after asserting her right to medical attention for a work related back injury).

194. An example of retaliatory discharge is an employer who retaliates against an employee by terminating the employee for filing a workers' compensation claim. Since the state legislature has enacted a law providing that an employee could not be discharged for the employee's valid claim for compensation, the employee would have a common law tort action for retaliatory discharge: "[b]ecause the legislature enacted a statute that clearly imposes a duty and because the intent of the section is to preclude retaliatory discharge, the statute confers by implication every particular power necessary to insure the performance of that duty." Smith v. Piezo Technology & Professional Adm'r's, 427 So. 2d 182, 184 (Fla. 1983) (relying on Fla. Stat. § 440.205 (1979)).


196. A federal statute covering federal employees provides that supervisory employees cannot discriminate against employees for disclosing information that the employee "reasonably believes" evidences a violation of any law, mismanagement, an abuse of authority, or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law or required to be kept secret in the interest of national defense or foreign affairs. 10 U.S.C. § 1587(b)(1) (1988). The employee can reveal the information otherwise prohibited in subsection (b)(1) if the employee reveals it to the federal employees designated to receive the disclosures. Id. § 1587(b)(2). See also 10 U.S.C. § 1034(c)(2) (1988) (protects a member of the armed forces who "reasonably believes" a violation of law or mismanagement has occurred). A Minnesota statute protects an employee's good faith report of a suspected violation of federal or state law. Minn. Stat. Ann. § 181.932(a) (West Supp. 1992).

Although none of the other statutes listed in note 195 explicitly require good faith, courts may require good faith. The Michigan act does not expressly require good faith, but the act has been interpreted to require a good faith belief based on the statute's language of "suspected violations." Mich. Comp. Laws Ann. § 15.362 (West 1981). Also, since the statute excludes protection of a report that "the employee knows . . . is false," the statute does not protect those acting in bad faith, implying that those acting in good faith are protected. Melchi v. Burns Int'l Sec. Serv., Inc., 597 F. Supp. 575, 583 (E.D. Mich. 1984).

Other potential claims include torts such as negligent or intentional infliction of emotional distress. An employer’s refusal to state any reason at all for the employee’s termination could be found to be “extreme and outrageous” conduct—especially since some states have expanded liability for intentional infliction of emotional distress to cover employment conflicts. However, numerous cases have recently considered and rejected claims based on intentional infliction of emotional distress arising out of the employee’s discharge, because the claims failed to establish the extreme and outrageous element. Since a termination alone is not suf-

198. An employee could file a § 8(a)(1) claim (interference with, restraint or coercion of right to assist a union and engage in concerted activities) and a § 8(a)(3) claim (discrimination in regard to tenure or other term of employment to discourage union membership). National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and 158(a)(3) (1988). A unionized employee probably has just cause protection under the collective bargaining agreement, so he can be reinstated since the false reason will not support just cause. See supra note 5.

199. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The elements of an intentional infliction of emotional distress claim are: (1) extreme and outrageous conduct, beyond all possible bounds of decency; (2) intent to cause or reckless disregard of the probability of causing distress; (3) severe emotional distress, so severe that no reasonable man could be expected to endure it; and (4) causation between the conduct and the severe emotional distress. Id. and cmts. d, i, and j. See supra note 6 for case examples.

200. Some cases base expansion of the tort on the “special relationship” between an employer and employee. In Alcorn v. Anbro Engineering, Inc., the court relied on the employer’s position of authority over the employee in noting that “plaintiff’s status as an employee should entitle him to a greater degree of protection from insult and outrage than if he were a stranger to defendants.” 468 P.2d 216, 218 n.2 (Cal. 1970) (supervisor disparaged employee’s race in a rude manner, stating “I don’t want any ‘niggers’ working for me,” and then fired the employee).

In Bodewig v. K-Mart, Inc., the court also relied on the authoritative relationship in holding that the special employment relationship required a lesser showing of intent to find the employer liable: “The relationship between plaintiff and K-Mart was a special relationship, based on which liability may be imposed if K-Mart’s conduct, though not deliberately aimed at causing emotional distress, was such that a jury might find it to be beyond the limits of social toleration and reckless of the conduct’s predictable effects on plaintiff. 635 P.2d 657, 661 (Or. Ct. App. 1981) (teenage employee accused by customer of stealing $20 was subjected to a strip search while the customer of the same sex watched). The court reversed the trial court’s granting of the defendant’s summary judgment motion and remanded for trial because a jury could find the employer’s actions constituted intentional infliction of emotional distress. Id. at 661.

The Restatement section on this tort explains that a position of authority influences the determination of what conduct constitutes extreme and outrageous conduct: “The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965).

201. E.g., Kelley v. Schlumberger Technology Corp., 849 F.2d 41 (1st Cir. 1988) (finding only negligent infliction of emotional distress for a drug test that resulted in the employee’s discharge). Although many cases do not succeed, employees are increasingly alleging intentional infliction of emotional distress arising out of discharge. In the following cases the employees lost their intentional infliction of emotional distress claims: Reid v. Sears, Roebuck & Co., 790 F.2d 453, 462 (6th Cir. 1986) (termination of at-will employee is within the legal rights of the employer, so the employee cannot recover for intentional infliction of emotional distress because the exercise of legal rights does not constitute extreme and outrageous conduct); Clark v. France Compressor Products, Inc., 694 F. Supp. 112, 114-15 (E.D. Pa. 1988) (the employer, prior to the employee’s termination, was forcing the employee to use a machine which was in poor condition and was “keeping the heat”
efficient, combining the termination with the employer's failure to state a reason is not apt to cross the threshold of extreme and outrageous conduct. Although establishing such a tort is unlikely, employers are nevertheless wary of tort claims because of the threat of punitive damage awards.

Even if the employee ultimately loses the suit, the employer must

on the employee to admittedly try to force the employee to retire, but the court found the conduct was not intentional infliction of emotional distress as a matter of law because the conduct was not extreme and outrageous; Corum v. Farm Credit Serv., 628 F. Supp. 707, 719 (D. Minn. 1986) (abrupt termination of employee was not sufficiently extreme and outrageous to allow recovery since the employer discharged the employee in the privacy of the employer's office); Watte v. Maeyens, 828 P.2d 479, 481 (Or. Ct. App.), review denied, 836 P.2d 1345 (Or. 1992) (although terminating employees after forcing them to hold hands and accusing them of being liars and saboteurs was "insulting, rude, boorish, tyrannical, churlish and mean," the conduct did not constitute intentional infliction of emotional distress); and Harris v. First Fed. Sav. & Loan Ass'n, 473 N.E.2d 457, 460 (Ill. App. Ct. 1984) (finding employer's conduct of criticizing, observing, transferring, demoting, and ultimately discharging the employee after the employee reported alleged criminal acts to her supervisor was insufficient to find intentional infliction of emotional distress because the employee did not allege that the employer's conduct was calculated to cause her to perform the illegal acts).

Another potential barrier to suits for intentional infliction of emotional distress is that such claims may be preempted by federal or state statutes. Such claims have been preempted by federal labor law under § 301 of the Labor Management Relations Act. 29 U.S.C. § 185(a) (1988). If the resolution of the state tort claim depends on the interpretation of the collective bargaining agreement, that state claim is preempted by federal law. Winery, Distillery & Allied Workers Local 186 v. E & J Gallo Winery, Inc., 857 F.2d 1353, 1358 (9th Cir. 1988) (union's intentional infliction claim for employer's refusal to arbitrate was preempted because it was not independent of the collective bargaining agreement); and Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149-50 (9th Cir. 1988) (race track employee's claim for intentional infliction because of discharge for theft was preempted by § 301 because the determination of the tort claim required determination of the validity of the discharge under the collective bargaining agreement). Such claims may also be preempted by the exclusive remedy provision in workers' compensation laws. E.g., Livitsanos v. Superior Court, 828 P.2d 1195, 1203 (Cal. 1992).

The United States Supreme Court has added another barrier to intentional infliction of emotional distress claims. In Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988), a cartoon parody of the religious leader depicts Falwell as stating that he engaged in incest with his mother and portrays Falwell and his mother as drunk and immoral. The Supreme Court stated that the plaintiff, who was a "public figure," must prove "actual malice" to recover for intentional infliction of emotional distress:

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. . . . Such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment. Id. at 56. Most employees suing for intentional infliction of emotional distress will not be public figures or public officials, so this requirement will not bar many employees' suits.

202. One court has stated that the employee must prove harassment or a pattern of conduct because termination alone is not sufficient to prove intentional infliction: "Generally, decisions to discharge an employee have not been found to constitute intentional infliction of emotional distress. . . . Where, however, the decision is accompanied, or preceded, by harassing conduct courts have permitted the claim to go to the jury." Borecki v. Eastern Int'l Mgmt. Corp., 694 F. Supp. 47, 61 (D.N.J. 1988) (termination of 61-year-old employee did not constitute intentional infliction of emotional distress because the employee did not allege harassment or a pattern of conduct).
spend time and money conducting discovery and defending the suit.203 The pleadings are apt to assert every possible theory and to state these theories in general terms because the employee will not know any specific facts underlying the discharge. The employee may have to amend her complaint several times as the facts are discovered. The discovery process is likely to be tedious and prolonged because the employee will be forced to pursue every potential theory in discovery to narrow the employer's actual reasons for the termination. As most discharged employees lack sufficient funds to conduct broad discovery, an attorney is unlikely to accept a discharge case on a contingency fee arrangement unless the employee's chances of a substantial recovery justify the expense of discovery and litigation.

Although an employer's disclosure to the employee of the reason for the termination clearly does not preclude these other claims, disclosure at least minimizes the employee's suspicions that the employer terminated her for impermissible reasons. Where an employer supplies a valid, truthful reason for the discharge, the employee would not be able to establish liability for self-publication since truth is a complete defense.204 As long as the reason is also just, nondiscriminatory, and nontortious, the employee probably will not be able to recover damages from the employer. Where the employer fabricates a reason, it is subject to liability for self-publication, and this fabrication supplies the basis for other claims. If the employer tells an employee a false reason, the discharge was probably lacking in cause and, therefore, wrongful. The employee could also allege the real reason was discriminatory or retaliatory and claim intentional infliction of emotional distress from the employer's manner of firing her. All of these claims are less likely when an employer communicates his reasons to the employee because an employee is less apt to feel she has been wronged and is less apt to file suit if the employer's justification is explained to her.

203. Defending suits brought by employees is costly. For example, “[d]efending such [employee defamation] actions can take years and cost employers tens of thousands of dollars.” Gregory Stricharchuk, Fired Employees Turn the Reason for Dismissal Into a Legal Weapon, WALL ST. J., Oct. 2, 1986, at 33. One military defense firm, TRW, Inc., estimates the cost to be even higher: “Defending defamation suits . . . costs between $140,000 and $250,000 each.” Id. Therefore, defending such suits is expensive even though plaintiffs prevail in 10% or less of the cases. 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, 235 (1987). In 1986, attorneys' fees exceeded $250,000 for “an average wrongful termination trial.” 7 Indiv. Empl. Rts. (BNA) Issue No. 7, at 2 (Apr. 21, 1992). The threat of wrongful discharge litigation is resulting in less hiring of employees according to RAND researchers. Id.

204. See supra notes 20-21 and accompanying text.
2. Methods To Encourage Employers To Reveal Reasons for Termination

The easiest method of avoiding the risk of increased litigation for failure to inform the employee of the reason for the termination is for state courts not to adopt the self-publication doctrine; employers could then avoid defamation liability by disclosing the reason for termination only to the terminated employee. However, for those jurisdictions that have already adopted the doctrine or that will adopt it in the future, several possible solutions to this problem are available.

a. Releases or Waivers

Employers could attempt to avoid self-publication liability while nonetheless disclosing to the employee the reasons for the termination by requiring the employee to sign a statement waiving her right to a self-publication suit before the employer releases any information about the reasons for the discharge. Employee releases have been effective in wrongful discharge suits even when the employee is ignorant of the contents of the document.\footnote{Reid v. Sears, Roebuck & Co., 790 F.2d 453, 461 (6th Cir. 1986). In Reid, the prospective employee signed an employment application form which stated that the employee agreed that employment could be terminated without cause at the employer’s option. The employee claimed that she read poorly and did not understand the contents. The Sixth Circuit relied on Michigan law which requires a person who cannot read to seek assistance before signing a document. The failure to seek assistance estopped the person from avoiding the effect of the writing. Id.} Employers have also used employee releases in which employees agree not to sue because of the information released by the employer to prospective employers.\footnote{Turner, supra note 187, at 20.} However, employers who are using such releases realize that a release may not be enforceable in all situations.\footnote{“The likelihood of a release protecting us is not the greatest in the world, but you have to take the risks.” Department of Defense Subcontractor Kickbacks: Industry Personnel Practices: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 99th Cong., 2d Sess. 21 (1986) (statement of Thomas Bennett of The Garrett Corp.).} While Professor St. Antoine notes that generalizing about the law of releases is hazardous, he testifies that:

the courts give a great deal of attention to releases when the release is in accord with what the courts think is decent and fair, and they ride right over them if they feel that somebody has been pressured into a release or doesn’t know what he or she is signing.\footnote{Id. at 45 (statement of Prof. Theodore St. Antoine of the University of Michigan Law School).}

Although the release alone may not suffice to protect an employer, the release could provide the court with additional justification for its decision.\footnote{Id. Professor St. Antoine believes that releases probably would not change the result because communications of reference information should be protected under a conditional privilege: [A]s long as there is no malice, as long as there is a legitimate need to know—then there is}
supply more personnel information.\textsuperscript{210}

Commentators disagree on the efficacy of a pre-employment waiver. Professor St. Antoine believes that such pre-employment releases would probably be upheld if the release only authorized disclosure of information relevant to a hiring decision.\textsuperscript{211} Professors Prentice and Winslett believe courts will invalidate such releases on the grounds of economic duress:

Employees who sign exculpatory clauses (e.g., "I promise not to sue if I am injured on the job through my employer’s fault") have long been excused from such clauses on grounds of duress. These employees did not voluntarily sign the clauses; instead, they were under a strong compulsion to sign in order to obtain work.\textsuperscript{212}

Professors Prentice and Winslett are arguing that the applicant cannot voluntarily agree to the former employer’s disclosure since the applicant has no chance of being offered the job unless she agrees to the disclosure. However, economic duress from the former employer is not motivating employee consent to a self-publication claim waiver since the employee has already been terminated by that employer. The economic duress a prospective employer may apply should not invalidate a release of the former employer who would not have supplied such information without the employee waiver—that is, a former employer should not be liable because a prospective employer coerced an employee into a release. Although such "duress" is always present when two parties with unequal bargaining power make an agreement, the employer's interest in obtaining valid information on the applicant's abilities and background should outweigh the applicant's interest in freedom from duress because

\textsuperscript{210} a qualified privilege in inquiries and responses concerning information relevant to the decision whether or not to hire a person. . . .

\textsuperscript{211} [E]mployers, for the most part, have been too timid, too reticent in their handling of reasonable inquiries. So far as the law is concerned, they are ordinarily immune to liability. They are simply taking the easy way out in providing nothing but the practical equivalent of name, rank, and serial number when asked about a current or former employee.

I believe that upon receipt of a legitimate inquiry—and certainly a prospective employer has a need to know—the former employer is entitled to provide any relevant factual information, not a mere subjective suspicion but any relevant factual information.

\textit{Id.}\ at 42.

\textsuperscript{210} “If this release were supported by the courts, it would serve to open more candid communication channels within industry and business.” \textit{Id.}\ at 85 (statement of Berwyn Fragner of TRW, Inc.).

\textsuperscript{211} Professor St. Antoine stated:

Since wide latitude would be allowed employers anyway in the pertinent information they could exchange about job applicants, I am satisfied that the courts would be quite liberal in sustaining releases signed by a person applying for a position. My principal reservation is that the employee's authorization for disclosure should apply to information that may be pertinent to the hiring decision, and should not extend to purely personal matters.

\textit{Id.}\ at 92.

\textsuperscript{212} Prentice & Winslett, \textit{supra} note 203, at 231.
an employer can be held responsible for an employee's act.\textsuperscript{213}

Courts have applied two standards to determine whether a release is valid: (1) the totality of circumstances test, and (2) regular contract principles of whether the release was knowingly and willingly signed.\textsuperscript{214} The factors used in the totality of the circumstances test include:

1. the plaintiff's education and business experience;
2. the amount of time the plaintiff had to consider whether to sign the agreement;
3. the plaintiff's role in determining the agreement's terms (i.e., whether plaintiff had an opportunity to negotiate the agreement's terms);
4. the clarity and specificity of the agreement;
5. whether the plaintiff was represented by or consulted with an attorney;
6. whether the consideration exceeded the benefits to which the plaintiff was already entitled by law or contract;
7. whether an employer encouraged or discouraged the plaintiff to consult an attorney;
8. whether the plaintiff had a fair opportunity to consult an attorney; and
9. whether the plaintiff knew or should have known his rights upon executing the release.\textsuperscript{215}

Under the totality of circumstances test, a release is valid and enforceable where plaintiffs are experienced executives familiar with reading contracts, where the release's language is clear and unambiguous, where the release states that the plaintiff is aware of his right to consult an attorney before signing the release, where the plaintiff has sufficient time to consider the release, and where the defendant placed no economic duress on the plaintiff.\textsuperscript{216} Another court upheld a release where

\textsuperscript{213} Employers can be held liable for an employee's conduct under the theory of negligent hiring when the employer fails to investigate an employee's background. See, e.g., Nigg v. Patterson, 276 Cal. Rptr. 587 (Ct. App. 1990) (customer stated claim against business owner when customer was beaten by employee who had a history of violent behavior). A Colorado jury found McDonald's Corp. liable for the negligent hiring of a developmentally disabled worker who had a history of sexually assaulting children when the employee sexually assaulted a three-year-old boy at the McDonald's restaurant. The jury awarded compensatory damages of $210,000. 6 Indiv. Empl. Rts. (BNA) Issue No. 6, at 1-2 (Mar. 26, 1991). The Colorado Supreme Court has expressly recognized the tort of negligent hiring but found no violation where a truck driver sexually assaulted a motel clerk because the truck company's policy limited the driver's contact with the public and because the company had checked the applicant's references and driving record and had asked the applicant whether he had any criminal convictions. Connes v. Molalla Transp. Sys., 831 P.2d 1316, 1323 (Colo. 1992) (citing to 14 other jurisdictions which have recognized the negligent hiring action).


\textsuperscript{215} Bormann, 875 F.2d at 403 (citations omitted); McBriarty, 52 Fair Empl. Prac. Cas. at 60-61.

\textsuperscript{216} Bormann, 875 F.2d at 403.
the agreement's terms were clear and specific, where the plaintiff was well-educated, where plaintiff's job duties included assisting in the reductions in force, where plaintiff was allowed twenty-nine days to deliberate before signing the agreement, where the agreement was negotiated with individualized terms, where the agreement stated that the plaintiff had the right to consult an attorney, and where the consideration exceeded the amount to which the plaintiff was entitled by law or contract since the employer allowed the plaintiff a transitional leave of absence to allow him to qualify for the full service pension.  

After those cases were decided, a 1990 amendment to the federal Age Discrimination in Employment Act explicitly defined the minimum requirements for a waiver to be considered knowing and voluntary in the context of a waiver of an age discrimination claim. The waiver must be written in a manner so that it may be understood by the employee and must specifically refer to rights or claims arising under the Age Discrimination in Employment Act. The employee does not waive any rights or claims that may arise after the date the waiver is executed. The employee must receive consideration in addition to any benefit that the individual is already entitled to receive. The employee must be advised in writing to consult with an attorney before signing the agreement, and the employee must be given a period of at least twenty-one days to consider the agreement. Moreover, the release must provide that for a period of at least seven days following the signing of the agreement the employee may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. A court would almost certainly find that any release of a self-publication claim that meets these criteria would also establish that the waiver was knowing and voluntary. However, most employers will probably be hesitant to tell an employee in writing to consult with an attorney and to tell the employee that she has three weeks to consider whether to sign the agreement and then an additional week during which she can revoke the agreement.

The California Court of Appeal has held that a pre-employment release form which an employer required asbestos removal workers to sign as a condition of employment violated California Civil Code section 1668. California Civil Code section 1668 states: “All contracts which

219. Id. § 626(f)(1)(A) and (B).
220. Id. § 626(f)(1)(C).
221. Id. § 626(f)(1)(D).
222. Id. § 626(f)(1)(E) and (F)(i).
223. Id. § 626(f)(1)(G).
have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." In *Baker*, the release form stated that in consideration of employment by the employer and in consideration of one dollar, the workers were required to acknowledge that they understood the dangers of asbestos and to agree that they knowingly assumed all risks, would not sue the employer, and would release the employer and all agents from all liability related to asbestos.  

Although a party cannot contract away liability for her fraudulent or intentional acts or for her negligent violations of statutory law, a party may contractually provide that she is exempt from liability for ordinary negligence where no public interest is involved and where no statute expressly prohibits it. The release in *Baker* violated public policy since it included a release for fraud and intentional acts. The court noted that the employees were given the choice of adhering to the release’s terms or foregoing employment. "This ‘pistol to the head’ approach to an employment relationship, where hiring is conditioned on acceptance of statutorily proscribed terms, is not acceptable to us." The court held that a worker cannot be coerced into signing sweeping releases by economic necessity because the employee may forego a legitimate claim rather than assume the risk of attempting to invalidate the release. The court noted that post-conflict agreements may validly waive all liability because the parties are attempting to resolve the entire dispute and prevent relitigation on a claim arising from the past event. However, requiring a waiver of all claims by prospective employees as a condition of employment is void as against public policy. Under the rationale of *Baker*, a release of a former employer from liability related to reference information given to a prospective employer should be considered enforceable because it is similar to a post-conflict release and is not a result of economic duress caused by the former employer.

The Florida Court of Appeals invalidated a pre-employment release of a defamation suit in *Kellums v. Freight Sales Centers, Inc.* The em-

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225. CAL. CIV. CODE § 1668 (West 1985).
227. Id. at 712.
228. Id.
229. Id.
230. Id. at 713.
231. Id.
232. Id. at 714.
233. Id.
234. 467 So. 2d 816, 817 (Fla. Dist. Ct. App. 1985). The court disallowed an exculpatory clause in an employment application. The clause released the former employer from all liability resulting from furnishing information about the employee's work to this prospective employer.
ployee had alleged that the former employer made the defamatory statements "knowingly and maliciously." The court noted that a release from all liability would allow the employer to disseminate any information without liability and stated that a party attempting to absolve itself from an intentional tort violates public policy. The court's reasoning, however, would not invalidate every release of liability based on the employee's self-publication. The court stated that defamation is "quasi-intentional in that with the exception of the element of publication, its basis is in strict liability. Publication may have been done either negligently or intentionally." The court stated that "there is no social advantage in the publication of a deliberate lie," but the court recognized that defamation was not always an intentional tort and that an employer may exculpate himself from negligence claims. Thus, the court's ruling suggests that an exculpatory clause should be enforced when the employer acted reasonably in communicating a reason for termination that turns out to have been false. Moreover, no other court has cited to this case as following the court's disallowance of the exculpatory clause.

Two theories explain the reason a release should protect an employer from self-publication suits—estoppel and waiver. The Seventh Circuit explained the distinction between the two theories:

Waiver... focuses on intent. If an individual intentionally relinquishes a known right, either expressly or by conduct inconsistent with an intent to enforce that right, he has waived it. Estoppel, on the other hand, focuses on the effects of the conduct of the obligee. It arises when a party's conduct misleads another into believing that a right will not be enforced and causes the other party to act to his detriment in reliance upon this belief.

An employer could attempt to avoid liability for self-publication by explaining to the employee that the reason he cannot tell the employee the basis for termination is because of such potential liability. The employer could then ask the employee to sign a form which states that the employee is aware of her potential lawsuit for self-publication and that the employee is intentionally waiving or relinquishing this potential right in order to hear the employer's reasons for the termination. Such a

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235. Id. at 818.
236. Id. at 817-18.
237. Id. at 817, 818 n.1.
238. Id. at 817 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 115, at 795-96 (4th ed. 1971)).
239. Id. at 817-18.
241. It may be simplistic to expect to obtain such a release from a terminated employee who is disgruntled and litigious. On the other hand, terminated employees usually request to know the reasons for the termination, and some may be willing to sign the release once they are told that the employer will not otherwise disclose the reasons.
SELF-PUBLICATION DEFAMATION

waiver in the self-publication context should be equally effective as those in the wrongful discharge context. Even if the actual document turns out to be unenforceable, the employee's conduct in agreeing not to sue the employer could establish estoppel since that conduct led the employer to reveal the reasons for termination when the employer would not have revealed them otherwise.\textsuperscript{242} The determination of whether waiver or estoppel exists is normally a question of fact.\textsuperscript{243} Since fact questions are submitted to a jury, and juries often sympathize with the plaintiff, the employer should take extra care that the waiver is express and unambiguous.

\textbf{b. Other Methods}

Another method of reducing the risk of other litigation and to encourage communication of the reason for termination is to hold the employer liable for defamation only when the employer is at fault. The employer could then tell the employee her good faith reason for the termination and would be liable only if that belief was unreasonable.\textsuperscript{244}

A further method of encouraging the employer to reveal the reason for discharge to the employee is to prohibit the award of punitive damages. If employers know the liability for disclosure is limited to the employee's actual injuries, employers are more apt to communicate freely. Alternatively, state legislatures could respond to the recognition of the compelled self-publication claim by imposing a statutory cap on the recovery of punitive damages, which might encourage additional communications.\textsuperscript{245}

The most effective protection against self-publication liability is afforded when courts recognize that privileges protect the employer's co-

\begin{itemize}
  \item \textsuperscript{242} The elements of estoppel, as defined by federal common law, are:
  \begin{enumerate}
    \item conduct or language amounting to a representation of material facts;
    \item the party to be estopped must be aware of the true facts;
    \item the party to be estopped must intend that the representation be acted on or act such that the party asserting the estoppel has a right to believe it so intended;
    \item the party asserting the estoppel must be unaware of the true facts;
    \item the party asserting the estoppel must detrimentally and justifiably rely on the representation.
  \end{enumerate}
  \textsuperscript{243} \textit{Apponi v. Sunshine Biscuits, Inc.}, 809 F.2d 1210, 1217 (6th Cir.), \textit{cert. denied}, 484 U.S. 820 (1987) (employees sought pension benefits after bakery closed and employer argued waiver and estoppel; the court remanded because the trial court had not given all elements of waiver and estoppel to the jury).
  \textsuperscript{244} \textit{Apponi}, 809 F.2d at 1217 ("[E]stoppel and waiver involve questions of fact which should be submitted to the jury.").
  \textsuperscript{245} \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323 (1974), states that defamation plaintiffs suing media defendants must prove at least negligence to recover. \textit{Id.} at 349. Most courts read \textit{Gertz} as already requiring evidence of negligence in all defamation actions, but recent Supreme Court decisions may have eliminated the requirement of fault in some cases. \textit{See supra} notes 25, 31, and 34 and accompanying text.
  \textsuperscript{245} \textit{See}, e.g., \textit{Civil Rights Act of 1991}, 42 U.S.C.A. § 1981a(b)(3) (West Supp. 1992), which caps compensatory and punitive damages for specified discrimination claims at $50,000 if the employer has 15-100 employees, $100,000 if 101-200 employees, $200,000 if 201-500 employees, and $300,000 if more than 500 employees.
\end{itemize}
munications to the employee, especially as some courts may hold that waivers of tort claims violate public policy. One court has held that the employee’s self-publication constitutes the absolute privilege of consent, but most courts rely on a qualified privilege. Privileges are discussed in Chapter V.

B. Effectiveness of Self-Publication Action in Achieving Public Policy Goals

When recognizing a tort claim fails to advance the interests of tort law, courts should reconsider whether the claim should be recognized as valid. The basic goals of tort law are to deter future tortious conduct, to compensate the victim, to publicly vindicate the victim’s rights, and to be fair to the defendant. None of these goals is substantially furthered by recognizing a claim for compelled self-publication.

One major goal of tort law in the employment area is to deter the current employer and others from future tortious conduct. An aspect of this goal is to punish the current defendant by making him pay for the injury he caused. Forcing the defendant to internalize the costs of his actions makes tortious conduct unprofitable. In the case of self-publication, however, the previous employer is already trying to avoid liability by not supplying any information to prospective employers. Punishing such a defendant is senseless because the employer never intended to publish the statement, and, thus, never intended to defame the plaintiff. Although the employer is blameworthy for telling the employee a false reason for the employee’s termination, a defamation claim also requires the employee to prove publication by the defendant to establish liability. An employer who diligently avoids publication is less blameworthy than one who repeats the false statement to the plaintiff’s prospective employers.

A second aspect of the deterrence goal is to dissuade similarly situated employers from committing the same tort as the first employer. These wrongful employment torts will end only if other employers learn of the damages awarded to the victim and recognize that such conduct is not socially acceptable or economically profitable. The problem with the deterrence argument is that most former employers have already stopped

249. Id. Punitive damages are intended to punish a defendant whose conduct was willful or malicious and to deter him and others from similar conduct. Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 306 n.9 (1986) (§ 1983 claim). Minnesota allows punitive damages to deter false and malicious attacks on a person’s reputation. Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 259 (Minn. 1980). Gertz recognized the legitimacy of deterring defamation via punitive damage awards if the plaintiff proves “actual malice.” Gertz, 418 U.S. at 350. See discussion of actual malice supra notes 22 and 25.
supplying the reasons for termination to the prospective employers because of the fear of defamation liability.\textsuperscript{250} The compelled self-publication theory will only deter an employer from supplying the reasons for termination to the employee. This will increase the likelihood of suits because of the inferences such exclusion will raise.

Related to the goal of forcing the wrongdoer to pay for his actions is a second goal of tort law—to compensate the victim. Full compensation requires at a minimum that the employee be returned to the economic position she would have occupied had the tort not occurred. If the employer's tort prevented the employee from finding a job, then the employee should recover all lost wages and benefits. Reinstatement is not a likely remedy since it is seldom awarded for wrongful discharge suits unless a contract so provides.\textsuperscript{251} The best the employee can do is recover compensatory damages for her actual injuries and try to recover punitive damages. Some courts allow extended liability for intentional torts by applying proximate cause more liberally than it is applied for mere negligence.\textsuperscript{252}

A third goal of tort law is public vindication of the plaintiff's rights. Because the employee’s job substantially affects her sense of self-worth,\textsuperscript{253} this goal may be the most important to the employee. On a practical level, however, few employees can afford to litigate a claim.

\begin{itemize}
\item \textsuperscript{250} See supra note 188.
\item \textsuperscript{253} A 1973 Report of a Special Task Force to the Secretary of Health, Education and Welfare entitled Work in America summarizes the importance of work to employees:

\begin{quote}
Work also serves a number of other social purposes. The workplace has always been a place to meet people, converse, and form friendships. . . .

. . . [W]ork plays a crucial and perhaps unparalleled psychological role in the formation of self-esteem, identity, and a sense of order.

Work contributes to self-esteem in two ways. The first is that through the inescapable awareness of one’s efficacy and competence in dealing with the objects of work, a person acquires a sense of mastery over both himself and his environment. The second derives from the view . . . that an individual is working when he is engaging in activities that produce something valued by other people. That is, the job tells the worker day in and day out that he has something to offer.
\end{quote}

MARK A. ROTHSTEIN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 4-5 (1987). “Empirical studies indicate that discharge from employment affects the self-esteem of employees no less severely than it affects their economic well-being.” J. Peter Shapiro & James F. Tune, Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335, 339 (1974). The stigma from discharge is further magnified when an employer supplies a false reason to justify the termination: “Reputation is particularly important in the employment context. There is a social stigma to being discharged from employment, and that stigma is greatly intensified when false reasons for the discharge—such as dishonesty or inefficiency—are supplied.” Robert A. Prentice & Brenda S. Winslett, Employee References: Will a "No Comment" Policy Protect Employers Against Liability for Defamation?, 25 Am. Bus. L.J. 207, 221 (1987).
\end{itemize}
merely to have the employer publicly found blameworthy; most employees must also recover a sufficient amount in damages to pay the litigation expenses.

If the self-publication claim survives preliminary motions to dismiss, these three goals will probably be met. The jury usually sympathizes with the plaintiff in tort cases, so the employee is apt to have her rights publicly vindicated and to recover fully for her injuries, especially since juries tend to award substantial punitive damages.\textsuperscript{254} One factor considered in determining punitive damages is the amount necessary to deter this defendant and others similarly situated from repeating the same wrongful conduct.\textsuperscript{255} The damage awards do change employer behavior and deter subsequent wrongful acts.\textsuperscript{256} The jury award is tempered by the employer asking for judgment notwithstanding the verdict, remittitur, or a new trial, but the award is seldom found excessive.\textsuperscript{257} However, excessive jury awards undermine a fourth goal of tort law—fairness to

\begin{footnotes}
\item[254] Gould, \textit{supra} note 251, at 406. Juries tend to overlook the malice requirement necessary to award punitive damages: "Because falsity imputes malice, once the jury finds that a label is 'false,' employers may be punished regardless of whether the false label was a good faith error or a knowingly false statement intended to injure the employee." S. Olivia Mastry, Note, \textit{Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation: Lewis v. Equitable Life Assurance Society of the United States}, 71 MINN. L. REV. 1092, 1107 (1987) (footnotes omitted). The author explains the reason that juries are free to infer malice from the falsity:

\[\text{[U]}nder the common law standard of malice, it is uncertain which facts a jury will focus on in finding malice. The standard is vague and virtually no guidelines are provided. Under the common law standard, once falsity or partial falsity is determined by a jury, no additional facts are required from the plaintiff to prove the defendant knew or should have known of the falsity. Consequently the inquiry into malice becomes entirely subjective. Thus, juries are free to infer malice from the mere presence of falsity.}\]

\textit{Id.} at 1110 (footnotes omitted). The author relies on Frankson v. Design Space International, 394 N.W.2d 140, 145 (Minn. 1986), to support her contention that falsity results in a jury finding malice. Mastry, \textit{supra}, at 1110. The author acknowledges that the Minnesota court reversed the jury findings for that very reason. \textit{Id.} at 1110 n.89. Therefore, the courts are willing to verify whether the record adequately supports the jury finding of malice.

\item[255] To determine punitive damages, the jury can consider the character of the defendant's acts, the nature and extent of plaintiff's harm, and the defendant's wealth insofar as wealth is relevant in fixing the amount that will punish and deter this defendant and others similarly situated. DiSalle v. P.G. Publishing Co., 544 A.2d 1345, 1375 (Pa. Super. Ct. 1988), \textit{cert. denied}, 492 U.S. 906 (1989) (verdict of $2.0 million in punitive damages against a wealthy publishing company was not excessive recovery for judge accused of fraudulent conduct when the newspaper article was prepared over a substantial period of time and the defamatory material was selected with the premeditated goal of sensationalizing the story).

\item[256] See \textit{supra} note 188.

\item[257] Jury awards are seldom held excessive. \textit{See} Frank B. Hall & Co. v. Buck, 678 S.W.2d 612 (Tex. Ct. App. 1984) (insurance salesman sued employer for breach of contract and defamation and recovered actual damages of $605,000, including $414,000 in lost wages, and punitive damages of $1.3 million), \textit{cert. denied}, 472 U.S. 1009 (1985); Hughes v. Patrolmen's Benev. Ass'n, 850 F.2d 876, 884 (2d Cir. 1988) ($575,000 award for intentional infliction of emotional distress was not excessive for a police officer who was harassed by fellow employees and his union, demoted, and transferred), \textit{cert. denied}, 488 U.S. 967 (1988). \textit{But see} Alexander v. Red Star Express Lines, Inc., 646 F. Supp. 672, 683 (E.D. Pa. 1986), \textit{aff'd}, 813 F.2d 396 (3d Cir. 1987) ($40,000 was excessive for wrongfully discharged employee's pain and suffering because the only emotional distress caused was for the period before the employee chose not to accept the employer's offer of light work).
\end{footnotes}
the defendant and recognition that the defendant may have justification for its actions. While the courts want to fully compensate victims, they do not want to bankrupt companies or drive them overseas, resulting in a loss of jobs and employees' rights.

More peaceful and stable industrial relations are another desired benefit of extending traditional tort protection to the workplace. The employer can avoid the traditional tort suits and substantial damage awards only by not committing the torts; this in turn should increase workplace cooperation and create more stable industrial relations. However, extending self-publication protection may instead have the opposite effect. When the tort theory allows an employee to recover for an injury occurring through self-publication, most employers will conclude that the best way to avoid liability is to withhold the reasons for the termination from the employee and prospective employer. This lack of communication will magnify tensions between the employer and its current employees. Employees will view the employer's acts as arbitrary and unjust since the employer refuses to explain the reason(s) the former employee was terminated.\(^{258}\)

Employers who commit torts are not sympathetic figures. A jury is apt to award substantial damages, especially if it realizes the importance of a pleasant and rewarding job to the employee's self-esteem. One potential benefit of large awards in traditional tort suits is greater publicity, thereby warning more employers that such conduct will not be tolerated and, hopefully, thereby preventing future violations of employees' rights. In self-publication cases, however, the most likely effect is not to deter discharges for false reasons, but to deter communication of the explana-

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258. It is well-established that an employer who communicates specific feedback, gives reasons for actions, and communicates those reasons to other employees will have a happier, more loyal, and more efficient work force. A stable and loyal work force contributes greatly to the long-range success of any business. 

Prentice & Winslett, supra note 203, at 234.

Prentice and Winslett conclude that courts should permit self-publication claims for several reasons. They argue that recognizing a self-publication cause of action will not decrease employer's statements to employees since this information is vital to a happy and efficient workforce. Id. at 234-35. However, the authors do not consider that an employer who intentionally defames employees does not particularly care about a happy and efficient workforce. Employers can continue to keep records on the employee's performance to justify the termination in a wrongful discharge suit without telling the employee the reason for termination, thereby also avoiding the self-publication suit. Employers predictably will decrease the information to employees regarding the reason for the termination as courts increasingly recognize the self-publication claim, just as employers have decreased information to other employers because of the fear of traditional defamation suits. See supra note 188. An employer's simple refusal to comment on the plaintiff to another employer has been held to be non-defamatory. Austin v. Torrington Co., 810 F.2d 416, 424 (4th Cir. 1987), cert. denied, 484 U.S. 977 (1987); Buffolino v. Long Island Sav. Bank, 510 N.Y.S.2d 628, 631 (1987) (reference letter stating that the employer's policy was to provide only dates of employment was not defamatory, especially since the letter stated that the failure to comment on the employee's character did not reflect on her as an individual).
tion for the discharge to the employee because employers will fear being sued for self-publication damages.

C. Employers Who Reveal Reasons for Termination Must Ensure That Underlying Facts Are True

Employees receive additional protection from defamation because courts have held that an employer's statement of its reasons for termination is true only if the underlying facts are true. For example, an employer that states it terminated an employee for "gross insubordination" can only avoid liability if the underlying facts support that the employee was insubordinate. The employer's determination of the level of conduct sufficient to find gross insubordination is not binding on the fact finder. Where the facts underlying the defamatory statement are in conflict, the question of truth must be submitted to the jury. An employer undoubtedly resents a jury second-guessing her determination, but the jury is restricted to determining whether the stated reason for termination was true, not whether the reason was fair. This part of the self-publication rule is reasonable since an employee otherwise could not recover even for traditional defamation when a past employer tells a prospective employer his unsupported and false conclusions about the employee.

The United States Supreme Court has indicated agreement with the rationale supporting the rule that the underlying facts must be true. In the case of *Milkovich v. Lorain Journal Co.*, the Court held that defamatory facts implied in a statement of opinion must be true or the defendant may be held liable for implying the false facts underlying the opinion. The Court determined that statements which are worded as opinions may be actionable as defamation because drafting a statement in terms of an opinion does not necessarily dispel the factual implications contained in the statement.

In *Milkovich*, a newspaper article in the sports section stated that a high school wrestling coach had lied under oath in a judicial proceeding. The Supreme Court held that the defamation was not absolutely protected by the First Amendment as opinion. The privilege of "fair

260. "The truth or falsity of a statement is inherently within the province of the jury." *Id.* at 889.
261. Churchey v. Adolph Coors Co., 759 P.2d 1336, 1342 (Colo. 1988) (determination of dishonesty depends on whether the employee had an obligation to inform her supervisor of the medical center's instructions since the employee's inaction would not otherwise be dishonest).
263. 110 S. Ct. at 2706-07.
264. *Id.*
265. *Id.* at 2698.
266. *Id.*
comment” precludes liability for a statement on a matter of public concern when based on a true or privileged statement of fact.267 This privilege protects only the opinion and does not protect a false statement of fact, whether it was expressly stated or implied from the opinion.268

A statement of opinion that implies a knowledge of facts may constitute defamation when the underlying implied facts are not true.269 Simply characterizing the false facts as an opinion does not dispel the implications of the underlying false facts.270 The Court is attempting to prevent defendants from circumventing the purpose of defamation law by not protecting all statements preceded by “In my opinion” or “I think.” Allowing a defendant to escape liability by using these words, explicitly or implicitly, would defeat the purpose of defamation law.271

A statement of opinion on a matter of public concern that relies on true and accurate facts is constitutionally protected.272 Words used as rhetorical hyperbole are protected opinion.273 This protection ensures that public debate will not suffer for lack of “imaginative expression.”274 Public plaintiffs have the burden of showing that the statements of opinion that imply defamatory facts were made with knowledge of their false implications or with reckless disregard of their truth.275 Further protection of opinions is not necessary to ensure the freedom of expression guaranteed by the First Amendment.276

The Supreme Court concluded that the statements in the sports column were “not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury.”277 The connotation that the coach had lied was sufficiently factual to be capable of being proved true or false based on objective evidence obtained by comparing the coach’s testimony before the athletic association hearing and before the trial court. The Court concluded that free speech rights must be balanced against the societal interest in preventing and redressing attacks on reputation.278

An employer will not escape liability merely by phrasing its defama-

267. Id. at 2703.
268. Id.
269. Id. at 2705-06.
270. Id.
271. Id. at 2706.
272. Id. “[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” Id.
273. Id. at 2705.
274. Id. at 2706-07.
275. Id. at 2707.
276. Id.
277. Id.
278. Id. at 2707-08.
tory assessment of the plaintiff as an opinion. The factfinder in a self-publication case may consider the truth of the facts underlying the opinion to determine whether the employer has provided a false assessment of the employee's ability to the employee.

D. Requirement of Employer's Negligence Does Not Sufficiently Protect Employer's Interests

Even if an employer must be at least negligent before being held liable for defamation, this requirement does not sufficiently protect the interests of employers in uninhibited communication among employers. That this fails to foster open communications between employers is demonstrated by the fact that most employers are not releasing detailed information about their former employees. Although most employers probably do conscientiously try to terminate employees only for reasonable cause, employers fear being held liable for that one mistake where a supervisor may have trumped up reasons for terminating a subordinate. Since requiring the plaintiff to prove fault is insufficient to promote the exchange of information about employees, courts need to clarify the requirements for privileged communications so that employers will know the permissible scope of comment. The qualified privileges that attach to such communications are discussed in Chapter V.

V

SELF-PUBLICATION AND THE THEORY OF PRIVILEGES

Privileges fall into two categories—absolute and qualified. Absolute privileges prevent liability even if the defamatory statement was made maliciously, whereas qualified (or conditional) privileges are lost if the statement abused the privileged occasion.

A. Absolute Privilege of Employee's Consent

An employer is not liable for defamation if the employee consents to

279. See supra notes 25 and 31. Since Professor Smolla believes that the Supreme Court no longer requires fault in private plaintiff/private concern cases, employers may not even have the protection of this fault requirement in the future. See supra note 25.

280. See supra note 188.

281. However, one court has held that an employee who had not been authorized to supply reference information, but who did supply such information, was not acting within the scope of his employment so that the employer could not be held liable. Seifert v. El Paso Natural Gas Co., 567 S.W.2d 77, 78-79 (Tex. Civ. App. 1978) (only the Personnel Director or an employee under his supervision had authority to release information, and release of any reference information was limited to dates of employment and position held).


283. Id. "It is not conditioned upon . . . the absence of ill will on the part of the actor." Id.

284. Id. § 594 cmt. a. "Even though the publication is privileged, a particular person cannot avail himself of the privilege if he abuses it." See also id. §§ 599-605A. See also infra Chapter V.B.3.
the publication of the defamatory statement. Consent is an absolute privilege which protects the employer even if the employer communicated the statement with malicious intent. Whether words or conduct are to be interpreted as consent is determined by reasonable inferences from the conduct in light of the surrounding circumstances. If the defendant reasonably interprets the plaintiff's language as consent, the publication is privileged. Consent is an absolute defense because the plaintiff could otherwise invite the statement in order to create a defamation cause of action for his own pecuniary gain.

The protection of the absolute privilege is limited to the scope of consent. Consent may be limited as to person, time, or purpose. If so, the privilege protects the publication only if published within those limits. For instance, if the employee consents to the employer's publication to the employee herself, that consent does not normally extend to the employer's subsequently publishing the statement to others. The consenting person may assume the risk that the statement may be defamatory. If the employee agrees to have his conduct investigated and knows the results will be published, he consents to the publication of the investigators' honest findings. An employee who voluntarily joins a


286. RESTATMENT (SECOND) OF TORTS § 583 cmt. f (1977). "By its very definition, an absolute privilege cannot be overcome by a showing of actual malice; malice is simply not the proper subject of inquiry in such a case." Royer v. Steinberg, 153 Cal. Rptr. 499, 504 (Ct. App. 1979).

287. RESTATMENT (SECOND) OF TORTS § 583 cmt. e (1977). For example, publishing defamatory matter about himself is not necessarily a consent to the recipients' repetition of the defamation. Id. Similarly, a defamed person's display of indifference to the defamation does not establish consent. Id.

288. Id. cmt. d. "If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." Id. § 892(2).

289. "One of the primary purposes of the doctrine of consent in defamation law is to prevent a party from inviting or inducing indiscretion and thereby laying the foundation of a lawsuit for his own pecuniary gain." Royer, 153 Cal. Rptr. at 504. Where an employee's agent solicits the defamatory statement, the employer was not liable because one who invites defamation cannot be heard to complain of the resulting damage to his reputation. Kelewae v. Jim Meagher Chevrolet, Inc., 952 F.2d 1052, 1055 (8th Cir. 1992).

290. ELDEREGE, supra note 285, § 62, at 321.

291. Id. "The Restatement says: '... a consent may be limited to a publication to a particular person or at a particular time, or for a particular purpose. If so, the publication is privileged only if made within those limitations.' Id.


293. The privilege can extend to the repetition where the plaintiff's request was intended and understood as the employer's abandonment of the privilege's protection. See infra note 302 and accompanying text.

294. RESTATMENT (SECOND) OF TORTS § 583 cmt. d (1977). Illustration 2 states that a terminated employee who demands that the reason for his termination be made public consents to the subsequent publication even though the publication turns out to be defamatory. Id.

295. Id. E.g., Baker v. Lafayette College, 504 A.2d 247, 249 (Pa. Super. Ct. 1986) (as faculty handbook, which provided for annual written evaluation, became part of the employment contract,
union or other organization consents to investigations for which the organization's rules provide.\textsuperscript{296}

Two different theories support the finding that an employee’s self-publication would be absolutely privileged. The first is that the employee consented to the publication by repeating the defamatory statement herself.\textsuperscript{297} The second theory is that any privilege covering the initial communication extends to the plaintiff’s repetition. Courts have found that a repetition should be protected when the absolute privilege of consent protects the initial publication.\textsuperscript{298} For example, an employee’s request to hear the reasons for termination when others are in the room, without asking the others to leave, indicates consent to that publication and to subsequent republications by those who were present at the first publication.\textsuperscript{299} Therefore, the privilege covering the initial communication should arguably extend to an employee’s self-publication.

Courts have held that the plaintiff’s asking the defendant to repeat the charge or asking the defendant to explain the charge constitutes consent.\textsuperscript{300} Therefore, if the employer does not volunteer the reasons for

\textsuperscript{296} Restatement (Second) of Torts § 583 cmt. d (1977).

\textsuperscript{297} One Michigan court has held that the employee’s self-publication was absolutely privileged because the employee consented to it: “The trial court found that plaintiff and no one else disclosed the reasons for her termination at defendant hospital to Zieger Hospital [a prospective employer]. A communication regarding a person is absolutely privileged if he consents to it.” Merritt v. Detroit Memorial Hosp., 265 N.W.2d 124, 127 (Mich. Ct. App. 1978). After urinalysis of the employee revealed morphine sulfate, supervisory personnel discussed the employee’s drug use at a meeting. Id. at 125. The appellate court concluded that the trial court was not clearly erroneous in finding that the plaintiff herself published the reasons for her termination to the prospective employer and that the defendant “could not have reasonably foreseen that she would do so.” Id. at 126-27.

\textsuperscript{298} E.g., Massengale v. Lester, 403 S.W.2d 701, 702 (Ky. 1966) (absolutely privileged statements stated in a complaint for a judicial proceeding do not lose that privilege when republished in a newspaper).

\textsuperscript{299} E.g., Johnson v. City of Buckner, 610 S.W.2d 406, 411 (Mo. Ct. App. 1980) (in a room full of people, including a stranger who turned out to be a newspaper reporter, a police officer’s request to the mayor to state the reasons for his termination constituted consent to the mayor’s statement and to the subsequent republication by the reporter in the newspaper).

\textsuperscript{300} Professor Eldredge referred to two cases to support the proposition that requested defamation constitutes consent. Eldredge, supra note 285, § 61, at 318 (referring to Christopher v. Akin, 101 N.E. 971 (Mass. 1913), and Shinglemeyer v. Wright, 82 N.W. 887 (Mich. 1900)). Neither case mentions consent expressly.

In Christopher, the court referred to privileges but never expressly stated whether it was ruling on a conditional or absolute privilege. 101 N.E. at 972. The court did say that malice would defeat the privilege, which indicates it is conditional, but Professor Eldredge uses this opinion to support consent, which is an absolute privilege. Id. In Christopher, an employee received his wages reduced
termination, and instead makes the employee request the reasons, the employer's publication should be absolutely privileged because of the employee's consent to the initial publication of the reason.

Whether the employee's request to the employer to repeat the previously absolutely privileged statement protects the repetition of the statement on a subsequent unprivileged occasion is a question of fact. The request does not constitute consent to the repetition if intended and understood as a request that the employer abandon the privilege's protection so that the employee would have an opportunity to vindicate his reputation in a lawsuit.

The courts that allow self-publication claims should not hold that

by the amount of a stolen tool's value and a bill for the tool's value. The employee asked the employer what the bill meant. The employer asked the employee if he wanted to know in front of the other employees waiting to be paid, and the employee answered yes. Id. at 971. The publication was privileged if the employee invited the publication, if the employer responded in good faith, if the publication was not excessive, and if the publication related to the employer's interest. Id. at 972. These conditions support that the court was applying the invited defamation rule as a conditional privilege.

In Shinglemeyer, the court merely stated that the invited publication "was not a publication for which the law gives a remedy." 82 N.W. at 890. The court would not allow the plaintiff to recover when she solicited the defendant's repetition of the theft accusation to a police officer since the accusation would not have been stated to the officer except at her invitation. Id.

Another court held that the defamation was invited when the plaintiff told a prospective employer to telephone his former employer when the plaintiff knew that the former employer would not favorably recommend the employee. Duncantell v. Universal Life Ins. Co., 446 S.W.2d 934, 937 (Tex. Civ. App. 1969). This case mentions the interest between the former employer and the prospective employer and concludes that the statement was, therefore, conditionally privileged. Id. The court then stated that invited defamation prevents recovery, which indicates that this court was holding that invited defamation constitutes consent, thereby establishing an absolute privilege. Id. But see infra note 358.

301. RESTATEMENT (SECOND) OF TORTS § 583 cmt. e (1977).

302. Id. Prosser explains that not all requests constitute consent:

One who has himself invited or instigated the publication of defamatory words cannot be heard to complain of the resulting damage to his reputation, and this is true although the publication was procured for the very purpose of decoying the defendant into a lawsuit. At the same time, of course, it is not every request to speak which manifests consent to slander, and an honest inquiry as to what is meant, or an investigation in good faith to find out what the defendant has been saying will not bar the action, even though it is made for the ultimate purpose of vindication at law. As in other cases of consent, the privilege is limited by the scope of the assent apparently given, and consent to one form of publication does not confer a license to publish to other persons, or in a different manner.


For example, a plaintiff who procures a defamatory communication for the purpose of suing cannot recover, but if the request was for the purpose of ascertaining the source of the defamation so as to counteract it, then the plaintiff could sue. The court's rationale was that a plaintiff cannot build up his own cause of action for pecuniary gain. Richardson v. Gunby, 127 P. 533, 536 (Kan. 1912) (plaintiff who initiated a "decoy" letter to the defendant, who replied by defaming the plaintiff's business abilities, could not recover because the plaintiff had instigated the defamation). See also Litman v. Massachusetts Mut. Life Ins. Co., 739 F.2d 1549, 1560 (11th Cir. 1984) (insurance agent's authorizing prospective employer to call the former employer, when the agent knew the former employer thought the agent was "in a financial mess," was "invited defamation" which constituted consent and, therefore, was not actionable), cert. denied, 484 U.S. 1006 (1988).
the plaintiff's repetition constitutes consent because recognition of this absolute privilege would, in effect, eliminate the cause of action. Recognition of consent is inconsistent with the basic premise of compelled self-publication—that an employee who is compelled to repeat the statement is not really consenting to the repetition. "Consent is not effective if it is given under duress." Most courts will probably consider the repetition to be subject to a conditional privilege, as discussed in the following section.

B. Qualified Privilege—Special Interest in Communication Which Was Not Abused

The concept of privileged communication is based on public policy. A court will determine a privilege exists when statements made under certain circumstances should be encouraged despite the risk that the statement may be defamatory. The purpose of qualified privileges is to promote the exchange of information when the exchange is reasonably necessary to protect the communicator's interests, the recipient's interests, or a third person's interests. To promote the free exchange of

303. RESTATEMENT (SECOND) OF TORTS § 892B(3) (1979). "Duress is constraint of another's will by which he is compelled to give consent when he is not in reality willing to do so." Id. cmt. j.

304. Harvet v. Unity Med. Center, 428 N.W.2d 574, 579 (Minn. Ct. App. 1988) (employer's statement to discharged employee of reasons for termination is in public interest because such information should be readily available to the discharged employee and to prospective employers, therefore warranting a conditional privilege to protect such statements).

305. ELDREDGE, supra note 285, § 83, at 448. The free flow of information in the employment relationship is crucial:

Vital to any business is the free flow of information regarding its human resources. Employers must hire employees and be able to conduct reference checks necessary to restrain the prevalent tendency of job applicants to falsify their resumes. Employers need to fire unsatisfactory employees and tell them the basis for discharge, an informative step that benefits employees. Also important to both employers and employees are the explanations provided to the work force regarding a particular employee's reprimand or discharge. Communication of this personnel-related information, however, has been impeded by the threat and reality of defamation lawsuits.


Employers' failure to communicate this information allows other employers to hire unqualified and dishonest employees. "But this tight-lipped approach can come back to haunt companies as they attempt to screen out incompetent and dishonest job applicants." Gregory Stricharchuk, Fired Employees Turn the Reason for Dismissal Into a Legal Weapon, WALL ST. J., Oct. 2, 1986, at 33. The defense industry is especially concerned: "An executive in TRW Inc.'s electronics and defense division recently told a U.S. Senate subcommittee that workers are able to cover up problems in their pasts and still land jobs in the defense industry because companies are wary of becoming involved in libel suits." Id.

Employers' failure to communicate such information to each other could increase the number of negligent hiring claims filed. 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, 225 (1987).
information, the publisher must be protected against liability for misin-
formation given in a good faith effort to protect one of these interests.
For example, Minnesota requires three elements to establish a privilege:
The statement (1) must be made on proper occasion, (2) must be from
proper motive, and (3) must be based on reasonable or probable cause.\(^{306}\)
Without this protection, information would not be exchanged because of
the fear of liability if the statements are subsequently discovered to be
false.\(^{307}\) Therefore, the interest in informational exchanges must be bal-
anced with the victim’s interest in reputation to determine whether the
statement was conditionally privileged.

Some courts allow an absolute privilege for defamatory matters in
termination letters or warning letters to the employee when the letters
are provided for in a collective bargaining agreement because of the
strong public policy favoring private resolutions of labor disputes.\(^{308}\)
However, the publisher’s or third party’s interests, when balanced
against the defamed person’s reputational interest, are seldom strong
enough to justify an absolute privilege but may nevertheless justify pro-
tection by a conditional privilege.\(^{309}\) As the purpose of qualified privi-
leges is to promote the exchange of information, courts should at least

Many jurisdictions recognize the tort theory of negligent hiring which imposes liability
directly on employers for the intentional acts of negligently hired employees. The negli-
gent hiring doctrine places a duty on employers to refrain from hiring employees whom
they knew, or in the exercise of reasonable care should have known, were potentially
dangerous.

Gregory Marderosian, Comment, *Tort Law—Employer Liable for Negligent Hiring After Cursory*

Most employers demand and check employment references. Prentice & Winslett, *supra*, at 230. But
if prior employers are not willing to disclose any important information, such verification is rendered
useless.

306. Stuemppes v. Parke, Davis & Co., 297 N.W.2d 252, 256-57 (Minn. 1980). Kansas recog-
nizes similar requirements. Munsell v. Ideal Food Stores, 494 P.2d 1063, 1073 (Kan. 1972) (recog-
nizing a privilege where communications are made in good faith, without actual malice, and with
reasonable or probable grounds for believing statements to be true).

307. ELDREDGE, *supra* note 285, § 83, at 448. Despite the conditional privilege protection,
many employers will not disclose personnel information because of the cost and time necessary to
defend against a defamation claim:

We recognize that the law does provide a qualified privilege for communication of relevant
information between interested parties. However, the fact that the law provides a defense
obviously does not protect an employer from the cost of defending lawsuits. Even if the
lawsuit is frivolous and likely to be dismissed on motion, the plaintiff is usually entitled to
discovery, which may be very expensive and time consuming.

warning letter to employee who was accused of opening company mail was absolutely privileged, but
such privilege can be lost if publication is to unauthorized people). *See also supra* notes 138-44 and
accompanying text for a further discussion of Pennsylvania law protecting notices of employee
terminations.

recognize that the employee's repetition to prospective employers falls within a qualified privilege.

Determining whether a qualified privilege protects the publisher is a two-step process: (1) the occasion must be conditionally privileged, and (2) the occasion must not be abused. The determination of whether the occasion was privileged is a question of law for the courts to determine. If the courts find that the first element is not met, the second element is not considered because the statement is not privileged. If the court finds that the occasion is privileged, then the jury may determine whether the privilege was abused. If the conditionally privileged occasion was abused, then the statement is not protected. If the occasion was not abused, then the conditional privilege provides the publisher with a complete defense.

1. Special Interests Protected by Qualified Privileges

Qualified privileges, if not abused, protect defamatory statements made to protect: (1) the publisher's interest (e.g., an employer's interest in avoiding a wrongful termination suit is advanced by telling the employee the reason he was fired); (2) the recipient's interest (e.g., an employee's interest in knowing the jobs for which he is not qualified or the reasons he was terminated); (3) a third party's interest (e.g., a subsequent prospective employer's interest in discovering the employee is not qualified for the job); (4) a common interest (e.g., managers of a company share an interest in the employee's efficiency); and (5) a public interest (e.g., the interest in preventing future crimes by reporting the employee's conduct to others).

a. Publisher's Interest

A qualified or conditional privilege attaches to a "communication published by a person in the conduct of his own affairs, in matters where his own interest is concerned." The Restatement identifies two requirements: (1) the information affects a sufficiently important pub-

310. ELDREDGE, supra note 285, § 83, at 449.
311. Id. at 449-50. "Determining when a qualified privilege should protect a communication is a question of law requiring the court to balance the interests protected by a privilege and the interests served by allowing a defamation action." Churchey v. Adolph Coors Co., 759 P.2d 1336, 1346 (Colo. 1988). The Supreme Court of Colorado found a conditional privilege based on the common interest between employers and employees in assuring that employees know the reasons for their terminations. Id.
312. ELDREDGE, supra note 285, § 83, at 449.
313. Id. at 449-50.
314. Id. at 450. E.g., Lewis v. Equitable Life Assur. Soc'y, 389 N.W.2d 876, 890 (Minn. 1986).
315. ELDREDGE, supra note 285, § 83, at 450; see Lewis, 389 N.W.2d at 890.
317. ELDREDGE, supra note 285, § 85, at 452.
lisher's interest, and (2) the recipient's knowledge of the defamatory matter would aid in protecting the interest.\textsuperscript{318}

If the publisher's interest is legally recognized, then the statement is conditionally privileged.\textsuperscript{319} The legal protection may exist either because the criminal law imposes a penalty for violating the interest or because the civil law allows a cause of action for damages.\textsuperscript{320} Although an interest is not directly protected by law, that interest may support creating a conditional privilege where the benefits to the publisher's interest if the defamatory statement is true outweigh the harm if the statement is false.\textsuperscript{321} Most economic interests are protected.\textsuperscript{322} The publisher's interest does not actually have to be in danger for the conditional privilege to arise. Circumstances which would lead a reasonable person to believe the interest is in danger suffice to create a conditionally privileged occasion.\textsuperscript{323}

To determine whether the information affects a sufficiently important interest of the publisher in the self-publication context, the publisher's identity must be determined—that is, either the employer or the employee could be considered the publisher. Although "publication" does not occur until the statement is communicated to a party other than the defamed party, the initial communicator in self-publication cases is the employer. If this communication is considered a publication, the employer's interest in communicating the reason for termination to the terminated employee is to help the employee understand the reason for termination, thereby hoping to prevent wrongful discharge suits.

The employer's statement is also conditionally privileged if it is a reply to an employee's demand for a monetary settlement. If plaintiff threatens a lawsuit or demands money or information, the defendant can respond with his reasons for not meeting the demand.\textsuperscript{324} If an employer waits until an employee sues him for wrongful discharge, the employer can respond with his reasons for termination. This response is conditionally privileged and therefore completely protected if it was not malicious.\textsuperscript{325}

The interest in promoting a free exchange of information can be met only if that protection also prevents liability for the recipient's repetition.

\textsuperscript{318} RESTATEMENT (SECOND) OF TORTS § 594 (1977).
\textsuperscript{319} Id. cmt. d.
\textsuperscript{320} Id. A conditional privilege also attaches to an interest not directly receiving legal protection such as a parent's interest in protecting a child's well-being. Id.
\textsuperscript{321} Id. cmt. e.
\textsuperscript{322} Any lawful pecuniary interest, except an interest in competition for prospective pecuniary benefits, is within the category of interests protected. Id. cmt. f. Defamation to obtain a competitive business advantage is not protected. Id. cmt. g.
\textsuperscript{323} Id. cmt. h.
\textsuperscript{324} Dickinson v. Hathaway, 48 So. 136 (La. 1909).
\textsuperscript{325} Id. at 138.
If the employee who repeats the statement to prospective employers is considered the “publisher,” then the employee-publisher's interest in disclosing the employer’s false statement would be honesty in communications with prospective employers by full disclosure of the reason the employee left the prior employment. No court has recognized this as a valid interest in self-publication cases. Courts have instead relied on the common interest conditional privilege in self-publication cases.326

The second requirement in the Restatement necessary to establish a qualified privilege based on the publisher’s interest is that the publication must be to a person who will help protect that interest.327 If the defendant has reason to believe the recipient will not help protect the defendant’s interest, then the statement is not privileged.328 A legal duty to render aid is sufficient to support a privilege, but is not a necessary requirement.329 In the employment context, if the employer believes that the employee will not help protect the employer’s interest, then the communication is not protected by the publisher’s interest privilege. If the defendant reasonably believes the recipient could help, the occasion is privileged even if the recipient cannot actually help.330

Since most terminated employees have no interest in helping former employers protect their interests, an employer’s communication to a terminated employee is probably not protected under this qualified privilege. If the employee is the publisher, the prospective employer has an interest in helping to protect the employee’s interest in honest communications since the prospective employer also benefits. However, this reasoning supports a common interest conditional privilege more than a publisher’s interest conditional privilege. Therefore, the publisher’s interest is not likely to be applied.

b. Recipient’s or Third Party’s Interest

Two elements are necessary for a publication to be conditionally privileged based on the recipient’s or third party’s interest: (1) the information must affect a sufficiently important interest of the recipient or a third party, and (2) the publisher must publish the statement (a) to a person to whom the publisher is under a legal duty to publish the defam-

327. Restatement (Second) of Torts § 594 cmt. i (1977).
328. Eldredge, supra note 285, § 85, at 460.
329. The fact that the recipient is under a legal or moral duty to render aid is ordinarily enough to justify the publisher in expecting assistance from him. It is not necessary, however, that the recipient be under such a duty. The fact that decent people ordinarily assist others or that the particular recipient has previously given assistance under similar circumstances is enough to justify the communication unless the person seeking assistance has reason to believe that the particular recipient will not give it to him on this occasion. Restatement (Second) of Torts § 594 cmt. i (1977).
atory matter or (b) to a person to whom publication is "within the generally accepted standards of decent conduct."

In determining whether the publication is "within the generally accepted standards of decent conduct," factors to consider include whether the information was requested or volunteered and whether the parties have a family or other relationship. Each case's circumstances affect whether the publication is socially desirable or at least permissible. The fact that the information was requested demonstrates that the recipient believed the information was sufficiently important to justify the publication of any defamatory matter that may be necessary to the response. If the requesting person's interest is trivial, the response is not privileged unless the harm to the subject's reputation is correspondingly slight. Even a volunteered statement is conditionally privileged if the circumstances justify the publication—that is, if the probable harm to reputation if the information proves false is substantially less than the probable benefit if the information proves true.

The weighing process to determine if the occasion is conditionally privileged is solely a function of the court. The court must weigh the moral, social, and economic values which the law attaches to the interest the publisher is trying to protect and the probability that the publication will protect that interest, against the extent of harm the communication is apt to cause. If the defendant reasonably believes that a sufficient interest is affected and that the recipient is a proper person to receive the information, the statement is conditionally privileged even if these two beliefs are not in fact accurate.

An employer's defamatory communication about an employee's character or conduct to a prospective employer is conditionally privileged if the communication is made for the purpose of enabling the recipient to protect his own interests and is reasonably calculated to do so. Therefore, the privilege includes information regarding the employee's

332. Id. § 595(2).
Comment j states that these considerations are not exclusive. If another relationship indicates greater justification for a defamatory communication than for such a statement between strangers, additional protection should be accorded the defamatory statement. The employment relationship could justify such additional protection for the communication between the terminated employee and his employer. The relationship between an employee and an employer is not an arms' length relationship between strangers since the employee's sense of well-being heavily depends on his job. See supra note 253.
333. Restatement (Second) of Torts § 595 cmt. j (1977).
334. Id.
335. Id.
337. Id. at 461.
338. Restatement (Second) of Torts § 595 cmt. c (1977).
339. Id. cmt. i.
honesty and efficiency. If the prospective employer specifically requests information on a subject, the communication may be privileged even though it would not be so otherwise. If an employer waits until prospective employers ask about the employee, the statement is more likely to be found privileged than if the employer voluntarily warns other employers.

To protect a third party's interest, the publication can be privileged even if the statement is not published to that third party. The communication is privileged when published to any person if the recipient's knowledge of the matter will help protect the third party's interest. An employer's communication of the reasons for termination to an employee should therefore be conditionally privileged because the employee's knowledge of the reason for termination will help protect subsequent employers' interests in a productive and honest workforce. However, the court must also consider the probability that the communication will protect that third party's interest. The third party's interest will be protected only if the employee is willing to self-publish the defamatory matter, which places the terminating employer in the awkward position of trying to determine whether the employee will repeat the statement to prospective employers. The situation is not as awkward as it might first appear, however, since the employer would not be liable either way. If the employer would reasonably expect the employee to repeat the statement, then the conditional privilege attaches and the employer is not liable unless he abuses the privilege. If the employer would not reasonably expect the employee to repeat the statement, then the self-publication was not foreseeable and the self-publication doctrine does not apply as the doctrine requires that the employer should have foreseen the self-publication was at least likely.

Even if the former employer's statement to the employee is not conditionally privileged, the employee's repetition of the statement should be, which could preclude liability against the former employer. The employee's repetition to the recipient prospective employer is important in determining the prospective employer's honesty and in protecting the efficiency of the prospective employer's operations by hiring qualified employees. The Supreme Court of Virginia has held that the original publisher is not liable to the defamed person when a privilege protects

340. Id. The privilege does not protect comments that are unconnected with the employee's duties for the prospective employer. Id.
341. Id. The reason for this is that the request indicates that the desired information is sufficiently important to the recipient to justify the publication. Id. cmt. j.
342. Eldredge, supra note 285, § 86, at 466.
343. The likelihood standard of self-publication is the theory that imposes liability on the employer based on a lesser showing than that the repetition was necessary. The compulsion standard is more difficult for employees to prove. See supra text accompanying notes 66-67.
Based on this court's reasoning and on the fact that an employee's harm occurs only when she repeats the statement to a prospective employer, the original publisher should not be liable for the defamation because an employee's repetition is conditionally privileged. However, the court noted that this rule is contrary to the Restatement view that the original publisher could be sued for the repetition despite the repeater's privilege. Moreover, no cases citing this case have ever applied this portion of the court's holding. While this argument could be asserted, and probably would be accepted in Virginia, courts which follow the Restatement view would likely find this argument unpersuasive.

This brings us to the conditional privilege most likely to succeed—the conditional privilege based on a common interest.

c. Common Interest

Most courts recognizing the self-publication doctrine have applied a conditional privilege based on the common interest between employers in exchanging information about employees. A conditional privilege attaches to a communication from one member of a group sharing a common interest to another group member when the communicator correctly or reasonably believes the other is entitled to know the information. The common interest must be a legitimate interest which the law recognizes as worthy of protection. The defamatory matter need not be published for the purpose of protecting the common interest as is required for the conditional privileges protecting the publisher's, recipient's, or third party's interests. This privilege is based on the right to

344. Watt v. McKelvie, 248 S.E.2d 826, 829 (Va. 1978). A third person's repetition of the defamatory statement in a judicial proceeding was absolutely privileged and that same absolute privilege protected the original publisher, so he was not liable for the republication. However, the court relied heavily on the republication occurring in a judicial proceeding.


346. See infra notes 413, 420 and accompanying text.

347. RESTATEMENT (SECOND) OF TORTS § 596 (1977). An employer telling all of his employees (almost 100 people) that plaintiffs were terminated for cause and then implying that it was for theft by saying that employees should not take from the company was conditionally privileged because of the common interest between management and labor in a successful business. Gonzalez v. Avon Products, Inc., 609 F. Supp. 1555, 1559 (D. Del. 1985). Since a material question of fact regarding defendant's subjective intent remained which affected the determination of abuse, the motion for summary judgment was denied. Id. See also Gonzalez v. Avon Products, Inc., 648 F. Supp. 1404, 1408 (D. Del. 1986), aff'd, 822 F.2d 53 (3d Cir. 1987) (court granted defendant's motion for a judgment notwithstanding the jury's failure to agree because no evidence existed on which reasonable persons could conclude that the employer abused the common interest privilege). But see Tumbarella v. Kroger Co., 271 N.W.2d 284, 290 n.9 (Mich. Ct. App. 1978) (although other stores' managers had interest in another store's employee being terminated for theft, employees at other stores did not have any interest, so the communication to these employees was not privileged).

348. ELDRIDGE, supra note 285, § 87, at 481.

learn from one's associates information regarding a matter in which one shares a common interest. Each party who shares the common interest is entitled to information affecting that common interest, even though the party is not personally concerned.

In the employment context, courts have recognized that this privilege protects several types of common interests. An employer's statement of the reasons for terminating an employee to other employees with a common interest in the information is conditionally privileged. Most courts hold that a former employer's statement of the reason for termination to a prospective employer is within the conditional privilege protecting a common interest. Communications between supervisory employees in charge of investigating an employee's misconduct implicate a common interest protected by the conditional privilege. Communications between members of an organization, such as a labor union, and other present or prospective members are within this conditional privilege, as are an employer's contractually obligated statements to the union regarding the employee's discipline. The rationale for recognizing a conditional privilege for statements concerning an employee's qualifications and work record is that such information is in the public interest and employers would not honestly supply such information were the conditional privilege not recognized.

This conditional privilege is best suited for protecting former employers from self-publication liability. All employers considering employment of a particular individual have a common interest in

350. Id.
351. Id.

352. An employer telling managers and three production operators on plaintiff's crew that plaintiff was fired for insubordination was protected by a conditional privilege, which was not abused since the employer's only motivation was to protect the workplace. Gaiardo v. Ethyl Corp., 697 F. Supp. 1377, 1383-84 (M.D. Pa. 1986). This interest includes an employer's publication to supervisory personnel whose duties interest them in the subject. An employer has a qualified privilege to publish a statement about the employee's misconduct to supervisory employees who were responsible for hiring and firing. Merritt v. Detroit Memorial Hosp., 265 N.W.2d 124, 127 (Mich. Ct. App. 1978).

353. "In the context of employment recommendations, the courts generally recognize a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose." Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980). See also Wynn v. Cole, 284 N.W.2d 144, 147 n.1 (Mich. Ct. App. 1979) (former employer's response to prospective employer's request about the plaintiff's nursing skills was conditionally privileged because both employers have a common interest).

354. See Beyda v. USAir, Inc., 697 F. Supp. 1394, 1397-98 (W.D. Pa. 1988) (discharged pilot's supervisors were conditionally privileged to investigate the pilot's misconduct; court never clearly stated if the conditional privilege it was applying was based on a common interest).


357. Stuempges, 297 N.W.2d at 257.
information about the employee’s skills. The conditional privilege should thus protect both the employer’s statement to the employee and the employee’s repetition because both statements advance the common interest in obtaining information regarding employee abilities.

d. Other Interests Protected by Qualified Privileges

Other conditional privileges that are not easily applied to the employment relationship include: (1) communications about family members,\(^{358}\) (2) communications regarding information which affects a sufficiently important public interest to one who may act in the public interest,\(^{359}\) and (3) communications by an inferior state officer published in the course of official duties.\(^{360}\)

Although strong arguments support applying the traditional privilege protecting a common interest between employers to the self-publication context, courts which do not believe the self-publication doctrine falls within a traditional qualified privilege can nevertheless recognize a new qualified privilege. As the purpose of qualified privileges is to balance the interests of the different parties, a qualified privilege can be recognized if the interest in receiving the information, if true, outweighs any reputational harm to the plaintiff if the information is false.

2. Scope of Qualified Privilege

Publication outside the scope of the conditionally privileged occasion is distinct from loss of the conditional privilege through abuse.\(^{361}\) The distinction is significant because courts determine as a question of law whether the occasion is conditionally privileged, but juries determine the question of abuse.\(^{362}\) If the communication deals with a matter extra-

\(^{358}\) See Restatement (Second) of Torts § 597 (1977). If a family member invites the repetition about another family member, the repetition is conditionally privileged. Thomas v. Kaufmann’s, 436 F. Supp. 293, 297 (W.D. Pa. 1977) (father’s demand for information regarding his plaintiff daughter answered by the employer accusing the daughter of stealing was held to be invited and conditionally privileged).

\(^{359}\) See Restatement (Second) of Torts § 598 (1977). This conditional privilege allows a public employee to make a defamatory report to a superior public official who is authorized to investigate corruption and incompetence. Eldredge, supra note 285, § 90, at 497. The communication must deal with matter that affects a substantial public interest and be addressed to a person who has the authority and power to act to protect that public interest. Eldredge, supra note 285, § 90, at 499. This conditional privilege also protects statements to private citizens when the information gives the recipient a privilege to act for the purpose of preventing a crime or apprehending a criminal. See Restatement (Second) of Torts § 598 cmt. f.

\(^{360}\) Id. § 598A. For example, a school board’s statement to a school teacher regarding discipline or termination is conditionally privileged. The communication must be “required or permitted in the performance of official duties.” Id. An absolute privilege protects communications of federal executive and administrative officers and some state superior executive officers. A conditional privilege protects those officials not covered by the absolute privilege. See generally id. cmt. c.

\(^{361}\) Eldredge, supra note 285, § 92, at 505.

\(^{362}\) Id.
neous to the subject of the privileged occasion, the privilege’s protection does not cover this unrelated matter. Publication of an unprivileged matter is not an abuse of the privilege because no privilege ever existed.

3. Abuse of Qualified Privilege

Qualified privileges are lost if abused by knowing that the statement is false, by publishing the statement for a purpose other than protecting one of the above interests, by excessive publication, or by publishing when publication is not necessary to accomplish the purpose for which the privilege was given.

The publisher is subject to liability for a statement made on a conditionally privileged occasion if the occasion is abused. The determination of whether a qualified privilege was abused is usually a question of fact for the jury. Abuse of a conditional privilege requires malice, defined as publication for an improper purpose. The malice required for abuse of a privilege (improper purpose) is not the same as the “actual malice” required in Gertz v. Robert Welch, Inc. (knowledge or reckless disregard of the statement’s falsity). While some courts have defined malice as ill will, others have applied the Gertz standard to determine whether the malice necessary to defeat the conditional privilege is estab-

363. Id. at 506 (citation omitted). For example, when one statement is reasonably believed necessary to accomplish the privilege's purpose but the second is known to be unnecessary, the conditional privilege does not protect the second statement. Restatement (Second) of Torts § 605A cmt. a (1977). If the harm from the unprivileged statement can be separated from the total harm, the defendant is liable only for that harm. Id. cmt. b. If the harm cannot be separated, the privilege is lost and the defendant is liable for the entire harm. Id. cmt. b.

364. Eldredge, supra note 285, § 92, at 507.

365. Restatement (Second) of Torts §§ 599-605 (1977). See, e.g., Tumbarella v. Kroger Co., 271 N.W.2d 284, 290 (Mich. Ct. App. 1978) (store's qualified privilege to tell managers that the employee had been terminated for theft did not extend to communications to employees in other stores); Dwyer v. Smith, 867 F.2d 184, 195 (4th Cir. 1989) (qualified privilege was not abused because communication was limited to appropriate personnel).


367. Id. § 619(2). The jury determines abuse of a privilege “unless the facts are such that only one conclusion can reasonably be drawn.” Id. cmt. b. See, e.g., Higgins v. Gordon Jewelry Corp., 433 N.W.2d 306, 310 (Iowa Ct. App. 1988) (question of excessive publication goes to jury when different inferences can reasonably be drawn, which is possible here since the plaintiff employee repeated the defamatory statement to other employees).

368. Eldredge, supra note 285, § 93, at 509.


370. Frankson v. Design Space Int'l, 394 N.W.2d 140, 144 (Minn. 1986) ("'actual ill will, or a design causelessly and wantonly to injure plaintiff'") (quoting McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 375 (Minn. 1975)); Haldeman v. Total Petroleum Co., 376 N.W.2d 98, 104 (Iowa...
lished.\textsuperscript{371} Under the Restatement, abuse occurs when there is: (1) knowledge of falsity or reckless disregard for the truth, (2) a purpose for publishing the statement other than the purpose of protecting the interest protected by the privilege, (3) publication to an unnecessary person, or (4) publication of information in excess of that required to protect the interest on which the conditional privilege is based.\textsuperscript{372} One difference between the \textit{Gertz} and common law standards of malice is that \textit{Gertz} focuses on the defendant's state of mind toward the truth of the statement, while common law malice focuses on the defendant's state of mind toward the plaintiff. Another difference between common law malice and the \textit{Gertz} standard of malice is the application of the standards; the first is used to determine liability while the second is used to determine damages. The common law malice standard is used to determine whether liability exists, and the defendant is completely protected from any liability and from all damages where a statement is conditionally privileged and that privilege is not abused by the defendant's malice. The \textit{Gertz} standard of actual malice is used after liability has been established to determine whether punitive and presumed damages may be imposed.

If the harm due to the abuse is separable from the harm due to the privileged statement, then the defendant is liable only for the harm due to the abuse.\textsuperscript{373} If the harm is not separable, then the defendant is liable for all harm.\textsuperscript{374}

\textbf{a. Knowing or Reckless Disregard of the Falsity or Defamatory Nature}

Abuse of a qualified privilege at common law required mere negligence—an unreasonable belief that the statement was true.\textsuperscript{375} If the United States Supreme Court now requires that all plaintiffs prove the defendant was at least negligent in not ascertaining the falsity or defamatory nature,\textsuperscript{376} a plaintiff's prima facie proof of negligence would always defeat the privilege under the common law standard.\textsuperscript{377} The Restate-
ment avoids this automatic defeat of the qualified privilege by providing that the qualified privilege is abused only if the defendant knows the statement was false or recklessly disregarded the probable falsity.\textsuperscript{378} Reckless disregard "exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement."\textsuperscript{379} Republication after the plaintiff notifies the defendant that the statement is false and defamatory may be evidence of reckless disregard.\textsuperscript{380} The mere fact that a former employer does not particularly like an employee does not establish malice because this attitude would not rise to the level of knowing or reckless disregard.\textsuperscript{381} Furthermore, if the defamatory matter turns out to be true, truth is a complete defense even though the defendant believed the statement to be false or acted with reckless disregard as to its truth.\textsuperscript{382}

An employer violates its qualified privilege when the employer fails to investigate statements that lack basic credibility.\textsuperscript{383} In \textit{Sigal Construction Corp. v. Stanbury}, the employer abused its qualified privilege where the defamatory statement was based only on rumor and hearsay, and no attempt was made to verify the information which could not be traced to an individual who had personal knowledge.\textsuperscript{384} The court also based its holding on the fact that the employer did not qualify his statements by disclosing the nebulous source of information and led the prospective employer to believe that he had first-hand knowledge.\textsuperscript{385} Where an employer fails to investigate and bases a termination on the report of an employee who may be biased or on second-hand hearsay with no identification of the individual with primary knowledge, the employer has not acted as a reasonably prudent person and lacks a reasonable basis for making the defamatory statement; the employer would not be protected by a qualified privilege.\textsuperscript{386}

Publication of a defamatory rumor does not necessarily abuse a conditional privilege even if the defendant knows or believes the rumor to be false.\textsuperscript{387} If the defendant states that the matter is a rumor and if the publication is reasonable based on the parties' relationship, the interests

\begin{itemize}
  \item \textsuperscript{378} \textit{Restatement (Second) of Torts} § 600 (1977).
  \item \textsuperscript{379} \textit{Id.} cmt. b. Reckless disregard is established by proof that the publisher "in fact entertained serious doubts as to the truth of his publication" or acted with a "high degree of awareness of . . . probable falsity." \textit{Masson v. New Yorker Magazine, Inc.}, — U.S. —, 111 S. Ct. 2419, 2429 (1991) (citations omitted).
  \item \textsuperscript{380} \textit{Eldredge}, supra note 285, § 94, at 528.
  \item \textsuperscript{382} \textit{Restatement (Second) of Torts} § 600 cmt. d (1977).
  \item \textsuperscript{383} \textit{Sigal Construction Corp. v. Stanbury}, 586 A.2d 1204, 1215 (D.C. 1991); \textit{Wirig v. Kinney Shoe Corp.}, 461 N.W.2d 374, 380 (Minn. 1990).
  \item \textsuperscript{384} \textit{Sigal}, 586 A.2d at 1214-15.
  \item \textsuperscript{385} \textit{Id.} at 1215 (applying Virginia defamation law).
  \item \textsuperscript{386} \textit{Wirig}, 461 N.W.2d at 380.
  \item \textsuperscript{387} \textit{Restatement (Second) of Torts} § 602 (1977).
\end{itemize}
affected, and the likely harm, the privilege has not been abused. 388

In the self-publication context, the abuse of a conditional privilege by knowing or reckless disregard of the statement's falsity would need to refer to the employer's state of mind, not the employee's state of mind. Were a court to use the employee's state of mind, the employee could never recover for self-publication since the employee knows the statement is false. Referring to the employee's state of mind would, in effect, eliminate the cause of action.

b. Publication for an Improper Purpose

A conditional privilege is abused if the publisher does not act for the purpose of protecting the interest for the protection of which the privilege is given. 389 Publication on a privileged occasion made solely from spite or ill will is an abuse since the purpose is not to protect the privileged interest. 390 However, if the purpose is to protect the interest, the fact that resentment toward the defamed person partly inspired the publication is not an abuse. 391 Nevertheless, if the publisher is not acting to protect the interest the privilege was meant to protect, the privilege is abused even though she is not acting out of ill will and even though the different interest she seeks to protect is a valid interest. 392

The employer must be acting to protect the common interest between employers or another interest protected by a conditional privilege when she tells the employee the defamatory statement. This condition should be met in most cases because employers normally are not trying to injure the employee and are not acting out of ill will. Further, the employer's communication to the employee is usually intended to assist the employee by helping him find a position more suitable to his skills.

The rationale for this conditional privilege lends support for the development of a rule prohibiting excessive repetitions of the defamatory statement by the employee in order to support a greater damage recovery. Where the purpose of repetition is to increase damages, the purpose is improper. Since a defendant's improper purpose allows recovery, a

388. Id. cmt. b. Factors used to determine if publishing a rumor is conditionally privileged include: (1) the publication is in response to an inquiry; (2) the interest the publisher is trying to protect is of great value and is apt to be seriously harmed if the matter is not published; (3) the likely harm to the defamed person's reputation; (4) the rumor is such that the recipient would normally investigate before taking action; and (5) the relationship of the parties justifies communication of the suspicions—for example, an employee to his employer. ELDERIDGE, supra note 285, § 94, at 535.


390. Id. cmt. a.

391. Id. If the motivating force is not ill will, the existence of ill will is irrelevant. ELDERIDGE, supra note 285, § 93, at 512.

plaintiff's improper purpose should defeat or reduce recovery if the extent of damage due to the plaintiff's abuse can be separated.\footnote{393}

c. Publication to Unnecessary Persons

Publication to a person who is not privileged constitutes abuse unless the publisher reasonably believes publication to this person is a proper means of communicating the matter to the person to whom its publication is privileged.\footnote{394} However, where the communication to the unprivileged person is incidental to the communication to a person whose knowledge is reasonably believed necessary or useful to protect the interest, the communication is privileged since the incidental publication to the other was not excessive.\footnote{395} Therefore, the fact that other employees overheard the employer accusing an employee of dishonesty does not by itself render the publication excessive.\footnote{396} Nor is publication in a company newsletter or a news release necessarily excessive.\footnote{397} When effective communication requires publication at a given time and place, the publication is privileged even though third parties are present who are apt to overhear it.\footnote{398}

Factors to consider in determining whether the publication to un-

\footnote{393. See supra notes 373-74 and accompanying text.}
\footnote{394. Restatement (Second) of Torts § 604 (1977).}
\footnote{395. Id. cmt. a. The risk that others will overhear the statement is one factor in determining the reasonableness of the publication, but it does not conclusively establish that the method was unreasonable:

[The fact that the communication is incidentally read or overheard by a person to whom there is no privilege to publish it will not result in liability, if the method adopted is a reasonable and appropriate one under the circumstances. But the fact that there will be such incidental publication to improper persons is itself important in determining whether the method is a reasonable one; and the defendant may be liable if he unnecessarily sends a defamatory message on a postcard or uses the telegram or speaks so that he will be overheard, instead of resorting to some adequate but less public alternative.]

PROSSER & KEETON, supra note 13, § 115, at 833. E.g., McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 375 (Minn. 1975) (employer's agents' conversation while investigating an employee retained its conditional privilege despite the chance that passersby may have overheard).

396. E.g., Montgomery Ward & Co. v. Watson, 55 F.2d 184 (4th Cir. 1932) (manager accusing employees of theft which other employees overheard was not excessive publication since the casual presence of bystanders does not rob the occasion of its privilege).

397. Zinda v. Louisiana-Pac. Corp., 440 N.W.2d 548, 553 (Wis. 1989) (abuse of the conditional privilege was not established as a matter of law when company newsletter stated employee was terminated for falsifying employment forms by failing to report a prior injury even though employees regularly took the newsletter out of the workplace); Straitwell v. National Steel Corp., 869 F.2d 248 (4th Cir. 1989) (company issuing news release stating that investigation of management employees justified their termination was protected by a conditional privilege that had not been abused because company employees had purchased the company's assets and managers' misconduct had resulted in community unrest); Record v. Whirlpool Corp., 6 Indiv. Empl. Rts. Cas. (BNA) 221, 223 (E.D. Ky. 1991) (qualified privilege was not abused by company publicizing internal drug investigation that resulted in indictments of 41 people when it issued news release to the local newspaper because the release was in the public interest and was not excessive because the company employed 1,000 area residents).

398. Restatement (Second) of Torts § 604 cmt. a (1977).}
necessary people is excessive include the importance of the interest, the
gravity of the threatened harm to the interest, and the inconvenience of
alternative communication. Accord with general business practices is
also a relevant factor. If a business communication is privileged, the
privilege covers all incidents of the transmission which accord with the
reasonable and usual course of business. For example, a telegram can be
reasonable if the information is needed immediately, but probably will be
considered excessive if the information could reasonably be communi-
cated by mail. If the employer's communication to the employee is in
the reasonable and usual course of business and if the employer's com-
munication to the subsequent employer would have been privileged, then
transmission via the employee should also be within that privilege.

Unnecessary publication to others when the defendant communic-
ates the statement to a privileged person normally is an abuse. Publication
to improper persons may justify the conclusion that the privilege
was abused because the defendant did not act for the purpose for which
the privilege is given. However, if the defendant reasonably believed
that this improper person's knowledge of the matter would help protect
the interest, the privilege still protects the defendant.

The employer should limit communication of the defamatory state-
ment to the employee, prospective employers who inquire about the em-
ployee, and managerial employees whose duties involve them in
personnel decisions, because these people share a common interest with
the employer in promoting an efficient workplace. In most cases, com-
munication to rank and file employees or to nonemployers would amount
to an abuse of the conditional privilege by excessive publication. If the
employee herself repeats the statement to people who do not have a com-
mon interest in workforce efficiency, she will have abused the privilege
and should not be able to recover the extra damages due to the excessive
publication.

d. Publication Includes Unnecessary Defamatory Information

A conditional privilege is abused when the defendant does not rea-

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399. Id. cmt. b.
400. IDLERIDGE, supra note 285, § 94, at 524.
401. Id. at 524-525, and the cases cited therein. Dictation to a secretary is also considered privi-
leged since it is a reasonable business practice. Id. at 525.
402. See infra note 420.
403. RESTATEMENT (SECOND) OF TORTS § 604 cmt. a. For example, an attorney loudly telling
his client in a bank that the client's real estate agent charged an outrageous commission is excessive.
See IDLERIDGE, supra note 285, § 93, at 518-19.
405. Id. cmt. c.
406. See supra V.B.1.c.
407. See supra notes 373-74 and accompanying text.
sonably believe the publication of the defamatory matter is necessary to accomplish the purpose for which the privilege is given. The plaintiff has the burden of proving that the defamatory statement was not reasonably necessary to accomplish the purpose for which the privilege is given, but the defendant must prove that the circumstances justified the publication, since this determines the existence of a conditional privilege. The plaintiff also has the burden of proving that the defendant abused the privilege by publishing matter she did not reasonably believe necessary to accomplish the privilege's particular goal.

Thus, if the employer included matters irrelevant to a determination of whether the employee is suitable for employment, the conditional privilege would be abused. If the employee also repeats such extraneous statements to prospective employers, the employee should not be able to recover for such damages because this information is not necessary to protect the common interest in an efficient workforce.

4. Conclusion Regarding Qualified Privileges

The law of qualified privileges and the abuse of these privileges has been well developed when applied to traditional defamation published by a defendant to an individual other than the plaintiff. However, the application of conditional privileges to self-publication claims will involve continuing analysis and refinement of the theory of qualified privileges.

C. Applying Qualified Privilege to Self-Publication Theory

Self-publication defamation is a relatively new cause of action; thus, the question of how qualified privileges should be applied to it is not settled. Commentators do not discuss the application of qualified privileges to the plaintiff's repetition since traditional defamation does not allow recovery when the defendant tells only the plaintiff the defamatory statement. The Restatement states that communication to the defamed person does not create a cause of action because the reputational interest which defamation law protects is not harmed unless a third person obtains knowledge of the defamatory matter. Professor Eldredge agrees

408. RESTATEMENT (SECOND) OF TORTS § 605 (1977). The privilege is abused if the matter published has no value in effecting the purpose that justifies the privilege. Id. cmt. a. For example, slurs on an employee's character which have no bearing on the offense of which he is accused would not be privileged.

409. Id. cmt. b.

410. Id.

411. One who communicates defamatory matter only to the person defamed is immune from liability for defamation, not because he is privileged thus to vilify the other but because the other's reputation, which is the interest protected by the law of defamation, cannot be harmed unless a third person obtains knowledge of the defamatory matter. This being so, whatever protection the defendant enjoys is not derived from a privilege but from a lack of the harm necessary to create a cause of action. Until the communication is made
that the question of whether a conditional privilege applies does not arise when only the plaintiff knows of the defamatory statement. In states that do recognize the self-publication theory of defamation, courts must first determine whether a privilege attaches to the employer's communication to the employee and then whether that same or another privilege attaches to the employee's subsequent repetition to a prospective employer.

The Supreme Court of Colorado found that self-publication communications are subject to a qualified privilege based on the common interest between employer and employee in assuring that employees know the true reasons for their terminations. The court concluded that recognizing this qualified privilege was consistent with previously recognized qualified privileges in the employment relationship, such as interoffice communications. However, the court reasoned that the existence of a conditionally privileged occasion does not end the inquiry; the plaintiff then has an opportunity to prove the defendant abused the privilege by publishing the material with malice. Since the employer could not prove the absence of any material question of fact as to malice, the court held that the trial court improperly granted the employer's motion for summary judgment.

The Supreme Court of Minnesota has also recognized the existence of a qualified privilege in the self-publication context. After pointing to the third person, there is simply no defamation at all, and the question of privilege or abuse does not arise.
out that the existence of a privileged occasion is a question of law for the court, the court stated that "the existence of a privilege results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." Employment recommendations are usually conditionally privileged if made in good faith and for a legitimate purpose. Since the prior employer's statement made directly to the former employee's prospective employer would be conditionally privileged, the conditional privilege should also attach to indirect communication of the same message. An additional reason for recognizing the conditional privilege is that such recognition is the only way to prevent the employer from being liable every time the employer tells the employee the reason for the employee's discharge.

This conditional privilege can be lost if abused. In Lewis, the jury found the employer abused the conditional privilege because the statement was "actuated by actual malice." The court distinguished between the common law definition of malice and the Supreme Court's definition of "actual malice." The court concluded that the common law definition was more appropriate for the employment relationship since it focuses on the employer's attitude toward the employee. Common law malice requires that the defendant make the statements from "ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." 

Other courts ruling on self-publication have also discussed the effect of privileges. The Court of Appeals of Michigan found a set of jury instructions on malice to be erroneous and remanded a self-publication

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418. Lewis, 389 N.W.2d at 889.
419. "In the context of employment recommendations, the law generally recognizes a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose." Id.
420. Id. at 889-90. "It makes little sense to deny the privilege where the identical communication is made to identical third parties with the only difference being the mode of publication." Id. at 890.
421. Id.
422. Id. The question of abuse is a jury question. Id. In Lewis the lower court had erred by submitting the question of the company's entitlement to the qualified privilege to the jury since that question is one of law for the courts to determine. Id. The error was not prejudicial, however, since the jury found that the employer's statements were motivated by actual malice. Id.
423. Id.
424. Id. at 890-91.
425. Id. at 891.
426. Id. at 891 (quoting from Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980)). The court defined common law malice for the jury, so the jury instructions were not erroneous. Id.
427. Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822, 824 (Mo. Ct. App. 1985) (held service letter was conditionally privileged, but did not clarify under which conditional privilege); Colonial Stores, Inc. v. Barrett, 38 S.E.2d 306, 308 (Ga. Ct. App. 1946) (court did not determine if letter required by government regulation was conditionally privileged since the
claim for a new trial.\textsuperscript{428} The instructions were erroneous because the trial court failed to instruct that the plaintiff must prove both falsity and actual malice, and that actual malice meant "that which is actuated by ill-will with a design to causelessly and wantonly injure the plaintiff."\textsuperscript{429}

Commentators have suggested that the \textit{Gertz} standard of knowing falsehood should be used instead of the common law malice standard.\textsuperscript{430} These commentators reason that since courts often combine malice and negligence terms in attempting to define malice, the jury usually associates malice with unreasonable conduct by the defendant or general "badness" about the defendant.\textsuperscript{431} The result is that juries often find the conditional privilege was abused without fully understanding the standard they are applying.\textsuperscript{432} The vagueness of the common law standard also makes it difficult for courts to direct verdicts for defendants as a matter of law on a conditional privilege.\textsuperscript{433} These commentators advocate use of the "knowing falsity" prong of the Supreme Court's "actual malice" standard.\textsuperscript{434} They argue this standard better protects the purpose of the conditional privilege, which is to encourage truthful statements.\textsuperscript{435} The social interest in open communication of employees' qualifications is not decreased because ill will may motivate the statement.\textsuperscript{436} "In terms of abuse of privilege, policy requires only that one not knowingly defame."\textsuperscript{437} These commentators further suggest that the term "malice" should be eliminated from jury instructions, as should "recklessness" toward the falsity.\textsuperscript{438} Only knowing falsehoods should constitute an abuse of the privilege.\textsuperscript{439} A knowing falsehood standard will allow courts to dismiss more claims where the pleadings do not support that the defendant knew the statement was false.

However, applying a knowing falsehood standard has several problems. First, determining whether the employer knew of the falsity is also a vague standard. An intelligent defendant would not admit to publishing a statement known to be false. The jury will be left to determine

\textsuperscript{429} Id.
\textsuperscript{430} O. Lee Reed & Jan W. Henkel, \textit{Facilitating the Flow of Truthful Personnel Information: Some Needed Change in the Standard Required to Overcome the Qualified Privilege to Defame}, 26 AM. BUS. L.J. 305, 320-23 (1988).
\textsuperscript{431} Id. at 314.
\textsuperscript{432} Id. at 319.
\textsuperscript{433} Id. at 317.
\textsuperscript{434} Id. at 318, 320.
\textsuperscript{435} Id. at 315.
\textsuperscript{436} Id. at 320.
\textsuperscript{437} Id.
\textsuperscript{438} Id. As recklessness is hard to define, the commentators advocate eliminating it. Id. at 319-20.
\textsuperscript{439} Id. at 320.
whether the defendant knew the statement was false by considering whether the defendant should have known the statement was false, which, in effect, amounts to the standard of reckless disregard of the falsity. Second, the knowledge requirement encourages employers not to investigate and to assume an "ignorance is bliss" attitude. Finally, the commentators assume that the only interest the conditional privilege was meant to protect is truth. Preventing malicious statements which may not be "known" to be false protects the employee's interest in knowing the legitimate reason for termination and also provides other employers with an unbiased report of the employee's qualifications.

D. A Statutory Response to the Self-Publication Theory

The Minnesota legislature has enacted a statute in response to the self-publication doctrine. This law requires employers to provide a written, truthful statement of the reason for the employee's termination within five days if the employee asks for such a statement within five days of the termination. The letter may not be used as a basis for a defamation claim. The statute does not provide an express remedy if the employer violates the requirement that the letter be truthful. The statute does not limit the prohibition of defamation claims to truthful letters, so the section could be read to preclude claims based on false letters. The statute also does not address whether an employee can sue for defamation if the employee does not ask for such a letter.

E. Conclusion on Privileges

Where courts recognize the plaintiff's repetition as consent to publication, the repetition is absolutely privileged. This, in effect, nullifies the cause of action since no claim exists unless the employee repeated the statement. Most courts will probably recognize a conditional privilege based on the common interest in promoting the free exchange of information about employee skills. If the conditional privilege is not abused,

440. An employee who has been involuntarily terminated may, within five working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within five working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination. MINN. STAT. ANN. § 181.933(1) (West Supp. 1992).

441. Id. § 181.933(2). "No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action for libel, slander, or defamation by the employee against the employer." Id.

442. However, § 181.935 does provide a civil remedy to recover damages and costs and to obtain equitable relief for a violation of the whistleblower protection under § 181.932. All of these sections are part of Chapter 181 (Employment; Wages, Conditions, Hours, Restrictions). Section 181.935 states that these remedies are "in addition to any remedies otherwise provided by law," which could indicate that other common law remedies apply to the other sections under the same Chapter.
the publication is completely protected and the employer cannot be held liable. If the conditional privilege is abused by excessive, malicious, or improper publication, the conditional privilege is lost and the employer can be held liable.

VI
LITIGATION OF SELF-PUBLICATION CLAIMS

The theory of compelled self-publication creates litigation problems which the traditional defamation theory does not. Since the employee's repetition creates the cause of action, the employee can control when the cause of action arises and the extent of damages by the timing and frequency of his repetitions.

A. Statute of Limitations

In the traditional defamation claim, the cause of action accrues and the statute of limitations begins running at the time the defendant publishes the defamatory statement. The purpose of a statute of limitations is to prevent stale claims about which the witnesses' memories have faded. This rationale is especially applicable to defamation claims, which normally have a shorter statute of limitations than many other claims.443 In self-publication claims, a difficulty arises in that the employee herself can determine when the statute of limitations will begin running by delaying her repetition of the statement. Until the defamatory statement is repeated, the cause of action has not yet arisen since no injury has occurred.444 In effect, the statute of limitations is tolled until the employee decides to repeat the statement.445

443. Compare CAL. CIV. PROC. CODE § 340(3) (West Supp. 1992) (providing for a one year statute of limitations for libel and slander) and MICH. COMP. LAWS ANN. § 600.5805(7) (West Supp. 1991) (providing for a one year statute for libel or slander) with CAL. CIV. PROC. CODE § 338 (West Supp. 1992) (providing for a three year statute of limitations for trespass, fraud, or false advertising) and MICH. COMP. LAWS ANN. § 600.5805(2) (specified intentional tort claims have a two year limitation period) and id. at § 600.5805(8) (other actions for injuries to person or property have a limitations period of three years from the date of the injury).

444. “[N]o cause of action for libel arises until there is a publication of the defamatory matter, which is ‘its communication intentionally or by a negligent act to one other than the person defamed.’” Gaetano v. Sharon Herald Co., 231 A.2d 753, 755 (1967) (quoting RESTATEMENT (FIRST) OF TORTS § 577 (1938)). A commentator agrees:

In nearly all jurisdictions the statute of limitations for matters actionable per se begins to run at the time of publication, that is, when the defamation is communicated to a third party. . . . In a suit for statements not actionable per se, the statute does not begin to run until some special damage is suffered, since no cause of action exists without special damage.


445. See McKinney v. County of Santa Clara, 168 Cal. Rptr. 89 (Ct. App. 1980). The plaintiff delayed repeating a defamatory statement made by his employer for one year and the court allowed the cause of action when it was filed almost two years after the defendant made the defamatory statement to the plaintiff. The court did not expressly rule on the statute of limitations question, and might not have allowed the claim if the defendants had raised the one year statute of limitations as a
To prevent claims from being brought years after the employer made the defamatory statement to the employee, a statute of repose should be implemented in each state which has judicially recognized the self-publication doctrine. A statute of repose sets an overall time limitation from the occurrence of an event even if injury does not arise during the period. A statute of repose would prevent the plaintiff with a self-publication claim from delaying injury for several years, and thereby delaying the cause of action from arising for several years without losing the claim. Allowing the claim years after the initial statement was made would result in all of the problems the statute of limitations is designed to prevent. In order to prevent stale claims, such a statute of repose should be, at most, one year in addition to the statute of limitations for defamation claims. Such an extension allows time for the injury to be incurred without extending indefinitely the amount of time the employee can delay the cause of action.

One commentator has argued that the statute of limitations should run from the time the defendant tells the plaintiff the false reason for the termination. Since the plaintiff is aware of all facts necessary to bring the cause of action, no justification for delaying the limitations period exists:

The same concerns addressed in “discovery rule” cases counsel a departure from the mechanical “time of publication” standard for accrual of self-publication actions. Just as the policy favoring protection of plaintiffs’ causes of action is paramount when the nature of the claim has shielded the wrongdoer from discovery, so should defendants’ interest in repose and protection from stale claims control here. In suits for defamation through self-publication, the plaintiff has within his knowledge and control all the elements of his cause of action as soon as the defendant has made the defamatory statements; only publication by the plaintiff himself need be completed. The plaintiff suffers no handicap in asserting his rights as in “discovery rule” cases. Under these circumstances, the defendant’s difficulty in defending stale claims should receive greater protection . . .

Although having the limitations period begin at the time the employer tells the employee is preferable to having the period begin when the employee repeats the statement, this standard does not consider the probability that the employee will not realize her claim is actionable. As
losing a job substantially impairs an employee's self-esteem, not all terminated employees will immediately seek a new job because of fear of repeated rejections. In addition, many defamatory terminations involve employees who may not be aware of their rights and may not realize all of the elements of a suit are in place. Furthermore, the sense of outrage that motivates a plaintiff to seek legal advice may not be as great where the employer is assuring the plaintiff that she will tell only the plaintiff and not prospective employers. The employee cannot initiate the suit until he has been compelled to repeat the statement, and that compulsion is not within the employee's control. Many reasons could prevent an employee from immediately repeating the statement, thereby triggering the cause of action. The better balance between protecting the employer from stale claims and protecting the employee's reputational interest would be struck by recognizing a statute of repose.

Another solution advocated by one court is to limit the employee's recovery to any one year period, with the employee deciding which publication triggers liability. In a case involving newspaper printings, the Supreme Court of Pennsylvania held that the single publication statute did not require the period of limitations to begin running from the first publication. The statute was intended to prevent countless suits and endless tolling of the statute of limitations, but that purpose was met "by holding that the plaintiff may choose any publication as the single publication which represents his single cause of action." The plaintiff could recover damages only which result from the publication he chooses and other publications occurring within the limitations period that begins running from his chosen date.

The problem with this rule is that the employee could still delay the self-publication suit for several years, which is unfair to the employer and violates the goal of preventing stale claims. Moreover, the Supreme Court of Pennsylvania has seemingly backed down from this rule. The statute of repose better balances the interests of employer and employee.

449. See supra note 253.
451. Id.
452. Id.
453. A federal district court in Pennsylvania cited another Supreme Court of Pennsylvania case to show that the state court had clarified that the plaintiff cannot choose any publication to start the statute of limitations running. Andrews v. Time, Inc., 690 F. Supp. 362, 366 (E.D. Pa. 1988) (citing Graham v. Today's Spirit, 468 A.2d 454 (Pa. 1983)). In Graham, the court stated that one edition of a paper was one publication and that a later circulation of a copy of the same edition was not an additional publication; however, two editions would be two publications. 468 A.2d at 457. The federal district court also pointed out that most jurisdictions pick a single fixed date and do not let the plaintiff choose any publication date to start the statute of limitations running. 690 F. Supp. at 366.
B. Damages for Self-Publication

The damages recoverable in a defamation claim include: (1) nominal damages, \(^{454}\) (2) general damages for the harm to reputation, \(^{455}\) (3) damages for special harm caused to the plaintiff's reputation, \(^{456}\) (4) damages for emotional distress and resulting bodily harm, \(^{457}\) and (5) punitive damages. \(^{458}\) Evidence which shows that the injury is less than that claimed is admissible to reduce damages. \(^{459}\) For example, a plaintiff's poor reputation before the defamation lowers damages since the defendant's defamation may not have worsened the reputation. \(^{460}\) A presumption of reputational harm is constitutionally permissible only where the defamation involves a private plaintiff and the publication is not of public concern. \(^{461}\)

I. Employee's Duty To Minimize Damages by Explaining the Statement's Falsity

Courts that recognize the compelled self-publication theory must impose a duty on the plaintiff to minimize potential damages by making a good faith effort to explain the reasons that the former employer's statement was false. If the employee does not have such a duty, the employee could increase her damages by telling every prospective employer the false reason for her termination, knowing the employer would then never hire her. Although the risk of an employee purposefully attempting to incur additional damages may seem unlikely to those who have not practiced labor and employment law, an Illinois court has used this potential problem as one reason to reject the self-publication theory. \(^{462}\) Further,

\(^{454}\) Nominal damages are awarded where the defamatory matter is insignificant or plaintiff's reputation was already so poor that the defamation did no further harm. ELDREDGE, supra note 285, § 95, at 537; RESTATEMENT (SECOND) OF TORTS § 620 cmt. a (1977). Professor Eldredge points out that Gertz was not clear on whether the requirement of "actual injury" prevents nominal damages or merely prevents presumed damages. ELDREDGE, supra note 285, § 95, at 540.

\(^{455}\) ELDREDGE, supra note 285, § 95, at 537.

\(^{456}\) "Special damages are damages that do not so frequently result from the publication as to be recoverable as general damages; moreover, if the defamation is not the kind that is actionable per se—i.e., libel or slander per se—then special damage means also pecuniary or material loss." PROSSER & KEETON, THE LAW OF TORTS § 116A, at 844 (5th ed. 1984).

\(^{457}\) ELDREDGE, supra note 285, § 95, at 537.

\(^{458}\) Id. The purpose of punitive damages is to deter highly culpable tortious conduct. Id. at 541. The Supreme Court in Gertz v. Robert Welch, Inc. held that the states cannot allow private plaintiffs to recover punitive damages without a showing of knowledge or reckless disregard. 418 U.S. 323, 348-49 (1974).

\(^{459}\) The true rule is that actual damages cannot be mitigated or enhanced, but every fact which tends to show that the injury was less or more than if these facts did not exist is admissible, for these facts show the extent of the actual injury, and that measures the limit of the compensatory damages. Craney v. Donovan, 102 A. 640, 643 (Conn. 1917).

\(^{460}\) ELDREDGE, supra note 285, § 97, at 564.


there is no reason not to impose this duty because recognizing the duty does not harm employees who are truly and actively seeking employment; such employees would already be explaining the falsity of the statement to prospective employers in order to obtain employment. Failing to recognize this duty, however, allows litigious employees to incur additional damages by not explaining the falsity of the prior employer's allegations. The duty should be imposed as a precaution against such employees.

Another reason for courts to require employees to attempt to minimize their injuries in self-publication cases is that defendants can decrease damages by a retraction in a traditional defamation suit. A court should allow an employer to minimize an employee's damages by retracting the defamatory statement that the employee is publishing to prospective employers. The retraction must be full and unequivocal, with no lurking insinuations. Even if the defendant's second statement does not rise to this level, any statement that decreases the harm can be considered in the mitigation of damages.

The mechanics of a retraction are more difficult in a self-publication case than in a traditional defamation claim. The employer could contact the employee and withdraw his statement to the employee, which should prevent the employee's subsequent repetitions. However, a court may not consider this to be sufficient since the purpose of a retraction is to reach those people who previously received the defamatory communication. A court could require that the employer contact all of the prospective employers to whom the employee has repeated the defamation in order to counteract the damage done to the employee's reputation.

2. Unavailability of Punitive Damages

Although allowing punitive damages in most tort claims serves the valid purpose of reducing intentionally harmful conduct, this deterrence purpose is not furthered by allowing punitive damages in self-publication cases. Most employers currently try to avoid defami ng their employees by releasing very limited data to prospective employers. These employers provide the reason for termination to the employee in order to

463. Retraction is a formal disavowal of a previous statement. Eldredge, supra note 285, § 96, at 543. A retraction does not totally release the defendant from damages, but does mitigate damages. Id. at 545. The jury determines how much the retraction has decreased the injury to the plaintiff's reputation. Id. A retraction should be considered in determining the extent of reputational harm and emotional distress harm. Id. at 561. A retraction is also relevant in determining whether punitive damages should be allowed at all. Id. at 562.

464. Id. at 547. Retraction must be an honest endeavor to repair all the harm which was done. Id.

465. Id. at 550.

466. See supra note 188 and accompanying text.
help the employee by explaining any performance problems which the
employer thought the employee had.

When a state court recognizes the self-publication cause of action, the
court should not allow punitive damages to be awarded. One factor
considered in determining the extent of punitive damages is the level of
damages necessary to deter the same defendant from similar conduct in
the future. However, where a defendant believes he is helping the em-
ployee by providing the reason for the employee’s termination, punitive
damages are inappropriate and are not necessary to prevent the employer
from supplying the reasons in the future. Further, allowing punitive
damages could encourage the plaintiff to repeat the statement more fre-
frently with the hope that a jury will award greater punitive damages
when the employee has suffered greater compensable damages. More-
over, imposing punitive damages on an employer when a state court rec-
ognizes the cause of action for the first time is especially unfair to that
employer.

In the alternative, courts should strictly control jury consideration
of punitive damages. The jury should be allowed to award punitive dam-
ages only for repeat violators or extremely egregious conduct. The court
could conduct a threshold review of the facts to determine whether the
employer’s conduct could reasonably be viewed as rising to the level of
required egregious conduct; the jury could then determine whether the
conduct actually reaches that level. At a minimum, punitive damages
should be imposed only where the defendant is at least reckless or knows
that the statement was defamatory and false. Even then, an employer
may be discouraged from providing a reason for termination because of
fear that a jury might find the employer had recklessly disregarded
whether the statement was false or defamatory. Punitive damages would
substantially chill the employer’s communication of termination reasons
to the employee even if the employer believes the reason is fully docu-
mented after a complete investigation.

In those states where the courts have already recognized the self-

467. See supra note 249, 255 and accompanying text.
469. This review is similar to the Restatement standard for the tort of intentional infliction of
emotional distress. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The court first determines
whether reasonable minds could find the conduct “extreme and outrageous,” and the jury then
determines if the conduct actually constitutes extreme and outrageous conduct:
It is for the court to determine, in the first instance, whether the defendant’s conduct may
reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is
necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of
the court, to determine whether, in the particular case, the conduct has been sufficiently
extreme and outrageous to result in liability.
panying text regarding whether fault is required in private plaintiff/private concern cases.
publication theory, the state legislature could respond by enacting a statute that provides a cap on punitive damages. Such a cap might minimize the chilling effect which punitive damages might otherwise have on an employer providing the reason for termination to an employee.

C. Effect of Self-Publication on Wrongful Discharge Actions

State courts must be careful in recognizing the self-publication theory if the state does not also recognize wrongful discharge theories. In effect, the self-publication theory is a form of wrongful discharge claim which holds that discharge is wrongful if founded on a false reason. Where an employee lacks just cause protection under an express or implied contract, that employee cannot sue under a wrongful discharge theory regardless of whether the employer’s stated reason is true or false. However, where the employer’s reason is false, that employee can sue under a compelled self-publication theory which allows the employee to recover damages for a discharge that is “wrongful” because a false reason was given. Although the main basis of a defamation cause of action is to protect the plaintiff’s reputation, damages awarded for the employee’s loss of reputation signals to the employer that the discharge was wrongful. Where an employee already has just cause protection, she can sue for compelled self-publication to protect her reputation in addition to her other claims which protect her right to keep her job absent just cause for the discharge. An employee without just cause protection can use the self-publication theory to recover damages for an unjustified discharge even though she has no explicit wrongful discharge cause of action.

Courts must exercise caution to ensure that their treatment of self-publication claims is consistent with their treatment of wrongful discharge claims. Those state courts that have deferred to the state legislatures on wrongful discharge theories should defer on the self-publication theory for the same reasons because the causes of action involve similar issues. Those states that have adopted wrongful discharge theories should fully consider the effect that recognizing self-publication may have on those theories. For example, if a state allows only compensatory damages for wrongful discharge, the court must decide whether it will allow only compensatory damages for self-publication. Another potential conflict may occur in a state which recognizes a wrongful discharge cause of action only when a termination interferes with a substantial public policy. Allowing self-publication claims without a violation of public policy will significantly expand an employee’s ability to recover for wrongful discharge by labeling his claim as one for self-publication

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471. Section 102(b)(3) of the Civil Rights Act of 1991, 42 U.S.C.A. § 1981a(b)(3) (West Supp. 1992), caps compensatory and punitive damages for some discrimination claims at amounts ranging from $50,000 to $300,000 depending on the size of the employer. See supra note 245.
defamation.\textsuperscript{472}

VII

CONCLUSION

Jurisdictions should not adopt the self-publication theory of defamation. The self-publication theory would impose liability on an employer who believed he was acting in the employee's best interests in disclosing the reasons the employer found the employee's work inadequate. Employers have already substantially reduced the information they will release to other employers because of the fear of tort liability. Recognition of the self-publication claim will not prevent discharges for "false" reasons—it will only prevent that information from reaching the employee. When the employer fails to supply a reason for the employee's discharge, the employee is more likely to sue on other grounds because the employee may assume that an employer with a legitimate reason would be willing to reveal that reason to the employee. Although a release from liability signed by the employee so that she may receive the information may encourage some employers to disclose the information, a court may not be willing to enforce such a waiver. While extending traditional tort theories to the employment context may have aided employees, extending the self-publication doctrine will only interfere with open communications between employers and employees.

While privileges offer some protection, that protection is often ineffective since a jury may find that the privilege was abused. Those courts that have most fully considered the self-publication doctrine recognize that a qualified privilege protects an employer's statements to its employees unless the employer abuses that privilege.

Other potential questions courts must answer if they adopt the self-publication theory include whether the statute of limitations begins to run at the time the employer first tells the employee the defamatory statement, whether punitive damages are available, and whether the self-publication theory is inconsistent with the state's rulings on wrongful discharge.

If courts recognize the compelled self-publication theory, there are several mechanisms through which courts should safeguard the employer's interests.

1) The courts should recognize a statute of repose, which sets an overall time limit for the employee to initiate suit, running from the date the employer communicates the defamatory statement to the employee. If courts think such a statute of repose should be enacted by the legislature, the court should then start the running of the statute of limitations.

\textsuperscript{472} Mazur, Note, \textit{Self-Publication of Defamation and Employee Discharge}, supra note 447, at 335-36.
from the time the employer tells the employee. Although this could prevent some claims, stale suits should be blocked because of the employer's and society's interest in prompt litigation while memories are fresh.

(2) The courts should require that the self-publication be strongly compelled. The employee should not recover for volunteering the repetition. Feeling an obligation to reveal the defamatory statement should not suffice. An example of a strong compulsion would be the employee being told that she will not be considered for the job, or at a minimum that her being hired is unlikely, without an explanation of the reasons she left her former employment. Courts need to examine the evidence closely on the compulsion question before giving the determination of that question to the jury because a jury is apt to sympathize with the employee.

(3) The courts should recognize that a conditional privilege protects the employer from liability for the employee's repetition and should also determine what conduct constitutes abuse so employers will know what conduct is acceptable. Courts should review this evidence closely, and if the evidence is insufficient to submit the question to the jury, the court should determine whether the conditional privilege was abused as a matter of law.

(4) The courts should enforce waiver agreements entered into at the time of application or at the time of termination. A pre-employment waiver may be ruled unenforceable because the employee is under substantial economic duress if she needs the job. However, others believe that courts can enforce pre-employment releases. After termination, the prior employer no longer exerts economic duress since the employee has already lost that job, so a waiver of the self-publication claim against that prior employer should be enforced.

(5) The courts should require the employee to minimize damages by explaining the reason the statement is false and by offering alternative references who would corroborate that the employer's statement is false.

(6) The courts should not allow juries to impose punitive damages unless the court concludes after a threshold review that the conduct was so egregious that punitive damages are necessary to punish and deter this particular defendant. This threshold requirement should demand conduct worse than that necessary to defeat a conditional privilege (i.e., greater than malice or ill will). For example, a court could require specific intent to injure the plaintiff, not mere probability that such an injury may result.

473. See supra note 86 (an employee who feels an obligation to repeat the defamation does not establish that the repetition was necessary).
474. See supra note 212 and accompanying text.
475. See supra note 211 and accompanying text.
The most obvious way for employers to avoid liability for self-publication is simply not to tell the employee any reason for the termination. However, an employer who adopts this approach may suffer from poor relations with his remaining employees and may face lawsuits based on wrongful discharge or other theories. An employer who wants to maintain open communications with its employees can try to avoid liability for self-publication by taking several precautions.

(1) An employer should create a paper trail to document the truth of the reason supplied for the employee's termination. Never reveal information to the employee that cannot be supported, since this could be interpreted as reckless disregard of the falsity. Periodic performance appraisals warning the employee of inadequate performance would inform the employee in advance of the reasons for termination.

(2) An employer should never rely on only one supervisor's description of the reason to terminate the employee. Employers should require at least two supervisors to concur that the employee's performance is faulty before terminating an employee. One supervisor could contact a second supervisor to verify the truth by observing or questioning the employee. Both supervisors should file written reports before taking any action. The personnel director or the corporate president could verify these reports where such an individual believes the employee may still sue or where she has any doubt about the supervisors' conclusions.

(3) An employer should verify that there is no improper motivation before terminating the employee in order to protect the employer's qualified privilege. The procedure outlined in suggestion two above should serve to prevent malicious terminations.

(4) An employer should avoid excessive publication. An employer should communicate the reason for termination only to those who need to know and should communicate the minimum amount of information possible.

(5) Pure opinions are not actionable, so an employer could try to
word the reason for termination in the form of an opinion. If the employee asks for details to support that opinion, she could be held to have consented to the defamatory statements that are factual in nature.

(6) An employer should clearly tell the employee that she is consenting to the publication by asking for the reasons for the termination and that such consent may defeat a defamation claim. The employer should then inquire whether this is what the employee wants. Some courts have found this type of clear assent to constitute consent.

(7) An employer could also require a release or waiver form. Some courts have accepted an express waiver of employment rights through a signed form. The waiver or statement of release should be in large, bold print so that the employee cannot claim that she did not notice it.479

(8) An employer should try to help the employee find employment suitable to her skills because a terminated employee who finds a job is unlikely to sue.480 However, this is possible only where the employee is unqualified for only certain jobs. An employer should not provide an untrue reference to help an employee who is dishonest or mentally inept find a job as this merely shifts the harm to another employer.

While none of these suggestions will completely prevent liability if a court strongly supports the self-publication doctrine, all of them should at least help to reduce damages. They also should eliminate the possibility of any punitive damages because punitive damages require, at a minimum, reckless disregard of the falsity and defamatory nature.

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480. "Personnel consultants say one of the best ways companies can defend themselves against defamation litigation is to help discharged employees find new jobs through outplacement counseling." Stricharchuk, supra note 188, at 33.