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Can You Now Speak the Truth About Ex-Employees?

Old war movies often have a scene of soldiers being warned to give only their name, rank and serial number when questioned. Similarly, it is almost universally understood in human resources departments that inquiries about ex-employees from prospective employers are to be answered only with dates of employment, job titles and rates of pay. The former employer never gives an assessment or recommendation as to the performance of the ex-employee, especially a negative one, for fear of a lawsuit by the ex-employee. This lack of communication is a disadvantage both to prospective employers and to ex-employees who are worthy of praise, and to the detriment of business as a whole.

Now the Connecticut Supreme Court has attempted to restore some sanity to the process. In the recent case of *Miron v. University of New Haven Police Department*, released on September 25, 2007, the Court held that if the ex-employee has signed a release authorizing his former employer to respond to a request for information about him, the former employer has a "qualified privilege" for any comments it may make. A qualified privilege means that the former employer cannot be sued for defamation (or related claims like tortuous interference with business expectancies or infliction of emotional distress) unless the ex-employee can prove that the comments were made with actual malice. In other words, any comment made in good faith is protected, even if it could be shown to be inaccurate. Former employers risk liability only if they deliberately make false statements for the purposes of harming the ex-employee.

In *Miron*, the plaintiff applied for other police department positions, and those police departments naturally solicited comments from her former employer, the University of New Haven Police Department, as to her qualifications in law enforcement. She was turned down for one job and hired for another but flunked out of training. She then sued her former employer, claiming that it was their comments rather than her performance which cost her the new positions.

Although Connecticut has a general statute, Section 31- 128f, which prohibits the release of information from a personnel file, the Court held that comments and opinions by former employers are outside of personnel records. Moreover, the ex-employee had given a written release. The Court stated that the integrity of employment references not only is essential to prospective employers, but also to prospective employees, who stand to benefit from the credibility of positive recommendations. It would encourage a "culture of silence" not to afford a qualified privilege to employment references that are made in good faith and without proper motive.

Last year, the Connecticut Appellate Court decided the case of *Chadha v. Charlotte Hungerford Hospital*, in which a doctor sued the Hospital over assessments of his fitness to practice medicine that were submitted to the National Practitioner Data Bank and the Connecticut Department of Public Health. But the Court ruled that the doctor could not assert a claim unless he proved actual malice based on improper motive.

In the *Miron* case, the comments were from one police department to another; in the *Chadha* case, the comments were from a hospital to regulators of physicians. All employers think that an informed evaluation of applicants is important but it is especially important for employers who are also protecting society as a whole. Because these plaintiffs were bold enough to challenge comments on their fitness to be police officers or to practice as physicians, without any proof that the comments were made in bad faith, all employers now benefit from a qualified privilege to respond to inquiries about ex-employees, and to make inquiries about applicants in their turn.

However, although the Court did not make it a prerequisite, employers should always require that the inquiring prospective employer furnish a signed release from the ex-employee.

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