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The Employer and Negative Job References

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It's the rare exception where an employee stays with the same employer for his or her entire working life. Even for upper management positions, an employee typically fills out an employment application in addition to providing a resume. Job applications include sections for employment work history, reasons for leaving past jobs, and a reference section.

What happens if you are a former employer and a prospective new employer calls you regarding the former employee's job performance? What do you say? What if an employee was terminated for violation of company policy, poor performance, etc.? What *can* you say? What does the law allow you to say?

It is common for employers to have a standard practice that they will only give a former employee's "name, rank, and serial number" to prospective new employers. That includes the position, length of service, and, potentially, salary range. Why is the standard protocol in place? What are the employee's rights and the employer's rights?

Earlier this year in Los Angeles Superior Court, Jerry Kowal filed suit against Netflix and Amazon. The suit made all of the "Hollywood" tabloids based on the allegations in the case. Jerry Kowal was a former employee of both companies. In his lawsuit, which also names individual Netflix executives, Mr. Kowal sought millions of dollars in damages because he claims he was "blacklisted" by Netflix. Kowal left Netflix's allegedly "cold and hostile" environment and joined Amazon. Approximately one week after leaving for Amazon, Netflix allegedly told Amazon that Kowal was under internal investigation for leaking proprietary information and documents to Amazon and instructed Amazon to cut off all contact with him. Kowal also claims that Netflix pressured Amazon executives to fire him, regardless of what any probes found concerning the contention that Kowal had stolen confidential information from Netflix. Although it was determined that Kowal had not disseminated secret Netflix information to Amazon after forensic inquiry, Kowal alleges in the Complaint that he was fired because of Netflix's pressure. Indeed, the Complaint states that "on at least one such occasion, executives of Netflix announced and gloated before dozens of other employees of Netflix that Kowal's employment had been terminated by Amazon."

This past Friday, the California Trial Judge ruled the allegedly defamatory statements of Netflix were protected speech under California's state law, the

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"anti-SLAPP" statute. The Court concluded the alleged defamatory statements were made in connection with potential litigation with Kowal, thus fitting within California's "anti-SLAPP" law. No doubt, an appeal will ensue.

What is the law Ohio?

Under Ohio Revised Code Section 4113.71, an employer is protected as to job performance information disclosures under most circumstances. The Revised Code section reads, in summary, that an employer who is requested by an employee or prospective employer to disclose information pertaining to the job performance of the employee, and who discloses the requested information, is not liable in damages in a civil action unless the Plaintiff proves two exceptions in Court. Those exceptions are that (1) the former employer knew the information was false, or made a disclosure with the intent to mislead, in bad faith, or with a malicious purpose, or (2) the information provided was in violation of employment discrimination laws. As an example, an employer who only gives good references to males but not to females would potentially be discriminating based upon gender, and therefore the Ohio statute may not protect the employer.

In a nutshell, a former employer can give negative job references as long as they are truthful and nondiscriminatory.

As an example of the qualified privilege in action, see *Reece v. Miami University*, 2003 WL 21067398 (Ohio Court of Claims, 2003). Reece was a former employee of Miami University. After the employee left Miami University, the new potential employer contacted Miami University for a reference. The potential employer was told that the Plaintiff, Reece, would not have been a "good fit" for the employer's vacant position due to Plaintiff's weaker people skills and confrontational relationship with his former supervisor. The Court found that the former supervisor's statements should be afforded a qualified privilege. The Court went on to say that a qualified or conditional privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, if made to a person having a corresponding interest under circumstances warranted by the occasion. Thus, a qualified privilege attaches where the publication is made in a reasonable manner and for a proper purpose. Implicit in the defense is a right and a duty to speak on matters of concern to a particular interested audience and good faith in the publication. Once the Defendant raises the qualified privilege defense, a Plaintiff has the burden of showing beyond the allegations in the Complaint that a Defendant acted with actual malice. The Court concluded that the statements by Miami University's supervisor were statements of opinion and that Plaintiff failed to prove that the supervisor acted with actual malice.

Why don't employers give references? While there is a qualified privilege under Ohio law, privilege does not stop an employee from filing suit. Miami University had to defend itself in Court regarding its qualified privilege. Right or wrong, the "name, rank, and serial number" answer means the employer need not defend its negative reference, even if it is protected under Ohio law.

***Felix Gora** is an Ohio State Bar Association Certified Specialist in Labor and Employment law. His practice is concentrated in the areas of employment, appellate, aviation, bad faith and personal injury. Felix's court appellate background is a key factor in his selection to handle some of the most difficult procedural issues in litigation.*

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